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APPENDIX A

S279722

IN THE SUPREME COURT OF CALIFORNIA

JOHNATHON GREGG,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC. et al.,
Defendants and Appellants.

Dismissed and remanded to CA 2/4.

Review in the above-captioned matter, which was granted and held for Adolph v. Uber Technologies, Inc. (2023) 14 Cal.5th 1104, is hereby dismissed. (Cal. Rules of Court, rule 8.528(b)(1).)

Votes: Guerrero, C.J., Corrigan, Liu, Kruger, Groban, Jenkins and Evans, JJ.

Sept. 13, 2023

APPENDIX B

S279722

IN THE SUPREME COURT OF CALIFORNIA

JOHNATHON GREGG,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC. et al.,
Defendants and Appellants.

Petition for review granted; briefing deferred.

The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in Adolph v. Uber Technologies, Inc., S274671 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Votes: Guerrero, C.J., Corrigan, Liu, Kruger, Groban, Jenkins and Evans, JJ.

June 14, 2023

APPENDIX C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHNATHON GREGG, Plaintiff and Respondent, v. UBER TECHNOLOGIES, INC. et al., Defendants and Appellants.	B302925 Los Angeles County Super. Ct. No. BC719085 Mar. 24, 2023

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed in part and reversed in part.

Littler Mendelson, Andrew Spurchise, Sophia B. Collins; Gibson, Dunn & Crutcher, Theane D. Evangelis, Blaine H. Evanson and Bradley J. Hamburger for Defendants and Appellants.

Outten & Golden, Jahan C. Sagafi, Adam Koshkin, Rachel W. Dempsey; Girardi & Keese, Thomas V. Girardi, Schultz and Bennett, Stephen J. Shultz and Mark T. Bennett for Plaintiff and Respondent.

INTRODUCTION

Johnathon Gregg sued Uber Technologies, Inc., and Rasier-CA, LLC (collectively, "Uber"), under the Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et seq.[1] He alleged Uber willfully misclassified him as an independent contractor rather than an employee, which led to numerous other Labor Code violations. In response, Uber moved to compel arbitration under the "Arbitration Provision" in the "Technology Services Agreement" ("TSA"), which Gregg accepted to use Uber's smartphone application and become an Uber driver.

The trial court denied Uber's motion and, in April 2021, this court affirmed. The United States Supreme Court vacated the affirmance in June 2022, when it granted Uber's petition for writ of certiorari and remanded the case for further consideration in light of *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] (*Viking River*).

In light of *Viking River,* we first determine the TSA's PAGA Waiver is invalid and must be severed from the Arbitration Provision. We then conclude that under the Arbitration Provision's remaining terms, Gregg must resolve his claim for civil penalties based on Labor Code violations he allegedly suffered (i.e., his individual PAGA claim) in arbitration, and that his claims for penalties based on violations allegedly suffered by other current and former employees (i.e., his non-individual PAGA claims) must be litigated in court. Lastly, we conclude that under California law, Gregg is not stripped of standing to pursue his non-individual claims in court simply because his individual claim must be arbitrated. Consequently,

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[1] All statutory references are to the Labor Code.

his non-individual claims are not subject to dismissal at this time. Instead, under the Arbitration Provision, they must be stayed pending completion of arbitration.

Accordingly, we affirm in part and reverse in part the order denying Uber's motion to compel arbitration. We remand the case to the trial court with directions to: (1) enter an order compelling Gregg to arbitrate his individual PAGA claim; and (2) stay his non-individual claims pending completion of arbitration.

BACKGROUND

Uber is a technology company that has developed a smartphone application known as the "Uber App," which connects riders with drivers to arrange transportation services. As of December 11, 2015, drivers wanting to use the Uber App must first enter into the TSA, which contains an Arbitration Provision.

In section i, the Arbitration Provision states it is "intended to apply to … disputes that otherwise would be resolved in a court of law" and "requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." (Bolded text omitted.) These disputes include "disputes arising out of or related to [the driver's] relationship with [Uber]" and "disputes regarding any … wage-hour law, … compensation, breaks and rest periods, … [and] termination[.]"

The Arbitration Provision also identifies the claims and issues not included in its scope. Of relevance to this appeal, it does not apply to "[a] representative action brought on behalf of others under [PAGA], to the extent waiver of such a claim is deemed

unenforceable by a court of competent jurisdiction[.]" The Arbitration Provision also states "the validity of [its] PAGA Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator."

The Arbitration Provision's PAGA Waiver states: "Notwithstanding any other provision of [the TSA] or the Arbitration Provision, to the extent permitted by law, (1) You and [Uber] agree not to bring a representative action on behalf of others under [PAGA] in any court or in arbitration, and (2) for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and [Uber] agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law)[.]" (Bolded text omitted.)

Drivers who did not wish to be bound by the Arbitration Provision could opt out in the 30-day period following their acceptance of the TSA. Those who did not exercise this option in that time were bound by the Arbitration Provision.

Gregg signed up to use the Uber App on October 10, 2016 and accepted the TSA three days later. He did not opt out of the Arbitration Provision in the following 30 days.

In August 2018, Gregg filed a complaint against Uber, asserting a single claim under PAGA on behalf of himself and other current and former employees.

He alleged Uber willfully misclassified him and other current and former employees as independent contractors, which led to its violation of California Wage Order 9-2001 and numerous other Labor Code provisions. Gregg's operative complaint only seeks to recover civil penalties for the alleged violations.

Uber moved to compel arbitration, seeking an order enforcing the PAGA Waiver by: (1) requiring Gregg to arbitrate his individual claim; and (2) dismissing and/or striking his non-individual PAGA claims. In the alternative, Uber requested an order: (1) "compelling [Gregg] to arbitrate the issue(s) of … whether he was properly classified as an independent contractor … and/or questions of enforceability or arbitrability"; and (2) staying all judicial proceedings until its motion was resolved and, if arbitration was ordered, extending the stay until its completion.

In December 2019, the trial court denied Uber's motion, reasoning that under California law at the time: (1) whether a plaintiff is an "aggrieved employee" within the meaning of PAGA is an essential element of a PAGA claim, not a "separate standing issue" capable of being "parse[d] out" for arbitration; and (2) the PAGA Waiver was not enforceable. In April 2021, applying *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*) and its progeny, a different panel of this court affirmed the trial court's order. (*Gregg v. Uber Tech.* (Apr. 21, 2021), B302925 [nonpub. opn.])

In June 2022, the United States Supreme Court granted Uber's petition for writ of certiorari, vacated this court's judgment, and remanded the case for further consideration in light of *Viking River*. Consequently, in August 2022, this court vacated its April 2021 opinion, recalled its July 2021 remittitur, and

directed the parties to file supplemental briefs addressing *Viking River*'s effect on the issues presented. Both parties timely filed their supplemental briefs.

DISCUSSION

I. Governing Law and Standard of Review

A. Standard of Review

Where, as here, the trial court's order denying a motion to compel arbitration "rests solely on a decision of law," the "de novo standard of review is employed." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

B. PAGA, *Iskanian*, and *Viking River*

PAGA authorizes an "aggrieved employee" to initiate a civil action "on behalf of himself or herself and other current or former employees" to recover civil penalties for violations of the Labor Code ordinarily "assessed and collected by the Labor and Workforce Development Agency[.]" (§ 2699, subd. (a).)

"An employee suing under PAGA 'does so as the proxy or agent of the state's labor law enforcement agencies.' [Citation.] Every PAGA claim is 'a dispute between an employer and the state.' [Citations.] Moreover, the civil penalties a PAGA plaintiff may recover on the state's behalf are distinct from the statutory damages or penalties that may be available to employees suing for individual violations. [Citation.] Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action. [Citations.] 'A PAGA representative action is therefore a type of qui tam action,' conforming to all 'traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.'

[Citation.] The 'government entity on whose behalf the plaintiff files suit is always the real party in interest.' " (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81 (*Kim*), italics omitted.)

In *Iskanian,* the California Supreme Court held "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." (*Iskanian, supra,* 59 Cal.4th at p. 360.) The United States Supreme Court granted certiorari in *Viking River* to decide whether *Iskanian*'s holding was preempted by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (*Viking River, supra,* 142 S.Ct. at p. 1913.)

The *Viking River* court began its analysis by explaining PAGA claims are "representative" in two ways. (*Viking River, supra,* 142 S.Ct. at p. 1916.) First, "PAGA actions are 'representative' in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State." (*Ibid.*) "In [that] sense, '*every* PAGA action is … representative' and '[t]here is no individual component to a PAGA action,' [citations], because every PAGA claim is asserted in a representative capacity." (*Ibid.*, original italics.) Second, some PAGA actions are "representative" in that they are brought by one employee to recover civil penalties for Labor Code violations committed against other employees. (*Ibid.*)

The *Viking River* court then observed: "*Iskanian*'s principal rule prohibits waivers of 'representative' PAGA claims in the first sense. That is, it prevents parties from waiving *representative standing* to bring PAGA claims in a judicial or arbitral forum. But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate

'individual PAGA claims for Labor Code violations that an employee suffered,' on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA." (*Viking River, supra,* 142 S.Ct. at pp. 1916-1917, original italics.)

The *Viking River* court determined the FAA does not preempt *Iskanian*'s principal rule. (*Viking River, supra,* 142 S.Ct. at pp. 1924-1925; see also *id.* at pp. 1919-1923.) In so doing, it noted, among other things: "[T]he FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce '*arbitration agreements.*' [Citation.] And as we have described it, an arbitration agreement is 'a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.' [Citations.] An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that ' "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral … forum." ' " (*Id.* at p. 1919, original italics, fn. omitted.) Thus, the court held "wholesale waiver[s] of PAGA claims[ ]" remain invalid under *Iskanian.* (*Id.* at p. 1924.)

Finally, the *Viking River* court held the FAA preempts *Iskanian*'s secondary rule "preclud[ing] [the] division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." (*Viking River, supra,* 142 S.Ct. at p. 1924.) It reasoned *Iskanian*'s "prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine 'the

issues subject to arbitration' and 'the rules by which they will arbitrate,' [citation], and does so in a way that violates the fundamental principle that 'arbitration is a matter of consent,' [citation]." (*Id.* at p. 1923.) Consequently, under *Viking River*, employers may enforce an agreement mandating arbitration of a plaintiffs individual PAGA claim, even if the agreement does not require arbitration of the plaintiffs non-individual claims. (See *id.* at p. 1925.)

II. The TSA's PAGA Waiver is invalid and must be severed.

We begin our analysis by addressing whether the PAGA Waiver is enforceable under *Viking River*. We conclude it is not.

As noted above, the PAGA Waiver consists of two clauses. Per the first clause, drivers "agree not to bring a representative action on behalf of others under [PAGA] in any court or in arbitration[.]" (Bolded text omitted.) The second clause states that "for any claim brought on a private attorney general basis—i.e., where [the driver is] seeking to pursue a claim on behalf of a government entity—both [the driver] and [Uber] agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether [the driver] ha[s] personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law)[.]"

The PAGA Waiver does not completely bar Gregg from filing suit under PAGA. The first clause prohibits Gregg from asserting any non-individual PAGA

claims against Uber.[2] Its second clause, however, implicitly recognizes he may assert an individual PAGA claim. In so doing, the second clause builds upon the first clause. First, it effectively reiterates that Gregg may only bring a "claim … on a private attorney general basis" based on "violations of law" he has "personally" suffered. It then requires him to resolve the claim in arbitration and limits the scope of that proceeding. Consequently, when read together, both clauses make clear that Gregg must completely forego his statutory right to seek civil penalties for Labor Code violations committed against other employees, whether in court or in arbitration. The PAGA Waiver therefore requires him to waive his right to invoke "representative standing" to recover penalties based on those violations for the state. (*Viking River,* 142 S.Ct. at p. 1916, italics omitted.) But as noted above, the *Viking River* court made clear "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies[ ]" (*id.* at p. 1919) and upheld *Iskanian*'s rule "prevent[ing] parties from waiving representative standing to bring PAGA claims in a judicial or arbitral forum." (*Id.* at p. 1916, italics omitted; see also *id.* at pp. 1924-1925.) Because the PAGA Waiver requires Gregg to do that which is still prohibited by *Iskanian*, we conclude it is invalid.[3] (See *id.* pp. 1924-1925.)

