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Appendix A

SUPREME COURT OF CALIFORNIA

No. S265257

ANGIE MORIANA,

Plaintiff-Respondent,

v.

VIKING RIVER CRUISES, INC.,

Defendant-Appellant.

En Banc
Filed: Dec. 9, 2020

ORDER

The petition for review is denied.

Appendix B

CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

No. B297327

ANGIE MORIANA,

Plaintiff-Respondent,

v.

VIKING RIVER CRUISES, INC.,

Defendant-Appellant.

Filed: Sept. 18, 2020

Before: LAVIN, Acting P.J., DHANIDINA, and EGERTON, J.

OPINION

Angie Moriana sued her former employer Viking River Cruises, Inc. (Viking), seeking recovery of civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.). Viking moved to compel Moriana's PAGA claims to arbitration, arguing that the United States Supreme Court's decision in *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___ [138 S.Ct. 1612] overruled the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59

Cal.4th 348 (*Iskanian*), which held arbitration agreements that waive the right to bring PAGA representative actions in any forum are unenforceable. The trial court denied Viking's motion to compel arbitration. We affirm the order denying that motion.

BACKGROUND

Moriana worked for Viking as a sales representative and agreed to submit any dispute arising out of her employment to binding arbitration. The agreement required Moriana to waive any right to bring a class, collective, representative, or private attorney general action. It also included a delegation provision, giving the arbitrator authority to resolve any disputes over the formation, existence, validity, interpretation or scope of the agreement.

Moriana sued Viking on behalf of the state and all other similarly situated aggrieved employees, alleging various Labor Code violations in a single cause of action under PAGA. Viking moved to compel Moriana's PAGA claims to arbitration. The trial court denied the motion.

DISCUSSION

Because the pertinent facts are undisputed and the denial of Viking's motion was based upon a decision of law, our review is de novo. (*Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 347.)

Viking argues that the trial court should have compelled Moriana's PAGA claims to arbitration based on the United States Supreme Court's decision in *Epic Systems Corp. v. Lewis*, *supra*, 138 S.Ct. 1612,

which Viking claims overruled our Supreme Court's decision in *Iskanian*, *supra*, 59 Cal.4th 348. *Iskanian*, at pages 384 and 389, held that an arbitration agreement that included a waiver of an employee's right to bring a representative PAGA action in any forum violated public policy and that federal law did not preempt this rule. Subsequent California Courts of Appeal cases applying *Iskanian* have held that an employee's predispute agreement to arbitrate PAGA claims is unenforceable absent a showing the state also consented to the agreement. (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 869-872; *Betancourt v. Prudential Overall Supply*, *supra*, 9 Cal.App.5th at pp. 445-449; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677-680.) Each of these cases relied on *Iskanian*'s reasoning that a PAGA representative action is a type of qui tam action and that the state is always the real party in interest in the suit. (*Julian*, at pp. 871-872, *Betancourt*, at pp. 448-449; *Tanguilig*, at pp. 677-680.)

Viking argues that *Iskanian* is no longer good law in the wake of *Epic Systems Corp. v. Lewis*, *supra*, 138 S.Ct. 1612. *Epic* was not a PAGA case. Rather, *Epic*, at page 1620, held that an agreement that requires an employee to arbitrate claims individually does not violate employees' right to engage in concerted activity and collective action via federal class action procedures. The *Epic* court noted the initial judicial antagonism toward arbitration "'manifested itself in a great variety of devices and formulas declaring arbitration against public policy.'" (*Id.* at p. 1623.) *Epic* warned lower courts to be "alert to new devices and formulas that would achieve much [of] the same result" and declared that "a rule seeking to declare

individualized arbitration proceedings off limits is ... just such a device." (*Ibid.*)

