SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

MARYAM ABRISHAMCAR and KAVI KAPUT,

Plaintiffs,

vs.

ORACLE AMERICA, INC., and Does 1 through 100, inclusive,

Defendants.
_____/

Case No. CIV 535490
PAGA REPRESENTATIVE ACTION

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

ORDERING DENYING MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS CASE

On September 27, 2022, hearing was held on Defendant's Motion to Compel Arbitration of Plaintiffs' Individual PAGA Claims and to Dismiss the Representative PAGA Claims in Department 2 of this Court before the Honorable Marie S. Weiner. Laura Ho, James Kan and Ginger Grimes of Goldstein Borgen Dardarian & Ho, Xinying Valerian of Valerian Law PC, and Michael Palmer, Meredith Firetog and Danielle Fuschetti of Sanford Heisler Sharp LLP appeared on behalf of Plaintiffs Maryam Abrishamcar and Kavi Kapur; and Brendan Dolan, Lucky Meinz, and Lowell Ritter of

Sheppard Mullin Richter & Hampton LLP appeared on behalf of Defendant Oracle America Inc.

Upon due consideration of the briefs and evidence presented, and all filings and records in this case, and having presided over the court trial already held in this action, and the oral arguments of counsel for the parties, and having taken the matter under submission,

IT IS HEREBY ORDERED as follows:

Defendant's motion to compel arbitration of the "individual" PAGA claims of the named Plaintiffs is DENIED. Defendant's motion to dismiss all PAGA Representative claims is DENIED. Defendant's requests for judicial notice are GRANTED.

THE COURT FINDS as follows:

Procedural History of this Case

On **June 23, 2014**, the **California Supreme Court** issued its decision in Iskanian v. CLS Transportation Los Angeles LLC (2014) 59 Cal.4th 348, holding that PAGA representative claims seeking recovery of civil penalties under the Labor Code are not individual claims, but rather are claims only belonging to the State, and that an individual employee cannot waive the rights of the State or contractually commit PAGA representative claims to arbitration.

This PAGA Representative Action was filed by Plaintiff Maryan Abrishamcar against Defendant Oracle America Inc. on **September 18, 2015.** This *Abrishamcar* case has only ever alleged PAGA civil penalty claims, and was never brought as direct claims for damages or for any certification as a class action.

After hearing and decision on Defendant Oracle's Demurrer and Motion to Strike as to the Complaint, Defendant Oracle filed an Answer to the Complaint on **February 5, 2016**. Although Defendant referenced the contractual arbitration provisions in a footnote in the Motion to Strike, Defendant did not allege an affirmative defense of right to arbitration. Defendant acknowledged that California law held that there was no right to arbitration of the PAGA claims.

At the Complex Case Management Conference held on **February 8, 2017**, a Court Trial was set to commence August 13, 2018. (See CMC Order #9.)

Plaintiffs filed a First Amended Complaint, after a contested motion for leave to amend, on **February 9, 2018**, in order to add a representative plaintiff who had claims for a later time period than existing Plaintiff Abrishamcar. Defendant filed an Answer to the First Amended Complaint on **February 23, 2018**. Defendant did not allege any affirmative defense of right to arbitration.

On **February 21, 2018**, Plaintiffs and Defendant filed parallel Section 437c motions on the issue of Labor Code Section 2751 and the duty to provide an employee with a signed copy of the employment agreement containing the terms of commissions.

Court Trial was originally set to commence on August 13, 2018.

Pursuant to request and stipulation of counsel for the parties at the Complex Case Management Conference held on March 22, 2018, the Court Trial and all pretrial dates and deadlines were continued, with trial then set for January 21, 2019. (See CMC Order #15.)

By order issued **April 4, 2018**, the Court granted the motion for summary adjudication of issues in favor of Plaintiff Maryam Abrishamcar, determining on the merits that Plaintiff had proven on undisputed evidence that she is an "aggrieved

employee" as to whom Defendant Oracle America Inc. violated California Labor Code Section 2751 by failing to provide Plaintiff with a signed commission agreement, and thus she may seek civil penalties under the California Private Attorneys General Act, Labor Code §§ 2698, *et seq.* (See CMC Order #16.)

On **October 1, 2018**, Stipulation and Order was entered, as a follow-up to the Conference held September 18, 2018, whereby the parties stipulated to have the PAGA claims adjudicated in **three phases** of Court Trial, instead of a single trial. Specifically, the parties stipulated (i) to have adjudication of the temporal scope of the PAGA case by briefed motion; (ii) that the Phase One Court Trial would adjudicate whether Defendant violated Labor Code Section 2751(b) and/or Section 232.5 and/or Section 2751(a); (iii) that the Phase Two Court Trial would adjudicate "any issue in Phase 1 that the Court determines were not completed in that Phase" and also adjudicate whether Defendant violated Labor Code Section 2751(a) and (b) in regard to backdating, and/or violated Labor Code Section 204 and/or Section 221 and/or Section 226(a) and/or Section 432.5; and (iv) that the Phase Three Court Trial would determine the number of violations (if any are found) that trigger a civil penalty and the exercise of the Court's discretion to assessing the civil penalties to be imposed.