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[2] To the extent Gregg reads the first clause of the PAGA Waiver to wholly preclude him from filing *any* lawsuits under PAGA, we reject his interpretation of the PAGA Waiver for the reasons stated in section III, *ante.*

[3] In its supplemental brief on remand, Uber does not argue or otherwise suggest any portion of the PAGA Waiver is valid and enforceable under *Iskanian* post-*Viking River.*

Accounting for the PAGA Waiver's potential invalidity, the Arbitration Provision contains the following severance clause: "If any provision of the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from [the TSA]; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative action brought under PAGA on behalf of others must be litigated in a civil court of competent jurisdiction and not in arbitration." Applying the first part of this provision, we conclude the PAGA Waiver must be severed from the Arbitration Provision (see *Viking River*, *supra*, 142 S.Ct. at p. 1925), and now turn to consider where Gregg must resolve his PAGA claim (i.e., in court or in an arbitral forum) under the Arbitration Provision's remaining terms.

III. Gregg must arbitrate his individual claim.

Gregg argues that with the PAGA Waiver's severance from the Arbitration Provision, he "cannot be forced to litigate any portion of his PAGA claims in arbitration." In support, he relies on the third part of the severance clause discussed above, which states, "any representative action brought under PAGA on behalf of others must be litigated in a civil court of competent jurisdiction and not in arbitration." He also notes that under section ii of the Arbitration Provision, "[a] representative action brought on behalf of others under [PAGA], to the extent waiver of such a claim is deemed unenforceable by a court of competent jurisdiction[,]" is among the "claims … [that] shall not be subject to arbitration[.]" As discussed below, we do

not agree with Gregg's argument and conclude he must arbitrate his individual claim.

Gregg misreads the two contractual provisions on which he relies. In his view, these terms require his entire PAGA claim, including its individual and non-individual components, to be litigated in court. Both provisions, however, only apply to a "representative action brought" under PAGA "on behalf of *others*[.]"[4] (Italics added.) They do not state or otherwise suggest they apply to a PAGA action or claim to the extent it is brought on the driver's *own* behalf. And, PAGA expressly permits an "aggrieved employee" to recover civil penalties "through a civil action brought … on behalf of himself or herself *and* other current or former employees[.]" (§ 2699, subd. (a), italics added.) We therefore conclude these terms do not exclude Gregg's individual PAGA claim from the Arbitration Provision's scope, nor do they mandate its resolution in court.

We acknowledge that in *Olabi v. Neutron Holdings, Inc.* (2020) 50 Cal.App.5th 1017 (*Olabi*), cited by Gregg, the First District Court of Appeal interpreted similar language differently. There, the plaintiff brought a PAGA claim on behalf of himself and others, asserting the defendant intentionally misclassified its workers as independent contractors and, consequently, violated several Labor Code provisions. (*Id.*, at pp. 1019-1020.) At the time, "California law block[ed] [an] employer from enforcing [an arbitration] agreement with respect to representative PAGA claims for civil penalties[.]" (*Id.* at p. 1019.)

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[4] On two separate occasions in his supplemental brief, Gregg omits the phrase "brought on behalf of others" when setting forth the third part of the Arbitration Provision's severance clause.

Consequently, the defendant petitioned the trial court to compel arbitration of the dispute concerning the plaintiff's classification, and stay the PAGA claim pending completion of arbitration. (*Id.* at p. 1020.) The trial court denied the petition. (*Ibid.*)

On appeal, "[t]he parties dispute[d] whether a representative PAGA claim may be split in th[e] manner[ ]" proposed by the defendant. (*Olabi*, *supra*, 50 Cal.App.5th at p. 1021.) The appellate court, however, determined it "need not decide the issue" because the parties' arbitration agreement "carves out PAGA representative actions[.]" (*Ibid.*) Similar to the language at issue in the TSA's Arbitration Provision, the agreement in *Olabi* stated, in relevant part: "Neither this Arbitration Provision nor the Class Action Waiver shall apply to a representative action brought on behalf of others under [PAGA]; any representative action brought under PAGA on behalf of others must be litigated in a court of competent jurisdiction." (*Ibid.*) Interpreting this provision, the appellate court concluded: "The term 'action' generally means 'suit' and refers to the entire judicial proceeding, from complaint to judgment. (See *Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298; Code Civ. Proc., § 22.) Thus, the plain language of the carve out removes a PAGA lawsuit from the 'disputes' otherwise arbitrable under the Arbitration Provision and requires the lawsuit to be litigated in court." (*Olabi*, *supra*, at p. 1021.)

We decline to follow *Olabi* for a few reasons. As an initial matter, the opinion was filed before *Viking River* was decided. (See *Olabi*, *supra*, 50 Cal.App.5th 1017; *Viking River*, *supra*, 142 S.Ct. 1906.) Therefore, the *Olabi* court did not interpret the agreement before it in the context of current law, which, as discussed

above, now permits a PAGA lawsuit to be split into arbitrable and non-arbitrable components, and does not require it to be treated as an indivisible unit for purposes of arbitration.

Further, in interpreting the agreement, the *Olabi* court focused entirely on the meaning of the word "action" in the relevant contractual provision, but relied exclusively on legal authorities defining what it "generally means[.]" (See *Olabi*, *supra*, 50 Cal.App.5th at p. 1021.) In so doing, however, it is unclear whether the court interpreted the PAGA carve out clause with the goal of ascertaining the parties' intentions behind the language at issue. (See *State of California v. Continental Ins.* Co. (2012) 55 Cal.4th 186, 195 [" 'The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract' "].) Indeed, it is unclear what principles of contract interpretation, if any, were applied. (See *Rice v. Downs* (2016) 248 Cal.App.4th 175, 185 ["The ordinary rules of contract interpretation apply to arbitration agreements"].)

Applying those rules of interpretation here, we conclude that by specifying their application to a "representative action" under PAGA "brought on behalf of *others*" (italics added), Uber did not intend section ii of the Arbitration Provision or the third portion of the severance clause to apply to the portion of a PAGA lawsuit brought on behalf of Gregg *himself.* (See *Cundall v. Mitchell-Clyde* (2020) 51 Cal.App.5th 571, 584, fn. 9 [describing "the principle of interpretation" known as *expressio unius est exclusio alterius*, under which "an author's choice to specify one thing tends to exclude others"].) To interpret the language at issue

to mean an entire PAGA lawsuit, including both its individual and non-individual components, would render the phrase "brought on behalf of others" surplusage. (See *Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 186 ["An interpretation that leaves part of a contract as surplusage is to be avoided"].)

Having concluded Gregg misinterprets the contractual terms on which he relies, we note he also overlooks two other provisions establishing that he must arbitrate his individual PAGA claim. First, as discussed above, the Arbitration Provision states it applies to "disputes arising out of or related to [Gregg's] relationship with [Uber], including termination of the relationship." It "also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, … compensation, breaks and rest periods, … [and] termination[.]" Based on this language, Gregg's individual PAGA claim falls squarely within the Arbitration Provision's scope. The claim is based on Uber's alleged misclassification of him as an independent contractor (i.e., a "dispute[ ] arising out of or related to [Gregg's] relationship with Uber[ ]") and, as a result thereof, Uber's alleged violations of the provisions in the Labor Code and the IWC Wage Order requiring it to, among other things, provide him with compliant meal and rest periods; pay him minimum, regular, and overtime wages; maintain accurate records for him; provide him with accurate itemized wage statements; and timely pay him wages due during, and upon termination of, employment (i.e., "disputes regarding … state … wage-hour law, … compensation, breaks and rest periods, … [and] termination").

Second, while fixating on the third part of the severance clause, Gregg ignores the second part, which

clarifies the PAGA Waiver's severance from the TSA does not affect the Arbitration Provision's application to his individual claim. On this point, the severance clause states: "severance of the unenforceable provision [of the PAGA Waiver] shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision[.]"

In sum, pursuant to section i of the Arbitration Provision and the second part of the PAGA Waiver's severance clause, Gregg must resolve his individual PAGA claim in arbitration. Per section ii of the Arbitration Provision and the third part of the PAGA Waiver's severance clause, however, his non-individual claims are not subject to arbitration and must be litigated in court. We now turn to consider whether his non-individual claims should be dismissed or stayed pending completion of arbitration.

IV. Gregg's non-individual claims must be stayed pending completion of arbitration.

After holding the plaintiff in *Viking River* was required to arbitrate her individual PAGA claim, the United States Supreme Court determined her non-individual claims must be dismissed. (*Viking River*, *supra*, 142 S.Ct. at p. 1925.) In so doing, the court reasoned: "[A]s we see it, PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. [Citations.] When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not

allow such persons to maintain suit. [Citation.] As a result, [the plaintiff] lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims." (*Ibid.*)

Uber contends the *Viking River* court "got PAGA's standing requirements exactly right[,]" and therefore argues Gregg's non-individual claims should be dismissed. In response, Gregg asserts: (1) this court "is not obligated to follow federal decisions interpreting state law[ ]"; and (2) under the "ample guidance" provided by the California Supreme Court on "the scope of PAGA standing," he does not lose statutory standing to maintain his non-individual PAGA claims in court simply because he must arbitrate his individual claim. As discussed below, we agree with Gregg.

Preliminarily, we note that we are not bound by the United States Supreme Court's interpretation of PAGA and its standing requirements. (See *Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 52 ["[F]ederal decisional authority is neither binding nor controlling in matters involving state law"]; see also *Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 335 ["We, of course, are not bound by federal decisions on matters of state law"].) Indeed, in her concurrence in *Viking River*, Justice Sotomayor correctly recognized "California courts … will have the last word[ ]" on whether a plaintiff retains statutory standing to assert non-individual claims in court when his or her individual claim has been sent to arbitration.[5] (*Viking River, supra,* 142 S.Ct. at p. 1925 (conc. opn. of Sotomayor, J.).)

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[5] In *Adolph v. Uber Technologies*, review granted July 20, 2022, S274671, the California Supreme Court will consider

Accordingly, we begin our independent analysis of the standing issue with the relevant statutory text. As noted above, PAGA authorizes an "aggrieved employee" to recover civil penalties for violations of the Labor Code ordinarily "assessed and collected by the Labor and Workforce Development Agency." (§ 2699, subd. (a).) "For purposes of [PAGA], 'aggrieved employee' means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).)

In *Kim*, *supra*, 9 Cal.5th 73, the California Supreme Court clarified the statutory requirements a plaintiff must satisfy to have standing to recover civil penalties under PAGA. (See *id.* at pp. 83-84.) It stated: "The plain language of section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.' " (*Ibid.*)

Applying the two-part test above, the *Kim* court concluded plaintiffs who "settle and dismiss their individual claims for Labor Code violations[ ]" do not "lose standing to pursue a claim under [PAGA]." (*Kim*, *supra*, 9 Cal.5th at p. 80; see also *id.* at pp. 84-85.) The court determined the plaintiff had "standing to pursue penalties on the state's behalf[ ]" under PAGA because he "was employed by [the defendant] and alleged that he personally suffered at least one

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"[w]hether an aggrieved employee who has been compelled to arbitrate claims under [PAGA] that are 'premised on Labor Code violations actually sustained by' the aggrieved employee [citations] maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' [citation] in court or in any other forum the parties agree is suitable."