Here, Viking argues that *Epic* invalidates the *Iskanian* rule against PAGA waivers as a judicially constructed device that prohibits or disfavors valid contracts requiring individualized arbitration proceedings. Since *Epic*, however, California courts continue to find private predispute waivers of PAGA claims unenforceable. (See, e.g., *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 622; *Collie v. Icee Company* (2020) 52 Cal.App.5th 477, 483; *Kec v. Superior Court of Orange County* (2020) 51 Cal.App.5th 972, 977-978; *Bautista v. Fantasy Activewear, Inc.* (2020) 52 Cal.App.5th 650, 657-658.) This is because "*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]." (*Correia*, at p. 619.) The cause of action in *Epic* "differs fundamentally from a PAGA claim" in that the real party in interest in a PAGA claim is the state. (*Correia*, at p. 619.) Thus, *Epic*'s warning about impermissible devices to get around otherwise valid agreements to individually arbitrate claims notwithstanding, *Iskanian* remains good law.[1] We therefore reject Viking's characterization of PAGA claims as a transparent device to preclude

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[1] "On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently." (*Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 619; accord., *Tanguilig v. Bloomingdale's, Inc.*, *supra*, 5 Cal.App.5th at p. 673.)

individualized arbitration proceedings and follow *Iskanian*, which instead viewed predispute PAGA waivers precluding PAGA actions in any forum as attempts to exempt employers from responsibility for violations of the Labor Code. (See *Iskanian*, *supra*, 59 Cal.4th at p. 383.)

Viking also argues that Moriana's "individual PAGA claim" should be compelled to arbitration. However, there are no individual PAGA claims. "All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf. The employee acts as "'the proxy or agent of the state's labor law enforcement agencies"' and "'represents the same legal right and interest as"' those agencies—"'namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency."'" (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185.) While *Iskanian*, *supra*, 59 Cal.4th at page 384, left open the possibility that an "individual PAGA action" might be cognizable, courts have since found that a single representative claim cannot be split into arbitrable individual claims and nonarbitrable representative claims. (See, e.g., *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 625; *Tanguilig v. Bloomingdale's, Inc.*, *supra*, 5 Cal.App.5th at p. 677.) "[R]egardless of whether an individual PAGA cause of action is cognizable, a PAGA plaintiff's request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer." (*Tanguilig*, at p. 677; accord, *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 421 [single representative action not divisible into

individual claims].) Moriana's complaint contains a single cause of action under PAGA and the only relief she seeks are statutory penalties for Labor Code violations. Thus, she has brought a representative claim that cannot be compelled to arbitration. Moriana alleged no personal claim seeking compensation that might be individually arbitrated.

Lastly, Viking contends that the trial court erred by not sending the "gateway issues" to the arbitrator, that is, whether there was an agreement to arbitrate between the parties and whether the agreement covers the dispute. However, the threshold question here is not whether claims are arbitrable under an agreement among the parties, but rather whether there exists an agreement among the parties at all. "Under 'both federal and state law, *the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate*.'" (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396.) Because Moriana was not acting as an agent of the state when she agreed to arbitrate any claim arising from her employment, there is no agreement that would bind the state to arbitration, even on the question of arbitrability.

DISPOSITION

The order is affirmed. Angie Moriana is awarded her costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P.J. EGERTON, J.

Appendix C

SUPERIOR OF CALIFORNIA
COUNTY OF LOS ANGELES

No. BC687325

ANGIE MORIANA,
Plaintiff,
v.
VIKING RIVER CRUISES, INC.,
Defendant.

Filed: Mar. 6, 2019

TENTATIVE DECISION

BACKGROUND

Plaintiff Angie Mariana ("Mariana") brings this representative action under the Private Attorneys General Act of 2004 ("PAGA"). Plaintiff contends that Defendant Viking River Cruises, Inc. ("Viking") committed wage and labor violations against its Sales Representatives.

In the First Amended Complaint, Plaintiff alleged a PAGA cause of action for: (1) failure to pay all wages; (2) failure to pay overtime wages at the legal overtime pay rate; (3) failure to provide all meal periods; (4) failure to authorize and permit all paid rest periods; (5) violations of Labor Code, § 204;

(5) violations of Labor Code, § 2751; (7) derivative failure to timely furnish accurate itemized wage statements; (8) derivative violations of Labor Code, § 203; and (9) independent violations of Labor Code, § 203.

Defendant filed a motion to compel Plaintiff's Labor Code, section 203 and 558 claims to arbitration. Plaintiff opposed the motion and requested leave to file a Second Amended Complaint ("SAC") that omitted the Labor Code claims. Defendant's motion came to hearing on November 20, 2018, at which time the court granted Plaintiff's request and deemed Defendant's motion to compel arbitration to be moot. The court reserved a hearing for January 31, 2019 to allow Defendant to file a new motion to compel arbitration based on the SAC.