Pursuant to stipulation of counsel for the parties, simultaneous Section 437c motions were filed and heard regarding the temporal scope of this PAGA action. The Court made the following detailed adjudication of the issues as follows, as set forth in CMC Order #17 issued **December 7, 2018**:

> This Court finds that under the express language of the PAGA statute, the time period for prosecution of claims under PAGA for liability against the employer and potential award of statutory penalties against the employer for violation of the Labor Code is as follows:

- All individuals (as defined or limited by the LWDA notice or the complaint) who were employees of the defendant employer at any time during the period one year before a LWDA pre-litigation notice up to the date of filing the complaint (or amending an existing complaint) alleging a cause of action under PAGA are "represented" by the PAGA plaintiff (hereinafter the "represented employees")
- The employer is liable for any identified violations of the Labor Code (as identified in the pre-litigation LWDA notice) actually committed against that same group of represented employees (or subset thereof) during that same time period.
- If an employee falls within the group of represented employees and a violation of the Labor Code was committed by the employer against him/her at least once during that same time period, if that same violation continues to be committed against that same employee, then civil penalties may be assessed and calculated based upon the first violation during that time period *and each successive* occurrence of that violation, even if the subsequent violation occurs after the filing of the complaint (or amendment of the complaint to add the PAGA cause of action).

Thus, the PAGA statutes (and statute of limitations) looks at (1) the scope of the employees "represented", which becomes fixed as of the date of filing the complaint or amending to add the PAGA claim, (2) the earliest possible starting date of liability and penalties as one year before the pre-litigation LWDA notice; and (3) the latest ending date of liability and penalties as when that violative behavior by the employer stops against those same represented employees.

Here, the complaint was originally filed by Plaintiff Maryam Abrishamcar and asserted a claim under PAGA. Subsequently, the complaint was amended to add Plaintiff Kavi Kapur and the PAGA cause of action was expanded to a time period based upon Kapur's later pre-litigation notice to LWDA for the same Labor Code violations.

Applying the law to this case:

Individuals employed by Defendant Oracle America Inc. as sales personnel subject to an Incentive Compensation Plan (for payment of commissions) at any time during the time period July 24, 2014 to September 18, 2015 are represented by Plaintiff Maryam Abrishamcar in prosecution of violations of the Labor Code[1] under PAGA (hereinafter the "Abrishamcar aggrieved employees"). Defendant may be subject to liability and civil penalties for any such Labor Code violations committed against each and any of the Abrishamcar aggrieved employees (specifically and only as to that group of people) during the time period

---

[1] Both Plaintiffs have served pre-litigation notices to the LWDA and alleged in their complaint(s) violations of Labor Code Sections 201, 202, 203, 204, 221, 226, 232.5, 432.5 and 2751.

July 24, 2014 to September 18, 2015. If such Labor Code violation was subsequently (or continued to be) committed by Defendant employer against the same employee thereafter, civil penalties may continue to be assessed and imposed upon the Defendant until the violative behavior ceases as to that employee.

Individuals employed by Defendant Oracle America Inc. as sales personnel subject to an Incentive Compensation Plan (for payment of commissions) at any time during the time period October 30, 2016 to February 9, 2018 are represented by Plaintiff Kavi Kapur in prosecution of violations of the Labor Code under PAGA (hereinafter the "Kapur aggrieved employees"). Defendant may be subject to liability and civil penalties for any such Labor Code violations committed against each and any of the Kapur aggrieved employees (specifically and only as to that group of people) during the time period October 30, 2016 to February 9, 2018. If such Labor Code violation was subsequently (or continued to be) committed by Defendant employer against the same employee thereafter, civil penalties may continue to be assessed and imposed upon the Defendant until the violative behavior ceases as to that employee.

Consequently, any sales commission personnel who were employed by Defendant *only* during the time periods (i) before July 24, 2014, (ii) after February 9, 2018, and/or (iii) between September 19, 2015 and October 29, 2016, are not the subject of this PAGA lawsuit, and no liability of the Defendant or imposition of civil penalties may be adjudicated at trial or evidence presented at trial as to those employees.

As a practical matter, in order to prepare for trial including preparation of expert witness opinions and necessary calculations and assembly of data, there needs to be a cut-off date for any alleged continuous violation as to any Abrishamcar aggrieved employees or Kapur aggrieved employees. Plaintiffs have stipulated to an end date of May 31, 2018, which this Court accepts and imposes.

In **January 2019**, this Court made rulings on the multiple motions in limine filed by the parties for the Phase One Court Trial, as well as evidentiary rulings on objections to deposition testimony. (See Trial Orders #1 and #2.)

Commencing **January 22, 2019, a Phase One Court Trial was held**, including presentation of trial testimony, deposition testimony, and trial exhibits. The Court issued its Tentative Decision on **August 7, 2019**, stating in substantive part:

1. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 2751(b), in that

Defendant employer -- as a consistent business practice -- failed to give the commissioned employee "a signed copy of the contract" during the time period June 1, 2014 through May 31, 2016. Thus all Oracle employees in California subject to Incentive Compensation Plans at any time during the time period June 1, 2014 through May 31, 2016, are "aggrieved employees" under PAGA, for this violation. Evidence was presented and facts stipulated demonstrating that Defendant Oracle did not sign any Comp Plans during FY15 and FY16, which is the time period June 1, 2014 through May 31, 2016. The evidence is undisputed that Defendant Oracle *did* electronically sign the ICPs/ICAs for FY17 and FY18, and thus Defendant did not violate Section 2751 during those time periods.