Labor Code violation on which the PAGA claim is based." (*Id.* at p. 84.) The court then rejected the defendant's contention the plaintiff "is no longer an 'aggrieved employee' because he accepted compensation for his injury." (*Ibid.*) It explained: "[The plaintiff] became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. [Citation.] Settlement did not nullify these violations." (*Ibid.*)

In addition to *Kim, Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924 (*Johnson*) is instructive. There, the plaintiff asserted a PAGA claim against her former employer on behalf of herself and other employees based on the employer's inclusion of an illegal non-compete clause in an agreement they had signed. (*Id.* at p. 927.) The defendant demurred to the complaint, arguing the plaintiffs individual claim was time-barred because she signed her agreement three years before filing suit. (*Ibid.*) In opposition, the plaintiff argued "she had standing to bring a claim under PAGA because she was an aggrieved employee and had exhausted the necessary administrative remedies." (*Ibid.*) The trial court sustained the demurrer without leave to amend, reasoning that because the plaintiffs claim was time-barred, she lacked standing to assert a PAGA claim on behalf of other employees. (*Ibid.*)

The Court of Appeal reversed, explaining: "Under *Kim*, we conclude [the plaintiff] is an 'aggrieved employee' with standing to pursue her PAGA claim. [She] alleged she is employed by [the defendant] and that she personally suffered at least one Labor Code violation on which the PAGA claim is based. [Citations.] The fact that [her] individual claim may be time-barred does not nullify the alleged Labor Code

violations nor strip [the plaintiff] of her standing to pursue PAGA remedies." (*Johnson*, *supra*, 66 Cal.App.5th at p. 930; see also *id.* at p. 932.) Further, the court rejected the defendant's attempt to limit *Kim*'s application to its facts. (*Id.* at p. 930.) In so doing, it explained: "The rule from *Kim* is an 'aggrieved employee' has standing to pursue a PAGA claim, irrespective of whether that employee maintains a separate Labor Code claim. And … [the plaintiff] alleged she was an aggrieved employee. Under *Kim,* this allegation is sufficient, at this stage, to establish standing." (*Ibid.*)

Applying *Kim*'s two-part test, we conclude that, at this stage of the proceedings, Gregg has established standing to recover civil penalties for Labor Code violations committed against other employees. His operative complaint alleges he was employed by Uber, that he has sustained "one or more" of the Labor Code violations underlying his claim, and that he "seeks to recover civil penalties on behalf of himself and other current and former Uber drivers for [Uber's] violations of the Labor Code[.]" His agreement to arbitrate his individual claim does not nullify these allegations. (See *Kim*, *supra*, 9 Cal.5th at p. 84; see also *Johnson*, *supra*, 66 Cal.App.5th at p. 930.) It merely requires him to litigate a portion of his PAGA claim in an alternative forum governed by different procedures. (See *Viking River*, *supra*, 142 S.Ct. at p. 1919 ["An arbitration agreement … does not alter or abridge substantive rights; it merely changes how those rights will be processed"].) And, so far as we can tell, PAGA does not require a plaintiff to resolve certain portions of his or her PAGA claim in a judicial—as opposed to an arbitral—forum in order to seek civil penalties based on Labor Code violations committed against other employees in court. "In construing a statute, we are

‘ “careful not to add requirements to those already supplied by the Legislature.” ’ ” (*Kim*, *supra*, at p. 85.)

Accordingly, we hold that under California law, an alleged “aggrieved employee” (§ 2699, subd. (c)) is not stripped of standing to assert non-individual PAGA claims in court simply because he or she has been compelled to arbitrate his or her individual PAGA claim. (See *Kim*, *supra*, 9 Cal.5th at pp. 83-85; see also *Johnson*, *supra*, 66 Cal.App.5th at p. 930; *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 77 (*Rocha*) [“[U]nless and until there is a finding on the merits regarding the alleged violation, allegations of a Labor Code violation by an alleged employee or former employee are alone sufficient to establish PAGA standing”].)

In arriving at our conclusion, we note the legislative history and the California appellate court decisions[6] cited by Uber do not—as it suggests—establish Gregg no longer meets PAGA’s standing requirements. These authorities, along with the two cases discussed above, make clear that to recover civil penalties under PAGA on behalf of other employees, the plaintiff must: (1) have been employed by the defendant; (2) have suffered one or more of the Labor Code violations on which the PAGA claim is based; and (3) seek to recover penalties for the violations he or she suffered in addition to penalties for violations suffered by other employees. (See *Kim*, *supra*, 9 Cal.5th at p. 90 [discussing Legislature’s inclusion of section 2699, subdivision (c) to dissuade “ ‘shakedown’ suits” and “ensure that PAGA suits could not be brought by

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[6] Uber also cites two federal district court decisions, which are not binding upon this court. (See *Haynes v. EMC Mortgage Corp., supra*, 205 Cal.App.4th at p. 335].)

'persons who suffered no harm from the alleged wrongful act" ']; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 678, [noting a PAGA plaintiff may "su[e] solely on behalf of himself or herself or also on behalf of other employees"]; *Amalgamated Transit Union, Local 1756 AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1004-1005 [labor unions lacked PAGA standing because they "were not employees of defendants" and therefore "cannot satisfy the express … requirements" of section 2699, subdivision (c)]; *Robinson v. Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476, 483-485 [employee lacked standing to assert a PAGA claim based entirely on Labor Code violations occurring after his termination].) They do not establish that a plaintiff who—like Gregg—allegedly satisfies these requirements, but has been compelled to resolve his or her individual claim in an arbitral forum, loses standing to pursue non-individual claims in court.

In addition, we note Uber also contends Gregg lacks standing to assert non-individual claims in court because: "The FAA demands that his individual PAGA claim be severed from his non-individual claims [citation], and thus what was once 'a single action' must now proceed as 'two … separate and distinct actions with consequent separate [j]udgments' [citations]." In support of this argument, Uber cites *Viking River*, *Bodine v. Superior Court of Santa Barbara County* (1962) 209 Cal.App.2d 354 (*Bodine*), and *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 (*Morehart*).

We reject this contention because it is unsupported by the authority on which Uber relies. In *Viking River*, the United States Supreme Court did not—as Uber asserts—hold that under the FAA,

Gregg's individual claim must be "severed" from his nonindividual claims. Rather, the court interpreted "PAGA's standing requirement" to provide that "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action[,]" and therefore concluded that "[w]hen an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit." (*Viking River*, *supra*, 142 S.Ct. at p. 1925.) However, as discussed above, and as Justice Sotomayor acknowledged, we are not bound by the *Viking River* court's understanding of state law[.]" (*Ibid.* (conc. opn. of Sotomayor, J.).)

Bodine and *Morehart* simply do not apply here. In *Bodine,* the appellate court considered whether the trial court erred by agreeing to empanel a jury in the second half of a hearing on a probate petition for determining heirship, when the executor of the estate and the heirs who initially appeared at the hearing previously stipulated to proceed without a jury. (See *Bodine*, *supra*, 209 Cal.App.2d at pp. 356-359.) In *Morehart*, our Supreme Court addressed: (1) whether an appeal can be taken from a judgment that does not completely dispose of all the pending causes of action, even if the judgment was entered on certain causes of action previously severed from the others; and (2) whether a zoning ordinance amended by the County of Santa Barbara and its board of supervisors was preempted by state law. (*Morehart*, *supra*, 7 Cal.4th at p. 732.) Although each decision noted severance of a civil action results in two or more separate cases with distinct judgments (*Bodine*, *supra*, at p. 361; *Morehart*, *supra*, at p. 739, fn. 7), in neither case did the appellate court apply this principle in a manner to suggest, let alone hold, that a plaintiff loses

standing to assert non-individual claims under PAGA once he or she is compelled to arbitrate his or her individual claim. (See *Bodine*, *supra*, at pp. 356-359; *Morehart*, *supra*, at pp. 731-732.)

Finally, we consider Uber's contention that Gregg's non-individual claims should be dismissed because "[a]ny other outcome would be unworkable." Specifically, it argues that unless Gregg's non-individual claims are dismissed, he will be "permitted to" litigate the issue whether he is an "aggrieved employee" under 2699, subdivision (c) in court to show he has standing to pursue civil penalties based on Labor Code violations suffered by other employees, even though he has agreed to resolve that issue exclusively in arbitration.

We are not persuaded by this argument for two reasons. First, it appears to assume that, absent dismissal, Gregg's non-individual claims will move forward in court while his individual claim is pending in arbitration, and therefore he will be required to litigate the issue whether he is an "aggrieved employee" under section 2699, subdivision (c) simultaneously in both forums. This assumption, however, is wholly unsupported by any explanation grounded in law or fact.

Second, Uber appears to assume that even if Gregg's non-individual claims are stayed pending completion of arbitration on his individual claim, he will be allowed to relitigate whether he is an "aggrieved employee" in court because the doctrine of issue preclusion will not apply to the arbitrator's finding on the issue. This assumption is premature at best, and incorrect at worst. A split in authority has recently developed on this issue (compare *Rocha*, *supra*, 88 Cal.App.5th at pp. 78-82 with *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83

Cal.App.5th 595, 602-607), and the parties have not asked to brief it. In any event, we express no opinion on the matter and need not address it. As discussed above, *Kim* and *Johnson* establish that regardless of its resolution, Gregg has not lost standing to assert his non-individual claims in court merely because he has agreed to arbitrate his individual claim.

Having concluded Gregg's non-individual claims are not subject to dismissal at this time, we agree with the parties that under the Arbitration Provision, they should be stayed pending completion of arbitration on his individual claim. On this point, the Arbitration Provision states: "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 PAGA Waiver is unenforceable with respect to those claims, the [p]arties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration."

DISPOSITION

The order denying the motion to compel arbitration is affirmed in part and reversed in part. Specifically, the order is affirmed with respect to Gregg's non-individual claims, and reversed with respect to his individual claim. The case is remanded to the trial court with directions to: (1) enter an order compelling Gregg to arbitrate his individual claim; and (2) stay his non-individual claims until completion of arbitration.

In the interests of justice, each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

CERTIFIED FOR PUBLICATION

CURREY, Acting P.J.

We concur:
COLLINS, J.
STONE, J.*

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

APPENDIX D

No. 21-453

IN THE SUPREME COURT OF THE UNITED STATES

UBER TECHNOLOGIES, INC., et al.,
Petitioners,

v.

JOHNATHON GREGG,
Respondent.

Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. ___ (2022).

June 27, 2022

APPENDIX E

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550] **UBER TECHNOLOGIES WAGE AND HOUR CASES**	Case No. CJC-21-005179 JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 5179 Feb. 14, 2022

The Included Actions: *Garcia-Brower v. Uber Techs., Inc., et al.,* Alameda County Superior Court, Case No. RG20070281 *Garcia-Brower v. Lyft, Inc.,* Alameda County Superior Court, Case No. RG20070283 *Olson, et al. v. Lyft, Inc.,* San Francisco County Superior Court, Case No. CGC-18-566788 *People of the State of California, et al. v. Uber Techs., Inc. and Lyft, Inc.,* San Francisco County Superior Court, Case No. CGC-20-588404 *Tabola v. Uber Techs., Inc.,* San Francisco County Superior Court, Case No. CGC-16-550992	ORDER GRANTING REQUESTS TO COORDINATE ADD-ON CASES

INTRODUCTION

This matter was set for hearing on February 14, 2022 in Department 304, the Honorable Ethan P. Schulman, presiding. The Court circulated a tentative ruling in advance of the hearing, which no party contested. The tentative ruling is hereby adopted as modified.

Having reviewed and considered the arguments, pleadings, and written submissions of all parties, the Court **GRANTS** Uber's and Lyft's requests to coordinate add-on cases.