On November 28, 2018, Plaintiff filed a SAC alleging a PAGA cause of action for: (1) failure to pay all wages; (2) failure to pay overtime wages; (3) failure to provide all meal periods; (4) failure to authorize and permit all paid rest periods; (5) violations of Labor Code, § 204; (5) violations of Labor Code, § 2751; (7) derivative failure to timely furnish accurate itemized wage statements; (8) derivative violations of Labor Code, § 201-202 and (9) independent violations of Labor Code, § 201-202.

Defendant now moves to compel Plaintiff's PAGA claims to arbitration. Plaintiff opposes the motion.

REQUEST FOR JUDICIAL NOTICE

The court "may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's

legally operative language .... From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265, disapproved on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 939.)

Defendant requests the court take judicial notice of the JAMS Employment Arbitration Rules & Procedures ("JAMS Rules"), effective July 1, 2014. As these rules are not material to the court's ruling on the subject motion, the request is MOOT.

DISCUSSION

I. Legal Standard

"California law reflects a strong public policy in favor of arbitration as a relatively quick and inexpensive method for resolving disputes. To further that policy, Code of Civil Procedure, section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies. Those statutory exceptions arise where (1) a party waives the right to arbitration; (2) grounds exist for revoking the arbitration agreement; and (3) pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues." (Code of Civ. Proc., § 1281.2; *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 967.) Similarly, public policy under federal law favors arbitration and the fundamental principle that arbitration is a matter of contract and that courts must place arbitration agreements on an equal footing with other contracts and enforce them

according to their terms. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.)

In deciding a motion to compel arbitration, trial courts must decide first whether an enforceable arbitration agreement exists between the parties, and then determine the second gateway issue whether the claims are covered within the scope of the agreement. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 961.) The opposing party has the burden to establish any defense to enforcement. (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579 ["The petitioner ... bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense."].)

II. Existence of an Arbitration Agreement

A motion to compel arbitration or stay proceedings must state verbatim the provisions providing for arbitration, or must have a copy of them attached. (Cal. Rules of Court, rule 3.1330.)

According to Defendant, Viking utilizes non-party TriNet HR III, Inc. (formerly TriNet HR Corporation, "TriNet") as a Professional Employer Organization ("PEO"), and Plaintiff electronically signed and agreed to a Dispute Resolution Protocol ("DRP") contained within a Terms and Conditions Agreement ("TCA") with TriNet that requires Plaintiff to submit "any disputing arising out of or relating to [her] employment" to binding arbitration. (Mot. 7.)

The TCA and DRP state in relevant part:

1. Co-Employment vs. Standard Employment

... If your relationship with TriNet is beginning because the company you work for ("your worksite employer," or "your company") is a TriNet customer, this means that your company has entered into an agreement with TriNet to share certain employer responsibilities as co-employers. This means TriNet will he your employer of record for administrative purposes and will process payroll based on the information provided by your worksite employer, sponsor and administer benefits, and provide certain human resources services. As your worksite employer, your company retains the responsibilities of directing your day-to-day work and managing its business affairs. Your Worksite employer,not [sic] TriNet, has sole responsibility for controlling, or providing input about, your wages, hours, and working conditions. ...

9. Dispute Resolution Protocol ("DRP")

a. How The DRP Applies

Subject to the limitations in subsection (b), this DRP covers any dispute arising out of or relating to your employment with TriNet and/or, if you work for one of TriNet's customers, arising out of or relating to your employment with your company, as well as any dispute with a benefit plan, insurer, employee, officer, or director of TriNet or of a

TriNet customer (all of whom, in addition to TriNet customers, are intended to be beneficiaries of this DRP) ("covered dispute"). The Federal Arbitration Act applies to this DRP. Also, any applicable internal procedures for resolving disputes (e.g., procedures in the Employee handbook for complaining about, and addressing complaints about, misconduct), as well as the option of mediation, will continue to apply with the goal being to resolve disputes before they are arbitrated. This DRP will survive termination of the employment relationship.