2. Defendant Oracle did not violate Labor Code Section 2751(a) -- which requires a written contract of employment where "the contemplated method of payment of the employee involves commissions," and that the written contract "set forth the method by which the commissions shall be computed and paid" – simply because its Comp Plans included vague provisions for the exercise of discretion. If commissions were *actually* calculated and paid using the *specific* methods, terms, components, percentages, multipliers, accelerators, and mathematics stated in the Comp Plan, there is no violation of Section 2751. On the other hand, Plaintiffs have proven by a preponderance of the evidence that the calculation and payment of commissions, in some individual and discrete circumstances, was done pursuant to vague verbiage in the T&C involving the exercise of "discretion," and/or was done pursuant to internal policies, procedures, or methods *not* specifically stated in the Comp Plan itself (i.e., the ICP and the T&C). As to those employees whose commission compensation was calculated and paid (or not paid) based upon the exercise of discretion or based up internal policies, practices or procedures not contained within the Comp Plan itself, Plaintiffs have made a prima facie showing by the preponderance of the evidence that those constitute a violation of Section 2751(a); and that such particular employees are aggrieved employees under PAGA.

3. Plaintiffs failed to prove by a preponderance of the evidence that Defendant violated Section 2751(b) on the basis that Defendant allegedly failed to provide a written "receipt" to commissioned employees of their signed Comp Plans. Evidence was presented that Defendant has an established electronic system whereby an employee has an electronic record (which can constitute a "receipt") of his/her "signed" Comp Plan, including the date and time.

4. It is undisputed that the Comp Plans include a confidentiality clause. Plaintiffs have failed to prove that the terms of the Comp Plan constitute "working conditions", and thus have failed to prove by a preponderance of the evidence a violation by Defendant of Labor Code Section 232.5 specifically. On the other hand, Plaintiffs have proven

by a preponderance of the evidence that these identical facts and claims violate the Labor Code, specifically Section 232, as the terms of the Comp Plan pertain to "wages," including commissions. That law prohibits an employer from barring employees from disclosing their wages and pay structure, which Defendant Oracle violated by requiring that its Comp Plans, including the ICPs and T&Cs be deemed highly confidential and requiring in writing that employees agree to keep it confidential. Thus all Oracle employees in California subject to Incentive Compensation Plans (ICP or ICA) at any time during the time period July 24, 2014 through May 31, 2018, are "aggrieved employees" under PAGA, for this violation.

In October 2019, and thereafter, this Court made rulings on the multiple motions in limine filed by the parties for the Phase Two Court Trial. (See Trial Orders #4, #5 and #6.)

Thereafter, **commencing November 4, 2019, the Phase Two Court Trial** proceeded (continuing into January 2020), including presented of trial testimony, deposition testimony, and trial exhibits, and extensive post-trial closing argument briefs (the timing of which was complicated by the Pandemic). The Court issued its Tentative Decision on **November 6, 2020**, making determinations on the merits, stating in substantive part:

1. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 2751(a) when Defendant failed to provide to any commissioned employee a written contract setting forth the method by which the commission s shall be computed and paid *prior to the time that the commissioned employee first started performing services for Oracle*. Evidence was presented that Defendant Oracle has an intentional business practice of never providing the Individual Compensation Plan stating the commission rates and sales target and never providing the Terms and Conditions thereto to any putative employee until they actually started working at Oracle. Evidence was presented that typically and usually a new employee subject to commission-based compensation would start performing sales services at Oracle before receiving any ICP or T&C documents.

2. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 2751 when Defendant issued new/revised ICPs and Ts&Cs to *existing* commissioned employees, with an effective date *prior to* the date of actual issuance

thereof. Subsection b provides: "In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party." Evidence was presented that Defendant Oracle issues new/amended ICPs and Ts&Cs at the beginning of each fiscal year, which specifically state that it expires on the date which is the end of that fiscal year. Evidence was presented that intentionally waits to give its existing commissioned employees the new fiscal year ICPs and Ts&Cs until several days after the actual beginning of the new fiscal year. In the interim, the commissioned employee may engage in sales efforts for which he/she is entitled to a commission. If there was no new contract, then the law provides that the employee would be entitled to commissions under the terms of the expired ICP. But the evidence presented demonstrates that these commissioned employees agreed to a new ICP with a "back dated" effective date instead. This would constitute a "superseding" contract, and is not illegal to use an effective date prior to the actual date the contract was signed. As this is a PAGA case seeking civil penalties for statutory violations of the Labor Code, the fact that such business practices may be unfair to the employee is not the issue – the employee could have refused the new contract and demanded/sued for the commissions under the terms of the expired contract.

3. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 221, by taking back or off-setting commissions already paid to the commissioned employee, under certain circumstances. It depends upon whether the offset/take-back is based upon conditions specifically stated as terms of the employment contract. For example, the law allows commission offsets based upon advances paid but a consumer fails to pay for the product. On the other hand, the offset must be within a reasonable time. Evidence was presented that Defendant Oracle stated in its Terms and Conditions that its business practice to proceed with collections for non-payment after 90 days. Reasonable delay in imposing offsets would be a violation of Section 221. In addition, the basis of the offset must be a specific term of the employment contract, and cannot be a vague, non-descript, 'discretionary" "condition". Further, a commission cannot be offset on the basis of things that are actually employer business expenses or the cost of doing business. The assertion by Defendant Oracle that all commissions are advances and are *never* final or "earned", even years later, is rejected.

4. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle's business practice of paying commissions 45 days after the end of the month were the sale was made is a violation of Labor Code Section 204. Evidence was presented that this was a reasonable business practice and that the commissions were not reasonably calculable prior thereto.