BACKGROUND

By order filed September 16, 2021, the Court (Hon. Andrew Y.S. Cheng) granted Petitioner Labor Commissioner Garcia-Brower's petition for coordination of the five wage and hour lawsuits listed in the caption of this order. All five actions allege that Uber and Lyft misclassified passenger drivers and/or food delivery drivers as independent contractors under the "ABC" worker-classification test. The actions assert claims of willful misclassification; failure to provide drivers with the minimum wage, overtime pay, rest and meal breaks, expense reimbursements, accurate wage statements, required employment records, timely payment of wages, insurance, and paid sick leave time; Private Attorneys General Act (PAGA) penalties based on Labor Code violations; violations of the Unfair Competition Law; restitution, statutory penalties, and/or injunctive relief. Three are brought by governmental plaintiffs (e.g., the two actions brought by the Labor Commissioner and the action brought by the People, represented by the Attorney General and the City Attorneys of San Francisco, Los

Angeles, and San Diego), and two by representative plaintiffs on behalf of aggrieved employees.

On September 9, 2021, Uber filed a notice of five potential add-on cases: (1) *Rosales v. Uber Technologies, Inc.* (Los Angeles Superior Court Case No. BC685555) (filed Dec. 4, 2017); (2) *Rowe v. Rasier-CA LLC* (Orange County Superior Court Case No. 2018-00989673) (filed May 1, 2018);[1] (3) *Adolph v. Uber Technologies, Inc.* (Orange County Superior Court Case No. 30-2019-01103801-CU-OE-CXC) (filed Oct. 10, 2019); (4) *Gregg v. Uber Technologies, Inc.* (Los Angeles County Superior Court Case No. BC719085) (filed Aug. 29, 2018); and (5) *Sherman v. Uber Technologies, Inc.* (Los Angeles County Superior Court Case No. BC656880) (filed Apr. 6, 2017).[2] On September 17, 2021, Lyft filed a notice of one additional potential add-on case: *Seifu v. Lyft, Inc.* (Los Angeles County Superior Court Case No. BC7129590) (filed July 5, 2018). All of these potential add-on cases are brought as representative actions under PAGA, and all of them raise similar wage and hour claims based on alleged misclassification of drivers by Defendants Uber and Lyft.

No party opposed Uber's notice of add-on cases. Plaintiff Million Seifu opposes Lyft's request to coordinate the *Seifu* case.

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[1] At the case management conference held on February 4, 2022, Uber's counsel represented that because *Rowe* has since been dismissed, it is withdrawing its notice as to that case.

[2] Judge Cheng did not rule on Uber's Notice of Potential Add-On Cases, but reserved the issue for the coordination trial judge. After the parties exercised peremptory challenges, the case was reassigned to the undersigned as coordination trial judge by order of the Presiding Judge filed December 21, 2021

STANDARD FOR COORDINATION

A petition for coordination of civil actions must be supported by facts showing that the actions are complex and that the actions meet the standards specified in section 404.1 of the Code of Civil Procedure. (Code Civ. Proc. § 404.) Under section 404.1, coordination of civil actions sharing a common question of fact or law is appropriate if it "will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions." (Code Civ. Proc. § 404.1.)

DISCUSSION

The Court has considered the factors set forth in Code of Civil Procedure section 404.1, and concludes that they support coordination of all of the five proposed add-on cases and that coordination would promote the ends of justice.

First, two of the cases (*Rosales* and *Adolph*) already have been designated as complex. This factor weighs in favor of coordination. The other cases, which seek to recover civil penalties under PAGA for alleged violations of the Labor Code based on purported misclassification of drivers, also should be deemed complex within the meaning of California Rules of Court, rule 3.400. Contrary to Seifu's argument, that the Los Angeles County Superior Court has not designated his action as complex does not

prevent this Court from adding it to the coordinated proceeding. "In the context of a request for coordination of add-on cases, the statutes and rules do not contemplate a further determination of whether the add-on actions themselves are complex. The only criteria to be applied are the coordination standards specified in section 404.1." (*Ford Motor Warranty Cases* (2017) 11 Cal.App.5th 626, 640; see Code Civ. Proc. § 404.4 [coordination of add-on case "shall be determined under the standards specified in Section 404.1."].)

Second, all five cases share similar if not identical facts and issues concerning the same central claims: whether Lyft and Uber misclassified drivers as independent contractors under the "ABC" worker-classification test, and whether the passage of Proposition 22 provides an affirmative defense to plaintiffs' claims. Indeed, Seifu expressly "concedes that common questions of fact or law predominate and are significant to the Seifu case and the coordinated actions." (Opp. at 7.) All parties will likely benefit from uniformly resolving the common and significant factual and legal questions that predominate in all actions, as well as from coordinated discovery and motion practice. This factor weighs heavily in favor of coordination. (See *Ford Motor Warranty Cases*, 11 Cal.App.5th at 643 [trial court erred in refusing to add to coordination proceeding "substantively indistinguishable cases" where, among other things, it was "obvious that 'the preparation for trial in terms of depositions, interrogatories, admissions, collection of physical data, etc., will be better achieved if done in a coordinated manner.' "]; *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 814 [coordination appropriate where rulings on anticipated "great volume of motion practice," including demurrers and motions for summary judgment, "should be accomplished in a

manner permitting uniform and centralized resolution on appeal."].)

Third, on balance, the Court finds that the convenience of all parties, witnesses, and counsel weighs in favor of coordination. While Seifu contends that coordination in this Court is not convenient for him because he resides in Los Angeles, the Court is aware that Seifu's counsel, although based in Boston, actively participates in litigation all across the country, including in this Court. Moreover, at a time when nearly all court appearances and depositions are conducted remotely, the physical residence of a single plaintiff is hardly determinative, particularly where the plaintiff is not asserting individual claims, but rather is suing in a representative capacity on behalf of a large number of aggrieved employees. (See *Ford Motor Warranty Cases*, 11 Cal.App.5th at 643 ["But with today's technology, there is no reason why counsel, parties and witnesses should have to travel frequently to Los Angeles. The complex courts in Los Angeles have used electronic filing and e-mail for years now, pretrial and posttrial court appearances may be made by telephone or video using CourtCall, and many judges accept conference calls to informally resolve discovery disputes. Counsel and the court may take advantage of technology to devise means to coordinate discovery and other pretrial practice so as to avoid 'great inconvenience.' "].)

Fourth, most of the cases are still at a relatively early stage of litigation, and indeed several have been stayed at different times for various reasons, including pending appeals and appellate decisions and in light of an earlier-filed PAGA action. While Seifu asserts that the parties to that action have been engaged in vigorous litigation since it was filed on July 5, 2018,

much the same is true as to the parties to the other actions.[3] Moreover, that *Seifu* was "brought by a private party and is, thus, materially different than the already-coordinated government actions" (Opp. at 3) does not distinguish it from *Olson* or *Tabola*. Moreover, the Labor Commissioner has now filed her own action against Lyft seeking penalties and other relief for the same alleged violations of the Labor Code. At a minimum, *Seifu* should be coordinated with the Labor Commissioner's similar action.

Lastly, coordination will promote judicial efficiency, streamline discovery, facilitate settlement, and avoid the possibility of two separate courts deciding novel and overlapping issues with the same defendants. These factors weigh heavily in favor of coordination. As discussed above, the purpose of coordination is to avoid multiple trials and inconsistent results and to promote the efficient use of judicial resources. (*McGhan Med. Corp.*, 11 Cal.App.4th at 811-814.) In short, "it is incontrovertible that coordinated management of discovery on those [common] issues will minimize the disadvantages of duplicative and inconsistent rulings and promote the efficient utilization of judicial facilities and manpower." (*Ford Motor Warranty Cases*, 11 Cal.App.5th at 645-646.)

For these reasons, the Court **GRANTS** the petition for coordination as to the five listed add-on cases.

CONCLUSION AND ORDER

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[3] Seifu contends that his was the "first-filed" PAGA action challenging Lyft's alleged misclassification of its drivers. In fact, the *Olson* case, which currently asserts such claims, was filed earlier, on May 25, 2018, and *Tabola* was filed against Uber in 2016. In any event, there is no "first to file" rule under the coordination statute and rules.

The Court **GRANTS** Uber's and Lyft's requests to coordinate the listed add-on cases. The moving parties must promptly file a copy of this order in each included action, serve it on each party appearing in the included actions, and submit it to the Chair of the Judicial Council. (Cal. Rules of Court, rule 3.529(a).)

IT IS SO ORDERED.

Dated:	/s/ Ethan P. Schulman
February 14, 2022	ETHAN P. SCHULMAN
	Judge of the Superior Court

APPENDIX F

Court of Appeal, Second Appellate District,
Division Four—No. B302925

S269000

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JONATHON GREGG,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC. et al.,
Defendants and Appellants.

The petition for review is denied.

The requests for an order directing publication of the opinion are denied.

CANTIL-SAKAUYE
Chief Justice

[Filed June 30, 2021]

APPENDIX G

Filed 4/21/21 Gregg v. Uber Technologies, Inc. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JONATHON GREGG,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC. et al.,
Defendants and Appellants.

B302925

Los Angeles County Super. Ct. No. BC719085

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Littler Mendelson, Sophia Behnia and Andrew M. Spurchise for Defendants and Appellants.

Outten & Golden, Jahan C. Sagafi, Rachel W. Dempsey; Merill, Shultz & Bennett, Stephen J. Shultz and Mark T. Bennett for Plaintiff and Respondent.

INTRODUCTION

Jonathon Gregg sued Uber Technologies, Inc. and Raiser-CA, LLC (collectively, "Uber") under the Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et. seq.[1] He alleged Uber willfully misclassified him as an independent contractor rather than an employee, which led to numerous other Labor Code violations. In response, Uber filed a motion to compel arbitration under the "Arbitration Provision" in the "Technology Services Agreement" ("TSA") that it had required Gregg to accept in order to use Uber's smartphone application and become an Uber driver.

The trial court denied the motion. In doing so, it rejected Uber's contentions that: (1) the issue of Gregg's misclassification was a "threshold issue" related to whether he had standing to bring a PAGA claim, which was separate and distinct from the PAGA claim itself and therefore subject to arbitration; and (2) the clause in the Arbitration Provision requiring Gregg to waive his right to bring a PAGA claim ("PAGA Waiver") was enforceable. On appeal, Uber largely relies on the same arguments presented in the trial court to contend its motion to compel arbitration should have been granted.

In *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 (*Williams*) we started the "chorus" of California courts holding an employer may not compel

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[1] All statutory references are to the Labor Code.

an employee to arbitrate whether he or she is an "aggrieved employee" before proceeding with a PAGA claim in Superior Court. (See *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 477 (*Contreras*).) Because we continue to sing the same tune, and join a similar chorus of California courts deeming PAGA waivers unenforceable, we reject Uber's arguments and affirm.

FACTS AND PROCEDURAL BACKGROUND

Uber is a technology company that has developed a smartphone application known as the "Uber App," which connects riders with drivers to arrange transportation services. As of December 11, 2015, drivers wanting to use the Uber App must first enter into the TSA, which contains the Arbitration Provision.

The Arbitration Provision states it is "intended to apply to … disputes that otherwise would be resolved in a court of law" and "requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." (Bolded text omitted.) These disputes include "disputes arising out of or relating to interpretation or application of [the] Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion [thereof]"[2]; "disputes arising out of or related to [the driver's] relationship with [Uber]"; and "disputes

[2] Uber refers to this language in the Arbitration Provision as a "delegation clause" because it "delegate[s] threshold issues of [the Arbitration Provision's] enforceability to arbitration … ." Because Gregg does not dispute its use of that term, we use it as well.

regarding any … wage-hour law, … compensation, breaks and rest periods, … [and] termination[.]"