With only the exceptions described below, arbitration will replace going before a government agency or a court for a judge or jury trial, and even in the exceptional situations described below, NO JURY TRIAL WILL BE PERMITTED, unless applicable law does not allow enforcement of a pre-dispute jury trial waiver in the particular circumstances presented.

b. Limitations On How The DRP Applies

The mandatory arbitration requirement of this DRP does not apply to claims for workers compensation, state disability insurance or unemployment insurance benefits.... The mandatory arbitration requirement does not prevent a party from bringing complaints, claims or charges before the Equal Employment Opportunity Commission, the U.S. Department of Labor, the National

Labor Relations Board, or the Office of Federal Contract Compliance Program, and does not prevent a party from bringing claims in any forum as provided in Public Laws 111-203, 111-116 & 112-10. Further, claims may be brought before any other administrative agency, provided applicable law does not preclude the right to bring claims there when there is a mandatory arbitration agreement.

If you work for one of Tri Net's customers, and there is at the time of a covered dispute an agreement between you and your company governing the resolution of the covered dispute, then to the extent inconsistent with this DRP, that agreement will be controlling as between you and your company (and its employees, officers and agents). The applicability of this DRP to covered disputes between you and TriNet (and its employees, officers and agents) will be unaffected by the existence of an agreement between you and your company regarding dispute resolution. ...

d. How Arbitration Proceedings Are Conducted

... There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without

> **limitation, uncertified class actions ("Class Action Waiver"); provided, however, that yon may opt out of the Class Action Waiver by clicking this box before you click below to acknowledge this TCA.** Disputes regarding the validity and enforceability of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration. ....

(Declaration of Grant Folsom ("Folsom Decl.") Ex. A, at ¶¶ 1, 9.)

Defendant argues that Plaintiff's PAGA claims are arbitrable because Plaintiff waived her right to bring representative PAGA actions through the DRP. (Mot. 13-14.)

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*) the California Supreme Court held that waivers of representative PAGA claims are unenforceable, as a PAGA representative action is a type of *qui tam* action. (*Id.* at pp. 382-383.) Defendant recognizes that it is precluded from compelling Plaintiff's PAGA claim to arbitration under *Iskanian* but argues that *Iskanian* was effectively overruled by the United States Supreme Court's holding in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (*Epic*).

The Court of Appeal recently addressed and rejected this specific argument in *Correia v. NB Baker Electric, Inc.* (Feb. 25, 2019) Case No. D073798, — Cal.Rptr.3d —, 2019 WL 910979 (*Correia*). As the *Correia* Court explained: "Although the *Epic* court

reaffirmed the broad preemptive scope of the Federal Arbitration Act (FAA), *Epic* did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum." (*Correia,* 2019 WL 910979, at pp. 1, 5-9, italics in original; see also *id.* at p. 5 ["Because *Epic* did not rule on the precise issue before *Iskanian,* we remain bound by *Iskanian*'s holding. Moreover, *Iskanian*'s holding and reasoning are not necessarily incompatible with *Epic.*"].) The *Correia* Court further explained: "The *Iskanian* court reached a different conclusion from *Concepcion* on the enforceability of the contractual waiver—not because the *Iskanian* court interpreted the FAA differently from *Concepcion* on the preemption issue, but based on the unique nature of a PAGA claim as a qui tam type action, and the 'PAGA litigant's status as "the proxy or agent" of the state' and his or her 'substantive role in enforcing our labor laws on behalf of state law enforcement agencies.'" (*Id.* at p. 9.)[1]

Correia is a published opinion that constitutes binding authority upon this court. Accordingly, the court DENIES the motion, finding that Plaintiff's

[1] The *Correia* Court also rejected the defendant employer's argument that the trial court erred in failing to order the plaintiffs' PAGA claim to arbitration, noting that several California Courts of Appeal have held that a PAGA arbitration requirement in a predispute arbitration agreement is unenforceable based on *Iskanian*'s view that the state is the real party in interest in a PAGA claim. (*Correia, supra,* 2019 WL 910979 at pp. 10-12.)

PAGA claim cannot be compelled to arbitration under *Iskanian* and *Correia*.

III. Conclusion

For these reasons, the court DENIES the motion, finding that Plaintiff's representative PAGA claims cannot be compelled to arbitration under California law. Counsel for Plaintiff to give notice.