5. Plaintiffs have proven by a preponderance of the evidence that Defendant Oracle's business practice of exercising discretion to delay the payment of commissions (more than the 45 days period) in order to conduct additional "reviews", e.g., reviews of "mega-deals", or to impose a "performance review", is a violation of Labor Code Section 204. This is a compounded violation when Defendant Oracle additionally freezes the payment of commissions to that employee on *other sales with other customers*, while it performs an "audit" or "review" of commissions on a particular sale/deal.

6. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Sections 201, 202 and 203 regarding payment of wages upon termination.

7. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code Section 226, regarding accurate wage statements, by the above-stated violations.

8. Plaintiffs have failed to prove by a preponderance of the evidence that Defendant Oracle violated Labor Code section 432.5 by the above-stated violations.

9. As to Defendant Oracle's affirmative defense that Plaintiffs failed to exhaust administrative pre-litigation conditions of PAGA, specifically Labor Code Section 2699.3(a)(1), requiring written notice to the LWDA and the employer "of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation":

(a) Any alleged failure to exhaust as to a Section 226 violation is MOOT as this Court found no violation;

(b) Plaintiffs adequately raised a violation of Section 432.5 in their LWDA notice, and thus adequately met PAGA's pre-litigation requirement;

(c) Plaintiffs adequately raised a violation of Section 2751 in their LWDA notice, and thus adequately met PAGA's pre-litigation requirement.

At the Complex Case Management Conference held on **September 21, 2021**, Counsel for the parties indicated that they wanted to have the Court adjudicate certain sub-issues, prior to the Phase Three Court Trial. Counsel agreed to prepare and submit a stipulation identifying those sub-issues and setting a briefing schedule. Further, counsel for the parties requested that trial be set in October 2022, but were not in agreement as to the length of the trial, i.e., how many months it will take, and the Court advised that it

might be considered to await the adjudication of the sub-issues. The Court indicated that a Trial Plan will be needed before the trial is set, and that the parties will need to meet and confer in that regard in the future before the setting of trial. (See CMC Order #23.)

At the Complex Case Management Conference held **November 30, 2021**, although two Section 437c motions were already pending, Defendant indicated its intention to file a third motion on the basis that compensation plans providing for a "bonus" are not a "commission" and thus there is no Labor Code violation. Counsel were ordered to meet and confer regarding the briefing schedule and hearing date on that third motion. (See CMC Order #24.) Despite this order, the parties did not so as of the CMC held January 25, 2022. (See CMC Order #25.)

On **December 15, 2021**, the United States Supreme Court granted certiorari of the California Court of Appeal unpublished decision in Viking River Cruises LLC v. Moriana, thus considering the issue of whether the FAA preempts PAGA such that arbitration can be contractually compelled.

On **March 15, 2022**, hearing was held on multiple Section 437c motions.

At the Complex Case Management Conference held on **April 5, 2022**, Defendant indicated that it still intended to file another motion for summary adjudication regarding "pool"/"bonus" compensation, but was not ready for setting a briefing schedule at this time. Defendant requested the opportunity to file supplemental briefing on its pending motion for summary judgment/adjudication, which was permitted. (See CMC Order #26.)

In **June 2022**, the Court issued it order determining the motions for summary adjudication heard in March 2022. The Court made the following determinations:

> The Private Attorney General Act allowing enforcement of the Labor Code by private citizens on behalf of the State is set forth in Labor

Code Sections 2698 *et seq.* In regard to the present motions by the parties, Section 2699(f)(2) states "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: . . . (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.**" (Bold added.)

Plaintiffs' Motion for Summary Adjudication of the following issue: "Civil penalties are available under the Private Attorneys General Act for each aggrieved employee for *each pay period* in which the employee is employed before Oracle issues a written commission contract; and, separately, in which the employee is employed pursuant to an unsigned commission contract." is GRANTED IN PART.

Defendant Oracle's Motion for Summary Adjudication of the following issue: "Plaintiffs may recover, at most, a single penalty under the Private Attorneys General Act in circumstances in which it is proven that Oracle violated Labor Code section 2751 by (1) failure to provide employees with a commission agreement signed by Oracle, and (2) failure to provide newly hired employees with a commission agreement before they began working for Oracle. These violations are one time initial violations of section 2751 that do not continue to accrue PAGA penalties on a per pay period basis." is DENIED.

The Court holds that civil penalties under PAGA are available for failure to issue a written commission contract per aggrieved employee per pay period until Oracle issues a written commission contract for that aggrieved employee (or their employment ends). The Court finds that the express provision of the statute that civil penalties are "per pay period" applies to the Labor Code Section 2751 violations alleged by Plaintiffs against Defendant Oracle. Defendant's argument that the Court should ignore that express statutory language, and instead find only a single violation for a single one-time penalty, is rejected.

Civil penalties under PAGA are available for failure of Oracle to provide a signed commission contract per aggrieved employee per pay period until Oracle provides a signed written commission contract. This must be taken in the proper context, in that Oracle issues annual commission contracts, and thus upon the expiration of that commission contract, the violation as to that contract would end upon the issuance of the new commission contract.

Oracle argues that the failure to provide a signed commission contract should be treated as single violation only for the first pay period that it occurs. Whether or not that is good policy is irrelevant – the

Legislature has stated in PAGA that civil penalties are per pay period for the violation. See Gikas v. Zolin (1993) 6 Cal.4th 841, 851, 854 ("In interpreting the language of a statute, we first turn to the words themselves. [Citation.]"; "Absent constitutional constraints, when the Legislature has established policy, it is not for the courts to differ. [Citations.]") The parties point to multiple examples in the Labor Code where the Legislature has provided a single penalty for a single violation, and Defendant points to case law regarding single penalty situations – none of which are PAGA's default civil penalties. That is *not* the language used in the subject civil penalty provision of PAGA. Oracle could "fix" the problem, i.e., stop the violation, by providing a signed written commission contract.