The Arbitration Provision also identifies the claims and issues not included in its scope. Of relevance to this appeal, it does not apply to "[a] representative action brought on behalf of others under [PAGA], to the extent waiver of such a claim is deemed unenforceable by a court of competent jurisdiction[.]" The Arbitration Provision also states "the validity of [its] PAGA Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator."

The Arbitration Provision's PAGA Waiver states: "Notwithstanding any other provision of [the TSA] or the Arbitration Provision, to the extent permitted by law, (1) You and [Uber] agree not to bring a representative action on behalf of others under [PAGA] in any court or in arbitration, and (2) for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and [Uber] agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law)[.]" (Bolded text omitted.)

Drivers who did not wish to be bound by the Arbitration Provision could opt out in the 30-day period following their acceptance of the TSA. Those who did not exercise this option in that time were bound by the Arbitration Provision.

Gregg signed up to use the Uber App on October 10, 2016 and accepted the TSA three days later. He did not opt out of the Arbitration Provision in the following 30 days.

In August 2018, Gregg filed a complaint against Uber, asserting a single claim under PAGA on behalf of himself and other current and former employees. He alleged Uber willfully misclassified him and other current and former employees as independent contractors, which led to its violation of California Wage Order 9-2001 and numerous other Labor Code provisions. Gregg's operative complaint only seeks to recover civil penalties for the alleged violations.

Uber filed a motion to compel arbitration,[3] seeking an order enforcing the PAGA Waiver by: (1) requiring Gregg to arbitrate his individual claims; and (2) dismissing and/or striking his representative PAGA claim. In support of this position, Uber contended the trial court was required to enforce the PAGA Waiver under *Epic Sys. Corp. v. Lewis* (2017) 138 S.Ct. 1612 [200 L.Ed.2d 889] (*Epic*), which—in its view—abrogated *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*).

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[3] The motion at issue on appeal is actually a renewed motion to compel arbitration filed in October 2019. Uber filed its initial motion to compel in November 2018. At the hearing on the initial motion, the trial court stayed the case and continued the hearing to December 5, 2019, pending our Supreme Court's decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 (*ZB*). Following *ZB*'s publication, the trial court approved the parties' stipulation to: (1) permit Gregg to amend his complaint to remove his request for unpaid wages, and thereby conform with *ZB*'s holding that unpaid wages are not recoverable under PAGA (*ZB*, *supra*, 8 Cal.5th at p. 182); and (2) allow Uber's renewed motion to compel to proceed on their proposed briefing schedule.

In the alternative, Uber requested an order: (1) "compelling [Gregg] to arbitrate the issue(s) of … whether he was properly classified as an independent contractor … and/or questions of enforceability or arbitrability"; and (2) staying all judicial proceedings until its motion was resolved and, if arbitration was ordered, extending the stay until its completion. On this point, Uber contended the issue whether Gregg had been misclassified as an independent contractor (the "misclassification issue") was a "threshold issue" governing whether he had standing to bring a PAGA claim, which would determine whether Gregg's claim is arbitrable. Thus, Uber argued, the issue must be arbitrated because the Arbitration Provision delegated issues of arbitrability to an arbitrator.

As noted above, the trial court denied the motion, reasoning that under California law: (1) whether a plaintiff is an "aggrieved employee" within the meaning of PAGA[4] is an essential element of a PAGA claim, not a "separate standing issue" capable of being "parse[d] out" for arbitration; and (2) the PAGA Waiver was not enforceable. Uber timely appealed.

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[4] Per section 2699, subdivision (a), "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency … , for a violation of [the Labor Code], may … be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." For purposes of PAGA, an "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).)

DISCUSSION

I. Standard of Review

Where, as here, the trial court's order denying a motion to compel arbitration "rests solely on a decision of law," the "de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

II. Analysis

Uber contends the order denying its motion to compel must be reversed because the Arbitration Provision is enforceable as written. In support of this position, Uber essentially raises two arguments, which are largely identical to the ones it presented in the trial court. We address each in turn below.

A. Arbitrability of Misclassification Issue

First, Uber contends the trial court should have enforced the Arbitration Provision's delegation clause and "require[d] Gregg to arbitrate the issue of whether his threshold worker classification is arbitrable[.]" In support of this position, Uber contends the misclassification issue is a "threshold issue" separate and distinct from his PAGA claim, which will determine whether he has standing as an "aggrieved employee" under section 2699 to bring such a claim, and therefore will determine whether his claim is arbitrable. Uber therefore argues the misclassification issue's arbitrability must be resolved by arbitration, as the delegation clause requires "disputes arising out of or relating to … application of [the] Arbitration Provision or any portion [thereof] … . be decided by an [a]rbitrator and not by a court or judge."

In the alternative, Uber contends the trial court should have required Gregg to arbitrate the

misclassification issue. Specifically, after reiterating its contention that the issue is separate from his PAGA claim, Uber contends "Gregg's alleged misclassification … is a private dispute between him and Uber regarding the nature of their business relationship," in which the state has no interest, and which the parties expressly agreed to resolve by arbitration.

The crux of both arguments above is Uber's contention that the issue whether Gregg is an "aggrieved employee" under section 2699 is not a part of his PAGA claim at all, and therefore can be arbitrated even if the PAGA claim cannot. As Gregg correctly points out, however, California appellate courts have uniformly rejected this argument, and "consistently … [held] that threshold issues involving whether a plaintiff is an 'aggrieved employee' for purposes of a representative PAGA-only action cannot be split into individual arbitrable and representative nonarbitrable components." (*Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 996, rev. denied Jan. 20, 2021 (*Provost*) [citing *Williams, supra,* 23 Cal.App.4th 642 and its progeny].) This is so because "a PAGA-only representative action is *not* an individual action at all, but instead is one that is *indivisible and belongs solely to the state*." (*Id.* at p. 988, second italics added.) Therefore, a plaintiff "cannot [be] require[d] … to submit by contract *any part* of his representative PAGA action to arbitration." (*Ibid*, italics added.) Applying these principles, the *Provost* court held a plaintiff's classification as an employee or independent contractor "falls within the ambit" of the "threshold issues" that cannot be split from the representative PAGA claim. (*Id.* at p. 996.)

Recently, in *Contreras, supra*, 61 Cal.App.5th 461, Division 5 of this court rebuffed an attempt

nearly identical to Uber's to "carve out" the issue of the plaintiffs' classification from their PAGA claim as a "gateway issue" of arbitrability within the purview of a delegation clause. (See *id.* at pp. 468, 473.) In so doing, Division 5 relied on—and set forth in detail—the extensive authority demonstrating the " 'splitting of the PAGA claim' " sought by the defendants was impermissible, including *Provost, Williams,* and several other Court of Appeal decisions. (See *id.* at pp. 474-477.)

Uber asserts we should not follow *Provost* and *Contreras*[5] because they relied on "the *Williams* line of cases," which is "inapposite." Specifically, Uber emphasizes the defendants in *Williams* and its progeny sought to arbitrate whether the plaintiffs were "aggrieved," whereas here, Uber seeks to arbitrate whether Gregg was an "employee." We are not persuaded, as this is a distinction without a difference. Despite its focus on a different portion of the definition set forth in section 2699, subdivision (c), Uber strives to achieve the exact same outcome sought by the defendants in *Williams* and its progeny through similar means: to avoid litigating a PAGA claim in court by severing a key issue related to whether the plaintiff is an "aggrieved employee" from the PAGA claim itself. Under well-settled California law, this it cannot do.[6]

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[5] *Contreras* was published after briefing was completed in this case. Gregg's counsel, however, included a citation to the case in a notice of supplemental authority. And at oral argument, counsel for both parties stated they were familiar with the decision and were allowed to present arguments regarding its applicability to this appeal.

[6] Uber relies on the same federal district court decisions cited by the defendant in *Contreras* to argue the "threshold worker classification issue must be determined by an arbitrator where

(See *Contreras*, *supra*, 61 Cal.App.5th at pp. 474-477; *Provost*, *supra*, 55 Cal.App.5th at pp. 993-996.)

In sum, we agree with *Provost* and *Contreras*, and conclude the misclassification issue is part and parcel of the "indivisible" representative PAGA claim asserted in this case, which "belongs solely to the state." (*Provost*, *supra*, 55 Cal.App.5th at p. 988.) The record does not demonstrate the state agreed to arbitrate the misclassification issue or delegate the arbitrability of that issue to an arbitrator. Nor does it establish Gregg was acting as an agent of the state when he agreed to the TSA. Accordingly, the trial court correctly determined Gregg cannot be required to resolve those issues through arbitration. (See *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 622 (*Correia*) ["Without the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement."]; see also *Bautista v. Fantasy Activewear, Inc.* (2020) 52 Cal.App.5th 650, 657-658 ["Because [the plaintiffs] were not acting as agents of the state when they entered into the arbitration agreements at issue here, [the defendant] has identified no arbitration agreement that would bind the real party in interest here—the state—to arbitration, even of the question of arbitrability."].)

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the arbitration agreement contains a delegation clause." (See *Contreras*, *supra*, 61 Cal.App.5th at p. 477, fn. 8.) Like Division 5, we too "find these cases irrelevant to this appeal" because "[n]one of [them] involve PAGA claims[.]" (*Ibid.*)

B. Enforceability of PAGA Waiver

Next, Uber argues that even if the misclassification issue is not separately arbitrable, the trial court should have enforced the Arbitration Provision's PAGA Waiver by "dismissing or striking the representative PAGA claim and compelling arbitration … of his PAGA claim on an individual basis[.]" On this point, Uber acknowledges that in *Iskanian*, *supra*, 59 Cal.4th 348, our Supreme Court held "that an employee's right to bring a PAGA action is unwaivable," and 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 pp. 383-384.) According to Uber, however, *Iskanian* has since been abrogated by *Epic*, *supra*, 138 S.Ct. 1612.

Numerous Courts of Appeal have rejected the contention that *Iskanian* is no longer good law in the wake of *Epic*. (See, e.g., *Correia*, *supra*, 32 Cal.App.5th at p. 620; *Provost*, *supra*, 55 Cal.App.5th at pp. 997-998; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 864, 872-873; *Collie v. The Icee Co.* (2020) 52 Cal.App.5th 477, 480, rev. denied Nov. 10, 2020.) In the first decision to do so, Division One of the Fourth Appellate District explained: "*Iskanian* held that 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. [Citation.] *Epic* did not consider this issue and thus did not decide the *same* question differently. [Citation.] *Epic* addressed a different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the [National Labor Relations Act]. [Citation.]" (*Correia*, *supra*, 32 Cal.App.5th

p. 619, italics in original.) In *Contreras*, Division 5 of this court "joined [these] Courts of Appeal." (*Contreras*, *supra*, 61 Cal.App.5th at pp. 471-472.) For the reasons stated in *Correia* and the other authorities cited above, we do so as well, and conclude Uber's argument regarding the PAGA Waiver's enforceability is without merit.[7]

DISPOSITION

The order denying the motion compel arbitration is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:
MANELLA, P.J.
COLLINS, J.

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[7] We are not persuaded by Uber's argument that *Iskanian* (and *Correia*'s analysis based thereon) are inapplicable because Gregg could have opted out of the Arbitration Provision. " '*Iskanian*'s underlying public policy rationale—that a PAGA waiver circumvents the Legislature's intent to empower employees to enforce the Labor Code as agency representatives and harms the state's interest in enforcing the Labor Code—does not turn on how the employer and employee entered into the agreement, or the mandatory or voluntary nature of the employee's initial consent to the agreement.' [Citation.]" (*Williams*, *supra*, 237 Cal.App.4th at p. 648.)

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 57

JOHNATHON GREGG VS UBER TECHNOLOGIES INC ET AL

BC719085

December 5, 2019 8:30 AM

Judge: Honorable Steven J. Kleifield	CSR: J. Fonseca
Judicial Assistant: J. Jimenez	ERM: None
Courtroom Assistant: K. Ghazarian	Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Jahan Crawford Sagafi and Rachel Williams Dempsey

For Defendant(s): Sophia Behnia

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration and Stay Proceedings

The matter is called for hearing.

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Jennifer Spee Fonseca CSR 12840, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The Court, having read and considered all papers filed and heard argument, comes on now and orders as follows:

The Motion to Compel Arbitration filed by Uber Technologies, Inc. on 11/01/2018 is Denied.

Defendant represents an appeal will be filed on the ruling of this motion.

Defendant requests case to be stayed pending appeal.

Status Conference re appeal is scheduled for 09/10/20 at 08:30 AM in Department 57 at Stanley Mosk Courthouse.

Notice is waived.

APPENDIX I

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 57 HON. STEVEN J. KLEIFIELD, JUDGE

JONATHON GREGG, PLAINTIFF, vs. UBER TECHNOLOGIES INC., ET AL., DEFENDANTS.	)	Case No. BC719085

REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, DECEMBER 5, 2019

APPEARANCES:

FOR THE PLAINTIFF: OUTTEN & GOLDEN

BY: JAHAN C. SAGAFI, ESQ.
RACHEL WILLIAMS DEMPSEY, ESQ.

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FOR THE DEFENDANT:
LITTLER MENDELSON, P.C.
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REPORTED BY: JENNIFER SPEE FONSECA, CSR 12840

CASE NO.:	BC719085
CASE NAME:	GREGG V. UBER TECHNOLOGIES
LOS ANGELES, CALIFORNIA	THURSDAY, DECEMBER 5, 2019
DEPARTMENT 57	HON. STEVEN J. KLEIFIELD, JUDGE
REPORTER:	JENNIFER FONSECA, 12840
TIME:	9:04 A.M.
APPEARANCES:	(AS NOTED ON THE TITLE PAGE)

THE COURT: OKAY. GREGG VERSUS UBER TECHNOLOGIES. COUNSEL, STATE YOUR APPEARANCES.

MS. DEMPSEY: RACHEL WILLIAMS DEMPSEY FOR PLAINTIFF, JONATHON GREGG.

MR. SAGAFI: JAHAN SAGAFI ALSO FOR PLAINTIFF.

MS. BEHNIA: SOPHIA BEHNIA FOR DEFENDANT, UBER TECHNOLOGIES.

THE COURT: OKAY. WE ARE HERE ON DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS. THE MATTER WAS FULLY BRIEFED. I'M FAMILIAR WITH THE ARGUMENTS OF THE PARTIES. I THINK YOU HAVE THE LABORING OAR. I'M LOOKING AT DEFENDANT. IT LOOKS TO ME THAT THE LEGAL ISSUES HAVE ALREADY BEEN DECIDED IN OTHER CASES, AND I'M NOT SURE THAT YOU NEED TO SPEND MUCH TIME DISCUSSING IT. AM I WRONG ABOUT THAT? I THOUGHT THAT THERE WAS A COURT OF APPEAL CASE. I THINK IT'S CALLED WILLIAMS THAT WERE THE -- THESE IDENTICAL ISSUES WERE RAISED AND DISCUSSED.

MS. BEHNIA: YOUR HONOR, IF I MAY RESPOND TO THAT.

THE COURT: YES.

MS. BEHNIA: THE WILLIAMS CASE DOES NOT ADDRESS THE—THERE'S SEVERAL ISSUES IN THIS MOTION, BUT I SUSPECT YOUR HONOR IS REFERRING TO THE ISSUE OF WHETHER THE INDEPENDENT CONTRACTOR/EMPLOYEE QUESTION CAN BE DECIDED IN ARBITRATION

BEFORE THE PAGA CLAIM PROCEEDS, AND THAT HAS NOT BEEN DECIDED. THAT WAS NOT DECIDED IN WILLIAMS, AND NO COURT HAS DECIDED THAT.

IN FACT, THE DECISIONS THAT HAVE COME OUT ON THAT, THE JOHNSTON VERSUS UBER TECHNOLOGIES CASE PENDING IN THE NORTHERN DISTRICT OF CALIFORNIA BEFORE JUDGE EDWARD CHEN, THE DRIVER IN THAT CASE BROUGHT A WARN ACT CLAIM, AND HE ACTUALLY CLAIMED THAT HE WAS FIRED AND THAT HE SHOULD BE ABLE TO BRING A WARN ACT CLAIM. ONLY EMPLOYEES CAN BRING WARN ACT CLAIMS, AND JUDGE CHEN IN THE JOHNSTON CASE SAID, OKAY, YOU GUYS NEED TO GO TO ARBITRATION FIRST AND DETERMINE WHETHER THIS DRIVER IS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE BECAUSE, IF HE'S PROPERLY CLASSIFIED AS AN INDEPENDENT CONTRACTOR, THEN THERE'S NO REASON TO PROCEED WITH THE WARN ACT CLAIM. SO HE STAYED THE CASE.

THE COURT: LET'S GET TO THE POINT OF THIS BEING A PAGA CASE, AND WE HAVE CLARIFICATION NOW THAT THE PAGA CASE IS LIMITED TO THE CIVIL PENALTIES. THE CIVIL PENALTIES MEAN JUST THAT. IT DOESN'T INCLUDE ANY INDIVIDUAL CLAIMS ON BEHALF OF THE PLAINTIFF. YOU HAVE AN ARBITRATION AGREEMENT THAT SAYS PAGA CLAIMS ARE NOT ARBITRABLE. ANY DETERMINATION AS TO WHETHER—THEY'RE NOT ARBITRABLE IF THE STATE LAW SAYS THAT THEY'RE NOT OR SOME LAW SAYS THAT THEY'RE NOT ARBITRABLE. WE HAVE CALIFORNIA COURT SAYING

PAGA CASES ARE NOT ARBITRABLE BECAUSE THEY'RE BROUGHT BY—IT'S AS IF THE STATE IS BRINGING THE CASE AND NOT THE INDIVIDUAL. DOESN'T THAT JUST PROVIDE THE RULE OF DECISION HERE? I MEAN, ISN'T IT CLEAR?

MS. BEHNIA: NO, YOUR HONOR. BECAUSE THE LABOR CODE IN PAGA SECTION 2699 SPECIFICALLY SAYS THAT AGGRIEVED EMPLOYEES MAY STAND IN THE SHOE OF THE STATE AND PROCEED FOR LABOR CODE VIOLATIONS ON BEHALF OF THE STATE. EMPLOYEES.

THE COURT: YES. AND ISN'T THAT AN ELEMENT OF THE CASE?

MS. BEHNIA: NO, IT IS NOT, BECAUSE IF HE'S FOUND THAT HE'S AN INDEPENDENT CONTRACTOR, HE LITERALLY CANNOT BRING A PAGA CLAIM. HE CAN'T TAKE ADVANTAGE OF THAT LABOR CODE SECTION, AND HE'S SPECIFICALLY CONTRACTED TO ARBITRATE THAT ISSUE. HE HAS A CONTRACT WHERE HE SAID THE DISPUTES WITH THE COMPANY, PRIVATE DISPUTES, NEED TO BE ARBITRATED, AND THAT ISSUE, HE CAN'T EVEN BRING A PAGA CLAIM IF HE'S FOUND TO BE AN INDEPENDENT CONTRACT. SO HE CAN'T CIRCUMVENT THAT AGREEMENT BY BRINGING A PAGA CLAIM.

THE COURT: SO LET ME ASK YOU, WHAT EXACTLY WOULD BE ENCOMPASSED IN AN ARBITRATION? IN OTHER WORDS, YOU CONTACT AN ARBITRATOR AND YOU SAY, WE DON'T HAVE A CAUSE OF ACTION HERE FOR YOU TO DECIDE. WE HAVE A FACTUAL ISSUE AS TO WHETHER THE PLAINTIFF IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR. SO WE'RE

JUST GOING TO HAVE A HEARING. IS THAT WHAT YOU ENVISION?

MS. BEHNIA: THERE'S TWO WAYS IT COULD HAPPEN. EITHER THE COURT COULD ISSUE AN ORDER TELLING US TO GO HAVE AN ARBITRATOR DECIDE THIS ISSUE, OR WE COULD, UNDER THE TERMS OF THE CONTRACT—MY CLIENT COULD, BECAUSE THERE'S TWO PARTIES TO THIS CONTRACT, DEMAND ARBITRATION AGAINST THE PLAINTIFF HERE IN THIS CASE SAYING THAT WE ARE ON NOTICE THAT THERE'S A DISPUTE REGARDING YOUR STATUS, AND WE SEEK DECLARATORY RELIEF FROM AN ARBITRATOR THAT YOU WERE PROPERLY CLASSIFIED. AND THAT'S ALL THE ARBITRATION WOULD BE. IT WOULD BE DISCOVERY AND A SHORT HEARING ON THE STATUS OF THIS PERSON AND WHETHER HE WAS PROPERLY CLASSIFIED AS AN INDEPENDENT CONTRACTOR.

THE COURT: OKAY. LET ME HEAR FROM PLAINTIFF.

MS. WILLIAMS DEMPSEY: SO I—YOU SEEM TO HAVE A GOOD HANDLE ON THE ISSUES. THERE JUST ISN'T A WAY TO SEPARATE THE ISSUE OF WHETHER THE PLAINTIFF WAS CLASSIFIED FROM THE PAGA CLAIMS THAT WERE BROUGHT ON BEHALF OF THE STATE ALLEGING THAT THE PLAINTIFF WAS MISCLASSIFIED AND THAT A SERIES OF LABOR CODE VIOLATIONS, INCLUDING A LABOR CODE VIOLATION LITERALLY FOR MISCLASSIFICATION. LABOR CODE SECTION 226.8 IS FOR THE VIOLATION OF MISCLASSIFICATION.

THERE'S NOT A SINGLE CASE THAT UBER HAS BEEN ABLE TO CITE THAT SUPPORTS THAT THAT COULD POSSIBLY BE A JURISDICTIONAL ISSUE GOVERNING WHETHER YOU CAN BRING A PAGA CLAIM. A PAGA CLAIM IS A PAGA CLAIM. WHETHER YOU ARE AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE IS THE CORE OF THAT PAGA CLAIM. IT'S NOT A JURISDICTIONAL ISSUE, AND I THINK IF YOU LOOK AT THE LANGUAGE OF WILLIAMS, OF PEREZ, OF HERNANDEZ, THEY HOLD PRETTY CLEARLY—SO THIS IS FROM PEREZ. THE COURT SAID THERE, "WE FAIL TO SEE HOW AN AGREEMENT THAT EXCLUDES REPRESENTATIVE CLAIMS CAN NONETHELESS BE REASONABLY INTERPRETED TO REQUIRE PLAINTIFFS TO ARBITRATE THEIR STANDING TO BRING A REPRESENTATIVE CLAIM." I THINK THAT GOVERNS THE ISSUE HERE. I THINK THIS IS A PRETTY SIMPLE—I THINK THIS IS A PRETTY SIMPLE DISPUTE.

MS. BEHNIA: YOUR HONOR, IF I MAY RESPOND. A COUPLE POINTS: ONE, THE CLAIM FOR MISCLASSIFICATION UNDER 226.8, LABOR CODE SECTION 226.8, IT IS SPECIFICALLY NOT LISTED AS A SECTION THAT CAN BE PROCEEDED AGAINST UNDER PAGA. 2699.5 LISTS THE LABOR CODE SECTIONS THAT CAN BE BROUGHT AGAINST FOR PENALTIES UNDER PAGA, AND 226.8 IS NOT THERE. SO THAT'S YET ANOTHER EXAMPLE OF THE LEGISLATURE MAKING IT CLEAR THAT THEY'RE FOCUSED ON EMPLOYEES BEING ABLE TO PROCEED AND PROCEED FOR PENALTIES AGAINST EMPLOYERS.