Rather, Oracle's argument actually goes to the issue of this Court's statutory authority under PAGA to exercise its discretion, under Section 2699(e), to reduce the total amount of civil penalties under the circumstances. *That* is not an issue for adjudication on motion for summary adjudication.

Lurking in the subtext is the determination as to whether the failure to timely provide a written commission contract and the failure to provide a signed written commission contract should be treated as *one* violation of Labor Code Section 2751 (i.e. failure to provide a signed written commission contract upon commencing services) *or* should be treated as *two* violations of Labor Code Section (i.e., violation of Section 2751(a) and violation of Section 2851(b)) for purposes of calculating civil penalties. Again, *that* is not the issue for determination on this motion – which Plaintiffs explicitly admit, i.e., that the issue of "stacking" of penalties is not presented by their motion.

Defendant Oracle's Motion for Summary Adjudication of the following issue: "Oracle cannot be assessed heightened PAGA penalties for 'subsequent' violations of Labor Code sections 204, 221, 232, or 2751 unless Plaintiffs prove that a court or the Labor Commissioner previously found that Oracle committed the same initial Labor Code violations on which subsequent penalties are sought." is DENIED. Defendant has over-stated its position and the statements in case law – and therefore has not precisely stated the standard under law. In regard to what is the meaning and effect of the undefined term "subsequent" – for purposes of PAGA penalties -- the threshold question is not whether a court or the State made a prior formal finding or adjudication of a Labor Code violation by that employer; but – at most – that the employer had **notice** that its conduct was in violation of the Labor Code.

On **June 15, 2022**, the U.S. Supreme Court issued its decision in Viking Cruises Inc. v. Moriana (2022) 595 U.S. __; 142 S.Ct. 1906.

Contrary to its representations to the Court, Defendant never filed a "third" motion for summary adjudication – or worked out a briefing schedule -- as discussed and ordered back in November 2021, January 2022, March 2022, and April 2022. Accordingly, Defendant successfully stalled the scheduling of the Phase Three Court Trial, for determination of the extent of the violations found by this Court to have occurred (in the prior Court Trials) as to other "aggrieved employees" and the amount of civil penalties to be awarded. Instead, Defendant Oracle filed this Motion to Compel Arbitration of Plaintiffs' Individual PAGA Claims and to Dismiss the Representative PAGA claims on **August 30, 2022.**

Viking River Cruises and the Continuing Unenforceability of PAGA Representative Claim Waiver

Defendant Oracle asserts in its moving brief: "*Viking River* held that the *Iskanian* rule is preempted by the Federal Arbitration Act (FAA) and that an arbitration agreement containing a representative action waiver must be enforced with the individual PAGA claim ordered to arbitration and the representative PAGA claim dismissed." *This is incorrect.* On the contrary, the U.S. Supreme Court upheld California law that a PAGA representative action waiver is *not enforceable.*

The holding in Viking River was that the FAA **did not** preempt or bar any California statute or case law holding that a PAGA representative action **waiver** is unenforceable. Indeed, the U.S. Supreme Court extensively discussed the very significant differences between a class action (and thus a class action waiver) versus a PAGA representative action (and thus a PAGA representative action waiver).

What the U.S. Supreme Court **did** hold is that PAGA representative claims are not appropriate for arbitration, and that the California Supreme Court's decision in *Iskanian* – to this extent only – holding that "individual" claims of the plaintiff cannot be separated, for purposes of arbitration, from the representative claims on behalf of other aggrieved employees, is inconsistent with FAA. The U.S. Supreme Court held that the "individual" claim of the plaintiff can be contractually subject to arbitration.

Thus, the question is whether Plaintiffs' "individual" claims for civil penalties under PAGA are subject to arbitration.

The Arbitration Provisions

Defendant argues that Plaintiffs Maryam Abrishamcar and Kavi Kaput have "individual" PAGA claims that are subject to contractual arbitration, and that they thus lack standing to pursue any PAGA Representative claims. Defendants do not assert that the PAGA "Representative" claims are subject to contractual arbitration.

It is undisputed that the Plaintiffs signed annual compensation agreements, called Incentive Compensation Terms & Conditions, that included an arbitration provision in Appendix 9 "Agreement to Arbitrate Disputes". The State of California is not a party to those agreements. It states in pertinent part:

> Employee and Oracle understand and agree that, except as set forth below, any existing or future dispute or claim arising out of or related to Employee's Oracle employment, or the termination of that employment, including but not limited to disputes arising under the Plan, will be resolved by final and binding arbitration and that no other forum for dispute resolution will be available to either party, except as to those claims identified below. The decision of the arbitrator shall be final and

binding on both Employee and Oracle and it shall be enforceable by any court having proper jurisdiction.

Arbitration proceedings under this Agreement to Arbitrate Disputes shall be conducted pursuant to the Federal Arbitration Act, and in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association or the Employment Arbitration Rules and Procedures adopted by Judicial Arbitration & Mediation Services (JAMS). Except as set forth below, the arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during and after the arbitration. . . .

[None of the contractual exception apply here.]

In Appendix 9, Defendant Oracle also inserted a class waiver and PAGA representative action waiver, that states in pertinent part:

Any claim by Employee against Oracle which is subject to arbitration under the terms of this Agreement to Arbitrate disputes must be brought in Employee's individual capacity and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiffs or similar non-individual proceeding ("class action"). Employee expressly waives any and all rights to bring, participate in or maintain in any forum any class action regarding or raising claims which are subject to arbitration under the terms of this Agreement to Arbitrate Disputes. The arbitrator shall not have authority to combine or aggregate similar claims or conduct, or conduct any class action or make an award to any person or entity not a party to the arbitration. Any claim that all or part of the class

action waiver in this paragraph is unenforceable or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The Court finds that any "individual" claims by Plaintiffs for violations of the Labor Code alleged in this lawsuit would be within the scope of the arbitration provision; and that any representative claims or claims belonging to the State are expressly *not* subject to arbitration.

Iskanian Still Applies Such That PAGA Representative Claims are not Waived and Not Subject to Arbitration

In Iskanian v. CLS Transportation Los Angeles LLC (2014) 59 Cal.4th 348, the California Supreme Court held that a class action waiver is enforceable, but a PAGA Representative Action waiver is *not* enforceable. Specifically, the California Supreme Court held that an employee's right to bring a PAGA action on behalf of the State is a matter of public policy and is unwaivable. Iskanian, at pp. 382-384. The California Supreme Court held that contractual waivers of bringing PAGA Representative Actions is in violation of Civil Code Section 1668, Civil Code Section 3513 and Labor Code Section 2699(a). Iskanian, at pp. 382-383. "But whether or not an individual claim is permissible under the PAGA, a prohibition of *representative* claims frustrates the PAGA's objectives." Id., at p. 384 (emphasis original).

The California Supreme Court also held that PAGA and these California statutes forbidding the waiver of bringing a PAGA Representative action are *not* preempted by the Federal Arbitration Act. Iskanian, at pp. 384-387. "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an

employee arising out of their contractual relationship. It is a dispute between an employer and the *state* . . ." Id., at pp. 386-387.

In Viking River Cruises, the U.S. Supreme Court *upheld* the decision in *Iskanian* that PAGA Representative Actions are *not waivable*, and that the California statutes making PAGA unwaivable *are not preempted by FAA*.

"Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. . . . [W]e have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract." Viking River, 142 S.Ct. at p. 1912. "The agreement between Viking and Moriana purported to waive 'representative' PAGA claims. Under *Iskanian*, this provision was invalid if construed as a wholesale waiver of PAGA claims. And under our holding, that aspect of *Iskanian* is not preempted by the FAA." Viking River, at pp. 1924-1925.

Dismissal of Representative Claims is Not Appropriate

In remanding the case to the California Court of Appeal, the U.S. Supreme Court suggested that the PAGA Representative claims would need to be dismissed because there was no named plaintiff with standing – if the plaintiff's "individual" claim was forced to go to arbitration. Viking River, at p. 1925. But California courts are not subject to Article III standing requirements. The Concurring Opinion by Justice Sotomayor clarified that the U.S. Supreme Court has no authority to decide state court standing issues: "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word." Viking River, at p. 1925. This is consistent with established U.S. Supreme Court case law:

> We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. 'The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." [Citation.]

City of Chicago v. Morales (1999) 527 U.S. 41, 61.

Our California Supreme Court held in Kim v. Reins International California Inc. (2020) 9 Cal.5th 73, that a plaintiff *does not* lose standing to prosecute a PAGA Representative Action, even if that plaintiff no longer has any individual claim. The U.S. Supreme Court's backwards reading of *Kim* does not alter the California Supreme Court's ruling on PAGA standing. Dismissal of the PAGA Representative claims is inappropriate and/or not required.

> Although the Supreme Court suggests that under PAGA, Moriana lost standing to pursue her non-individual PAGA claims, because the California Supreme Court is the final arbiter of California law, this Court applies *Kim's* interpretation of PAGA standing to this case. [Citation.] Shams was employed by Revature and alleges that she suffered at lease one of the asserted PAGA Labor Code violations, thus she is an aggrieved employee with standing to pursue penalties on the State's behalf. [Citation.] Accordingly, the Court DECLINES to dismiss the non-individual PAGA claims remaining in this case.

Shams v. Revature LLC (N.D.Cal. 2022) __ F.Supp.3d __; 2022 WL 3453068.

There is also no reason or requirement for this Court to stay adjudication of the "non-individual" PAGA Representative Claims, because any hypothetical arbitration of

Plaintiffs' "individual PAGA claim" would not be res judicata as to the State's claims prosecuted via a PAGA Representative Action. Gavriiloglou v. Prime Healthcare Management Inc. (2022) 83 Cal.App.5th 595.

Accordingly, regardless of whether or not Plaintiffs' alleged "individual" PAGA claims might be subject to arbitration, it is clear that the PAGA Representative claims on behalf of the State as to other aggrieved employees cannot be waived and are not subject to arbitration under the Agreement.

At oral argument, Defendant Oracle asserted that the language of the PAGA statutes supports the argument that if the "individual" claims are sent to arbitration, that the "representative" claims cannot proceed because there is no "plaintiff" – and that one cannot proceed without the other. This Court need not reach that issue of first impression because it is MOOT, as this Court finds that arbitration is not enforceable against the individual Plaintiffs in the first place because this motion is untimely.

Motion to Compel Arbitration After Commencement of Trial is Untimely

Motion for Arbitration Must Be Brought Before Trial

Under federal law, any petition to compel arbitration must be brought *before* trial commences. 9 U.S.C. §4; see also 9 U.S.C. §3. Under California law, any petition or motion to compel arbitration is also contemplated to be brought *before* trial. See Code of Civil Procedure §1281.4.