IF THEY WANTED TO INCLUDE NON-EMPLOYEES AS PART OF THIS, THEY WOULD HAVE WRITTEN THAT IN THE STATUTE. THEY DIDN'T. THEY WROTE AGGRIEVED EMPLOYEES, AND THAT FIRST QUESTION NEEDS TO BE ARBITRATED BECAUSE THE CONTRACT SAYS SO. THE SUPREME COURT OF THE UNITED STATES HAS BEEN CLEAR TIME AND TIME AGAIN THAT CONTRACTS OF ARBITRATION ARE TO BE ENFORCED. SECONDLY, COUNSEL FOR PLAINTIFF WAS REFERRING TO THE REPRESENTATIVE ACTION WAIVER IN THE ARBITRATION AGREEMENT. THAT DOES NOT SOMEHOW PRECLUDE US FROM SAYING THAT THIS ISSUE IS A THRESHOLD ISSUE AND NEEDS TO BE ARBITRATED.

ALSO, THE REPRESENTATIVE ACTION WAIVER, AS YOUR HONOR POINTED OUT EARLIER, SPECIFICALLY SAYS, IF A COURT DETERMINES THAT IT'S NOT VALID, IT CAN BE SEVERED, AND ONLY IF LAW REQUIRES US TO ENFORCE IT OR NOT ENFORCE IT. NOT BECAUSE IN THIS CASE WE'RE ARGUING THAT A FIRST ISSUE BEFORE WE CAN EVEN FIGURE OUT WHETHER THERE'S AN AGGRIEVEMENT OR ANY SORT OF LABOR CODE VIOLATION, WE HAVE TO DETERMINE IF THIS GUY, JONATHON GREGG, CAN EVEN STAND IN THE SHOES OF THE STATE. AND WE DON'T EVEN KNOW IF HE CAN BECAUSE WE DON'T KNOW IF HE'S AN EMPLOYEE OR NOT, AND MY CLIENT HAS A RIGHT TO HAVE THAT HEARD IN ARBITRATION BECAUSE THEY ENTERED INTO A CONTRACT, BOTH PARTIES DID, AND THEN COME BACK HERE IF NEEDED.

THE COURT: ANYTHING ELSE? I MEAN, IS THERE ANYTHING THAT YOU COULD SAY TO RESPOND TO THAT THAT WOULDN'T BE REPEATING YOURSELF?

MS. WILLIAMS DEMPSEY: NOT THAT WOULDN'T BE REPEATING MYSELF, NO. I THINK A PAGA CLAIM IS A PAGA CLAIM. THAT'S WHAT THE PLAINTIFF BROUGHT HERE, AND THAT'S WHAT THE PLAINTIFF, BY THE PLAIN TERMS OF THE CONTRACT, DESERVES TO HAVE THE RIGHT TO BE HEARD IN COURT.

THE COURT: RIGHT. I DON'T THINK WE CAN PARSE OUT AN ISSUE THAT IS AN ELEMENT OF A PAGA CLAIM. IF THE PLAINTIFF IS NOT AN AGGRIEVED EMPLOYEE, THE PAGA CLAIM CAN'T PROCEED, BUT THAT'S AN ELEMENT OF THE CASE. I DON'T THINK IT'S A SEPARATE STANDING ISSUE. THE PLAINTIFF IS ALLOWED TO BRING A PAGA CASE IN STATE COURT. IT'S NOT ARBITRABLE BECAUSE IT IS BROUGHT ON BEHALF OF THE STATE. IT CAN'T BE ARBITRATED UNDER CALIFORNIA LAW. SO I APPRECIATE THE ARGUMENTS. I UNDERSTAND THEM, BUT THE MOTION IS DENIED.

MS. BEHNIA: OKAY, YOUR HONOR. THANK YOU. MY CLIENT WILL BE APPEALING THE ORDER. SO WE WOULD ASK FOR A STAY OF PROCEEDINGS PENDING THE OUTCOME OF THE APPEAL. I THINK SECTION 1281.4 OF THE CODE OF CIVIL PROCEDURE MANDATES A STAY OF ARBITRATION MOTIONS PENDING THEIR OUTCOME.

THE COURT: OKAY. LET'S TAKE A LOOK. 1281.

MS. BEHNIA: 1281.4. AND I THINK, IN ADDITION TO THAT CODE SECTION, JUST IN THE INTEREST OF EFFICIENCY AND JUDICIAL ECONOMY, IF WE GO UP TO THE COURT OF APPEAL AND THE COURT OF APPEAL REVERSES, THERE'S OTHER APPEALS PENDING ON THIS ISSUE. I KNOW OF TWO OTHER APPEALS ON THIS EXACT ISSUE PENDING. SO IF THE COURT OF APPEAL COMES DOWN DIFFERENTLY AND SAYS THAT THIS MUST BE DECIDED IN ARBITRATION, IT WOULD NOT BE EFFICIENT FOR US TO PROCEED HERE FOR EIGHT OR TEN MONTHS. TO HAVE TO WALK AWAY FROM THAT AND WASTE ALL THAT TIME AND MONEY.

THE COURT: JUST GIVE ME A MOMENT TO LOOK. I THINK YOU'RE RIGHT. I'VE BEEN THROUGH THIS BEFORE WHERE THERE'S AN APPEAL FROM AN ORDER DENYING ARBITRATION. BUT IT IS IN 1281.4; RIGHT?

MS. BEHNIA: YEAH. I BELIEVE IT'S 1281.4 THAT TALKS ABOUT THE STAY PENDING A DECISION ON AN ARBITRATION MOTION.

THE COURT: DO YOU AGREE?

MS. WILLIAMS DEMPSEY: WE DON'T DISAGREE. I HAVE A COUPLE OF QUESTIONS. ONE, AS MISS BEHNIA SAID, I BELIEVE THIS ISSUE IS ALREADY PENDING BEFORE THE COURT OF APPEAL. AGAIN, IF THE COURT OF APPEAL DECIDES THAT ISSUE BEFORE THEY DECIDE THIS CASE, I WONDER IF THE APPEAL IS STILL RELEVANT IF THE STAY SHOULD GO THROUGH THE WHOLE COURSE OF THIS APPEAL OR IF THE ISSUE THAT'S ALREADY BEFORE THE

COURT OF APPEAL SHOULD GOVERN THE PERIOD OF THE STAY.

THE COURT: THE ISSUE—IN ANOTHER CASE YOU'RE TALKING ABOUT?

MS. WILLIAMS DEMPSEY: YEAH.

THE COURT: PENDING WHERE? IN OUR DISTRICT—OR THERE'S ONE IN THE 4TH DISTRICT, ISN'T THERE?

MS. WILLIAMS DEMPSEY: OH, IS IT IN THE 4TH DISTRICT?

MS. BEHNIA: YES. THERE'S ONE IN THE 4TH DISTRICT. WE PUT IT IN IN OUR REQUEST FOR JUDICIAL NOTICE.

THE COURT: YES. I DID SEE THAT. IT'S NOT UNUSUAL TO HAVE AN ISSUE PENDING IN DIFFERENT COURTS. I DON'T KNOW WHAT THE SECOND DISTRICT WILL DO.

MS. BEHNIA: EXACTLY.

THE COURT: I CAN'T EVEN KNOW WHAT A DIFFERENT DIVISION OF THE SECOND DISTRICT WILL DO AS OPPOSED TO ANOTHER ONE.

MS. BEHNIA: AND I MAY FEEL DIFFERENTLY IF IT WERE MY CLIENT WITH THE APPEAL ALREADY PENDING, BUT THESE ARE DIFFERENT COMPANIES. SO MY CLIENT WOULD WANT ITS APPEAL FULLY BRIEFED AND HEARD AND DECIDED.

THE COURT: RIGHT.

MS. WILLIAMS DEMPSEY: OKAY. UNDERSTOOD.

THE COURT: BUT I'M JUST LOOKING FOR THE LANGUAGE. FOR SOME REASON—

MS. BEHNIA: IS IT NOT—LET ME—

MR. SAGAFI: 1281.4?

MS. BEHNIA: YEAH. MY PHONE—THE CELL RECEPTION ISN'T GREAT. OTHERWISE, I'D PULL IT UP.

SO IF I MAY READ IT, YOUR HONOR.

THE COURT: YES.

MS. BEHNIA: "IF A COURT OF COMPETENT JURISDICTION, WHETHER IN THIS STATE OR NOT, HAS ORDERED ARBITRATION OF A CONTROVERSY WHICH IS AN ISSUE INVOLVED IN AN ACTION OR PROCEEDING PENDING BEFORE A COURT OF THIS STATE, THE COURT IN WHICH SUCH ACTION OR PROCEEDINGS PENDING SHALL, UPON MOTION OF A PARTY TO SUCH ACTION OR PROCEEDING, STAY THE ACTION OR PROCEEDING UNTIL AN ARBITRATION IS HAD IN ACCORDANCE WITH THE ORDER TO ARBITRATE OR UNTIL SUCH EARLIER TIME AS THE COURT SPECIFIES."

THE COURT: OKAY. AND THAT DOESN'T TELL US WHAT HAPPENS IF THE COURT DENIES THE MOTION?

MS. BEHNIA: I DON'T THINK THERE'S AN EXPLICIT IF THE COURT DENIES THE MOTION. IT TALKS—AND I CAN KEEP READING, BUT IT DISCUSSES UPON MOTION OF THE PARTIES, THE COURT SHOULD ORDER A STAY. I MEAN, I'M ASKING FOR IT HERE. I'M PREPARED TO FILE A FULLY BRIEFED MOTION TO STAY IF THAT IS WHAT THE COURT REQUIRES.

THE COURT: NO. I HAVE STAYED THEM IN THE PAST, AND I DIDN'T LOOK AT THIS ISSUE AHEAD OF TIME, AND I DON'T RECALL WHETHER THERE'S A CASE THAT SAYS THAT, THEY INTERPRET THE STATUTE THAT WAY, OR IT'S A DIFFERENT CODE SECTION. BUT IF THERE'S NO—IF THERE'S NO DISPUTE ABOUT IT, I'M HAPPY TO STAY IT, AND WE CAN SET A STATUS CONFERENCE MAYBE NINE MONTHS OUT OR SO, AND WE CAN SEE WHAT THE STATUS IS.

MS. BEHNIA: YEAH. AND THE COURT OF APPEAL IN THE FRANCO CASE ALSO STAYED A PAGA CLAIM IF THE ISSUES TO LITIGATION UNDER PAGA MIGHT OVERLAP WITH THOSE THAT ARE SUBJECT OF ARBITRATION. SO I JUST FEEL LIKE, YES, IT SOUNDS LIKE THERE'S NOT A DISPUTE. SO I THINK IT MAKES SENSE TO DO THAT.

MS. WILLIAMS DEMPSEY: I THINK WE'D LIKE TO BRIEF THE ISSUE, YOUR HONOR.

THE COURT: YOU'D LIKE TO BRIEF THE ISSUE OF A STAY?

MR. SAGAFI: JUST TO MAKE SURE JUST BECAUSE IT HASN'T BEEN RAISED. WE CAN ALSO MEET AND CONFER ABOUT IT BEFORE THEY BRING THEIR MOTION, AND IF WE AGREE, THEN WE CAN SAVE THEM THE TROUBLE OF MOVING—

MS. BEHNIA: SURE. I JUST THINK IT'S REALLY CLEAR THAT IT WOULD NOT BE IN THE INTEREST OF JUDICIAL EFFICIENCY OR ECONOMY OR ANYTHING TO PROCEED WITH THIS CASE IF WE'RE APPEALING THE VERY ISSUE

THAT WILL TOTALLY CHANGE THE CASE IF IT COMES OUT DIFFERENTLY. SO I MEAN, IF WE'RE GOING TO—WASTING TIME TO FULLY BRIEF AND HEAR IT AGAIN IS FRANKLY A LITTLE BIT RIDICULOUS FROM MY PERSPECTIVE, BUT IF THAT'S WHAT THE COURT ASKS US TO DO, THEN I WILL HAVE TO DO THAT.

MS. WILLIAMS DEMPSEY: YOUR HONOR, WE'RE HAPPY TO MEET AND CONFER, AND IF WE CAN REACH AN AGREEMENT, WE CAN FILE A STIPULATION.

MS. BEHNIA: WHAT IS THE CONCERN? WE MIGHT AS WELL TALK ABOUT IT RIGHT NOW.

THE COURT: WE ARE TALKING ABOUT IT RIGHT NOW. IF I HAD A CODE SECTION OR A CASE IN FRONT OF ME THAT SAYS THAT I'M SUPPOSED TO STAY THIS— I THOUGHT IT WAS. I THOUGHT IT WAS AUTOMATIC THAT YOU'RE SUPPOSED TO DO IT OR BY OPERATION OF LAW, OR MAYBE IT'S THAT ONCE A NOTICE OF APPEAL IS FILED, THE—IS THERE A CODE SECTION THAT SAYS YOU HAVE—I THINK IT'S A DIFFERENT CODE SECTION THAT SAYS THAT YOU HAVE THE RIGHT TO APPEAL AN ORDER DENYING A MOTION AND THAT THE ACTION IS STAYED. I THINK IT'S A DIFFERENT CODE SECTION, AND IF WE WERE PREPARED TO DISCUSS THAT NOW, I HATE TO HAVE TO PUT THIS OVER. LET ME SEE IF WE CAN FIND IT.

MS. WILLIAMS DEMPSEY: YOUR HONOR, WE AGREE THAT THERE'S AN AUTOMATIC STAY PENDING APPEAL. THAT'S A SEPARATE ISSUE. WE DON'T CONTEST THAT.

MS. BEHNIA: OH, WELL, THEN GREAT. I'M REPRESENTING ON THE RECORD THAT WE'RE GOING TO APPEAL. AS SOON AS WE GET THE ORDER, WE'LL FILE A NOTICE OF APPEAL.

THE COURT: OKAY. LET'S JUST DO THIS: LET'S—WE'LL JUST SET A FURTHER STATUS CONFERENCE, AND THE QUESTION IS WHEN DO WE SET IT? WE CAN SET IT OUT A COUPLE OF MONTHS JUST TO CONFIRM THAT YOU HAVE FILED THE NOTICE OF APPEAL. I JUST NEED TO HAVE A FURTHER DATE—

MS. BEHNIA: UNDERSTOOD.

THE COURT: —TO TRACK THE PROGRESS OF THE CASE. I'M CONFIDENT YOU'RE GOING TO APPEAL. SO WHY DON'T WE JUST—LET'S SET IT NINE MONTHS OUT. I DON'T—IT'S GOING TO HAPPEN. SO LET'S GO ON ABOUT NINE MONTHS, AND WE'LL DO A STATUS CONFERENCE RE APPEAL.

THE CLERK: SEPTEMBER 10TH, 2020.

THE COURT: OKAY. AND THEN I THINK IT JUST GETS STAYED BY OPERATION OF LAW.

MS. WILLIAMS DEMPSEY: YEAH. PLAINTIFFS WOULD ALSO JUST LIKE TO REQUEST A LIST—A PAGA LIST PURSUANT TO WILLIAMS PENDING THE APPEAL JUST SO THAT WE CAN GIVE NOTICE TO THE DRIVERS OF THEIR RIGHTS AND THEIR DOCUMENT PRESERVATION OBLIGATIONS.

MS. BEHNIA: THERE IS ZERO AUTHORITY TO SUPPORT THAT REQUEST. WE'VE JUST ACKNOWLEDGED THERE'S GOING TO BE A STAY OF THIS CASE PENDING THE APPEAL. SO

TAKING DISCOVERY RIGHT NOW IS COMPLETELY INAPPROPRIATE.

MS. WILLIAMS DEMPSEY: I'M NOT SUGGESTING DISCOVERY. I'M SUGGESTING A LIST, A CONTACT LIST OF THE DRIVERS WHOSE RIGHTS ARE IMPLICATED IN THIS CASE.

MS. BEHNIA: THERE'S NO—

THE COURT: I'M SORRY. NOW, ARE YOU MAKING THAT REQUEST OF THE DEFENDANT? ARE YOU ASKING ME TO MAKE AN ORDER? WHAT ARE YOU ASKING?

MR. SAGAFI: I'M ASKING THE COURT TO MAKE AN ORDER.

MS. BEHNIA: NO GROUNDS FOR THAT. THERE'S MANY OTHER PAGA CASES. THEY'RE WAY FAR IN LINE. I'VE FILED A NOTICE OF RELATED CASE IN THIS CASE. DRIVERS ARE FULLY AWARE.

MR. SAGAFI: SO UNDER THE OTHER WILLIAMS CASE FROM THE SUPREME COURT, IT'S STANDARD THAT, AS WITH A CLASS ACTION, A PAGA ACTION INVOLVES CERTAIN RIGHTS FOR THE AGGRIEVED EMPLOYEES TO KNOW ABOUT THE LAWSUIT. SO THERE'S TWO PURPOSES FOR THE CLASS LIST. ONE CAN BE FOR DISCOVERY PURPOSES, WHICH WE WOULDN'T NEED NOW BECAUSE WE'RE NOT DOING DISCOVERY.

THE OTHER IS, DURING THE STAY, UBER HAS THE OPPORTUNITY—UBER KNOWS ABOUT THE LAWSUIT. UBER HAS THE OPPORTUNITY TO PRESERVE DOCUMENTS, COLLECT EVIDENCE, PREPARE ITS DEFENSES AND ANY

COUNTERCLAIMS IT WANTS TO BRING. THE DRIVERS DON'T KNOW ABOUT THIS LAWSUIT. MANY OF THE DRIVERS KNOW ABOUT THE IDEA OF A LAWSUIT, THE IDEA OF SOME RIGHTS THAT THEY MIGHT HAVE, BUT DURING THE COURSE OF THE NEXT TWO OR THREE YEARS DURING THE APPEAL, THESE DRIVERS HAVE EVIDENCE. THEY HAVE CALENDARS. THEY HAVE NOTES THAT THEY MIGHT TAKE. THEY HAVE ELECTRONIC RECORDS OF HOW MANY MILES THEY DROVE OR WHAT KIND OF ACTIVITIES THEY ENGAGED IN, WHAT KIND OF LICENSES THEY HAVE OR DIDN'T HAVE. ALL THE ELEMENTS OF THE ABC TEST THAT THEY'RE GOING TO BE THROWING AWAY AND LOSING AND FORGETTING OVER THE COURSE OF THE NEXT FEW YEARS.

SO IF WE SEND A NOTICE TO THEM, JUST A SIMPLE ONE-PAGE NEUTRAL NOTICE THAT SAYS THERE IS THIS CASE, IT EXISTS, IT—WE'LL ADJUDICATE YOUR RIGHTS SOME DAY PERHAPS. PLEASE PRESERVE YOUR EVIDENCE. THIS IS SOMETHING WE'VE DONE IN. OTHER CASES SO THAT YOU'RE ON THE SAME FOOTING AS THE DEFENDANT, WHICH HAS COUNSEL, WHICH HAS CONTACT WITH THE COUNSEL, KNOWS ABOUT ITS RIGHTS, KNOWS ABOUT ITS OPPORTUNITY TO PREPARE ITS DEFENSE, AND GET READY FOR THAT TRIAL THAT MIGHT HAPPEN THREE YEARS FROM NOW.

THE COURT: WELL, THAT'S FINE, BUT YOU'RE ASKING ME JUST OUT OF THE BLUE HERE WITHOUT ANY NOTICE, ADVANCED NOTICE TO MAKE AN ORDER UNDER SOME CASE THAT I HAVEN'T TAKEN A LOOK AT. I DON'T

KNOW IF IT'S APPROPRIATE TO MAKE SUCH AN ORDER, AND I DON'T KNOW WHAT THE PARAMETERS OF THE ORDER WOULD BE.

MS. BEHNIA: THANK YOU, YOUR HONOR.

MR. SAGAFI: WE'RE HAPPY TO BRING A MOTION.

MS. BEHNIA: IT'S NOT APPROPRIATE. THE SUPREME COURT IN WILLIAMS IS IN THE CONTEXT OF DISCOVERY IN A PAGA CASE.

THE COURT: THAT'S WHAT I THOUGHT. I'M FAMILIAR. THAT WAS JUDGE HIGHBERGER'S CASE.

MS. BEHNIA: YES. THAT'S EXACTLY THAT CASE. IT WASN'T A RANDOM CASE WHERE—THAT'S INAPPROPRIATE.

THE COURT: HE WAS STAGING DISCOVERY. I WAS AWARE OF THAT CASE. I DON'T KNOW—I DON'T THINK I CAN JUST MAKE SOME ORDER BASED ON MY RECOLLECTION OF WHAT WAS IN THAT CASE. IT WAS A DISCOVERY CASE. SO THE—ALL WE'RE AT RIGHT NOW IS I'VE DENIED THE MOTION. IT'S BEEN REPRESENTED TO ME THAT AN APPEAL WILL BE FILED. WE'VE SET A STATUS CONFERENCE DATE, AND I LEAVE IT TO YOU TO DECIDE WHAT YOU DO NEXT.

MS. BEHNIA: YOUR HONOR, IF I MAY ASK, WILL THERE BE AN ORDER FROM THE COURT THAT WE'LL BE WAITING FOR, OR ARE YOU JUST DENYING IT ON THE RECORD AND WE CAN APPEAL BASED ON THIS RECORD? HOW WOULD YOU LIKE THAT DONE?

THE COURT: I AM MAKING MY ORDER NOW. I DON'T THINK THAT WE NEED A FORMAL ORDER.

MS. BEHNIA: OKAY. THAT'S FINE.

THE COURT: AND WE DO HAVE A RECORD OF IT NOW. I SUPPOSE—I DON'T THINK WE NEED A FORMAL ORDER. THERE WILL BE A MINUTE ORDER.

MS. BEHNIA: OKAY. I'LL WAIT FOR THE MINUTE ORDER THAT SAYS DENIED BASICALLY, AND THEN I'LL ATTACH THAT WITH THE TRANSCRIPT, AND WE'LL APPEAL. DOES THAT WORK?

THE COURT: THAT'S FINE WITH ME. IT SHOULD BE AVAILABLE ONLINE PROBABLY WITHIN A DAY.

THE CLERK: YES.

THE COURT: PROBABLY BY TOMORROW?

THE CLERK: IT WILL BE HOPEFULLY BY TONIGHT.

MS. BEHNIA: PERFECT. IF IT SAYS JUST DENIED. IT WILL BE QUICK. WE'LL PULL IT FROM THERE.

THE COURT: OKAY. YOU DO HAVE A TRANSCRIPT.

MS. BEHNIA: YES.

MR. SAGAFI: THANK YOU, YOUR HONOR.

THE COURT: YOU'RE WELCOME. NOTICE IS WAIVED; RIGHT?

MS. BEHNIA: FOR THE SEPTEMBER HEARING, YES, NOTICE IS WAIVED FROM THE DEFENDANT.

MS. WILLIAMS DEMPSEY: NOTICE IS WAIVED FROM THE PLAINTIFF.

(THE PROCEEDINGS CONCLUDED AT 9:26 A.M.)

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Cal. Lab. Code § 2699.

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3.

(e)(1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil

penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g)(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on

behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not

supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(*l*)(1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.