A demand for arbitration after a trial has been held, or adjudication of issues on the merits, is contrary to the purpose and intent of contractual arbitration.

Such a demand for arbitration should not be entitled to consideration. First, the most basic purpose of arbitration is to secure the

> speedy resolution of disputes. This purpose would be undermined if a party could litigate a dispute to final judgment, then demand arbitration. Second, a party should not be permitted to speculate on a favorable judgment with the secret intention of moving the controversy to another forum if the judgment is adverse. Third, a party should not be permitted to put another party to the expense of protracted court proceedings, only to reject the consequences of the proceedings.

Construction Arbitration Handbook (2nd Ed 2022 update) §3:65 Waiver of right to enforce arbitration.

In Campagna v. Smallwood (La.App. 1983) 428 So.2d 134, the appellate court addressed the situation where a motion for stay or motion to dismiss on the basis that defendant had requested arbitration after the filing of a lawsuit. The motion was denied, and the case proceeded to trial and judgment. On appeal, defendant assigned as error the trial court's failure to dismiss the lawsuit and required arbitration. The Court of Appeal affirmed the trial court.

"The purpose of arbitration is to avoid costly and lengthy litigation and for speedy resolution of contractual disputes. [Citation.] That purpose has long since been rendered moot in this case. We agree that no purpose would be served by setting aside the judgment and remanding for arbitration." Campagna, at p. 1346.

Arbitration After Change of Law Must Occur Before Trial

Defendant Oracle correctly points out that during the pendency of this PAGA Representative action, the California Supreme Court's *Iskanian* decision applied, such that this Court would have been bound to deny any motion to compel arbitration of any and all of the PAGA claims in this lawsuit. Defendant asserts that any such effort would

have been futile prior to *Viking River*, and that the passage of time since the filing of this lawsuit should be deemed "irrelevant" to determination of its motion to compel and motion to dismiss.

Defendant states: "Courts have compelled arbitration based on a change in the law years after the filing and litigation of a lawsuit in court" Defendant then cites to multiple cases as alleged support for its position.

Unfortunately, ***none*** of the cases cited by Defendant address our situation *where a motion to compel arbitration is filed* ***after summary judgment motions have been ruled upon and after Court Trial have been held and after Adjudication of issues on the merits after Court Trial.***

In Phillips v. Sprint PCS (2012) 209 Cal.App.4th 758, the court addressed a motion for reconsideration of a prior motion to compel arbitration. Although the case has been litigated for eight years, of that three years were spent on the pleadings, two more years on class certification, and one year of a stay of proceedings. In Fisher v. A.G. Becker Paribas Inc. (9th Cir 1986) 791 F. 2d 691, the case was litigated but no adjudication of the merits. In Iskanian, the three years of litigation were regarding adequacy of the pleadings and class certification, not the merits. In Flores v. West Covina Auto Group LLC, 151 Cal.Rptr.3d 481, an unpublished case (as review was granted), the litigation had only involved the pleadings and discovery, not adjudication of the merits. In Reyes v. Liberman Broad Inc., an unpublished case (as it was reviewed and remanded for further action) again the litigation had only involved the pleadings and discovery, and the matter was remanded for further determine by the lower court. In Quevedo v. Macy's Inc. (C.D.Cal. 2011) 798 F.Supp.2d 1122, the motion to compel

arbitration was raised in the context of a motion for class certification, i.e., well before any trial setting.

Sending this case to arbitration at this procedural junction would be contrary to common sense, contrary to judicial economy, contrary to the public policies behind the PAGA statutes, and contrary to jurisprudence.

California maxims of jurisprudence support this interpretation of the arbitration statutes: "The law neither does nor requires idle acts." C.C. §3532. "Between rights otherwise equal, the earliest is preferred." C.C. §3525. "Interpretation must be reasonable." C.C. §3542.

That the law changed after the time that Defendant could have brought this motion does not change the fact that it is untimely. The train already left the station. Defendant is not entitled to ignore years of litigation, discovery, and adjudication of issues on the merits, and then ask to start all over again via arbitration. There can be no forum shopping after the fact.

Applicable Law on Waiver

Although not necessary, as this motion was found to be untimely, should the appellate court require a "waiver" analysis, one is provided in the alternative:

Code of Civil Procedure Section 1281.2(b) provides that a contractual right to arbitration can be deemed waived. It can also be deemed waived under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*) FAA §3. The key decision by the California Supreme Court on the issue of waiver of the right to arbitration is St. Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187.

While "waiver" generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.] In the arbitration context, "the term 'waiver' has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost." [Citation.] St. Agnes, at p. 1195 fn. 4.

Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.] "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citation] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citation.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]" [Citations.]

In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980 . . . , the Court of Appeal referred to the following factors: "In determining waiver, a court can consider (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement

close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, mislead, or prejudiced the opposing party." [Citations.] We agree these factors are relevant and property considered in assessing waiver claims.

St. Agnes, at p. 1196.

Whether Defendants' actions are inconsistent with the right to arbitrate

In this lawsuit, Defendant only alleged arbitration in footnotes to briefs, and not as an affirmative defense or by a prio motion to compel arbitration. Defendant has actively participated in and used of court proceedings and litigation opportunities to pursue its defense and their affirmative defenses. Over the past seven years, Defendant has engaged in a multitude of actions that are inconsistent with the right to arbitrate. Defendant's actions are certainly inconsistent with an assertion via a motion to compel arbitration.

Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

This factor weighs in favor of a determination that the right to compel arbitration has been waived. The active participation of Defendant in all aspects of litigation for seven years, and in proceeding to a Court Trial on the merits, the Court finds that Defendant substantially invoked the litigation machinery, and that the parties were well

into preparation of a lawsuit, and indeed had already adjudicated liability at a Court Trial, at the time of the filing of this motion.

Whether Defendants requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay

This factor weighs in favor of a determination that the right to compel arbitration has been waived. Defendants requested arbitration enforcement after two Court Trials had already been conducted, and the third and final phase of Court Trial as to the amount of civil penalties was being set.

Whether Defendants filed a counterclaim without asking for a stay of the proceedings

There was no counterclaim by Defendant.

Whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place

This factor weighs in favor of a determination that the right to compel arbitration has been waived. Defendant notes that the arbitration agreement via AAA or JAMS provides for adequate civil discovery.

In this lawsuit, the entire panoply of civil discovery opportunities under the Code of Civil Procedure were available to Defendant, and Defendant actively propounded and participated in civil discovery. That discovery included the issue of whether aggrieved employees other than Plaintiffs were subjected to violations of the Labor Code, and discovery of the scope and extent thereof for purposes of expert witness determination of potential civil penalties.

In regard to use of the discovery procedures in litigation that would not be available in arbitration, the First Appellate District in Oregal, held that defendant's taking of depositions and other discovery on the issue of class certification was "conduct inconsistent with arbitration" as class certification would not have been an issue in plaintiff's individual arbitration. Id., at p. 359.

So too here, discovery was conducted regarding the circumstances of the multitude of "aggrieved employees", not just the individual named Plaintiffs, which would not have been an issue in Plaintiffs' individual arbitrationx.

Whether the delay affected, mislead, or prejudiced the opposing parties

The request of Defendant to now dismiss the PAGA Representative Claims under the authority of the State, after Court Trial thereof, would also affect and prejudice the State – which relied upon the PAGA Representative Action proceeding to trial after seven years of litigation.

A component is prejudice to the Plaintiffs. St. Agnes, at p. 1203. "Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses. [Citations.]" Id., at p. 1203.

> Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect "a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" and are intended "to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially

undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.

For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; whether a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence [citation].

St. Agnes, at p. 1204. If defendant delays in bringing a motion to compel arbitration after taking discovery on matters which would not have been part of the arbitration proceedings, the delay deprives the plaintiff of the advantage of arbitration. Oregel, at p. 360; see also Spracher v. Paul M. Zagaris Inc. (2019) 39 Cal.App.5th 1135, 1140 ("defendants' delay resulted in prejudice to [plaintiff] by causing her to expend significant time and resources while denying her the efficiencies of arbitration.")

"True, California has a strong public policy in favor of arbitration. But that public policy is founded upon the notion that arbitration is a 'speedy and relatively inexpensive means of dispute resolution.' [Citation.] That goal was frustrated by defendant's conduct." Oregel, at p. 361.

Here, the case proceeded all the way *through Court Trial*, after seven years of litigation. The prejudice to Plaintiffs is evident and severe, if Plaintiffs were required to start from scratch in adjudication of this case through arbitration.

Federal Factors for Waiver

This Court is aware of and acknowledges the very recent decision of the First Appellate District issued on October 31, 2022 in Davis v. Shiekh Shoes LLC (2022) 84 Cal.App.5th 956. In *Sheikh Shoes*, the Court of Appeal upheld the trial court's decision that the right to invoke contractual arbitration was waived when defendant employer filed a motion to compel arbitration 19 months after the filing of the complaint[2] by plaintiff employee, after the parties participated in discovery, and after the case was *set* for trial.

The Court of Appeal held that federal law under FAA applied to determine waiver, rather than California law under *St. Agnes*, pursuant to the very recent decision of the U.S. Supreme Court in Morgan v. Sundance Inc. (2022) __ U.S. __, 142 S.Ct. 1708. "In its unanimous decision, the court sided with the minority of the circuit courts and held that under the FAA, courts may not 'condition a waiver of the right to arbitrate on a showing of prejudice.'" Shiekh Shoes at *5. In *Morgan*, the Supreme Court held that *prejudice was not a requirement for waiver* in general contract cases, and prejudice could not be specially required in determining waiver of contractual arbitration. Morgan, at p. 1713; Shiekh Shoes, at *5. Accordingly the *other* factors set forth in *St. Agnes*,[3] which were based upon the federal decision in Peterson v. Shearson/American Express Inc. (10th Cir. 1988) 849 F.2d 464, would still apply in determining waiver. Shiekh Shoes, at p. *6.

---

[2] The Court of Appeal specifically held that delay in seeking arbitration is measured from the date the lawsuit is filed (or at best, the day that it was served), not the date that the defendant filed their appearance. Sheikh Shoes at fn 7.

[3] The Court of Appeal noted that the issue of whether prejudice is no longer a required factor post-*Morgan* is presently before the California Supreme Court, as review was granted in Quach v. California Commerce Club (2022) 78 Cal.App.5th 470, S2751521. See Shiekh Shoes at fn. 5.

But, "prejudice is no longer required to demonstrate a waiver of one's right to arbitration, and the waiver inquiry should instead focus on the actions of the holder of that right." Id.

If the factor of prejudice is ignored from the prior analysis by this Court, the other factors still weigh heavily in finding that Defendant waived any right to invoke contractual arbitration. Indeed, if prejudice is not required to be shown, Plaintiffs' position that Defendants have waived contractual arbitration is even stronger.

DATED: December 18, 2022

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT