NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

RICHARD SMIGELSKI, Plaintiff and Respondent, v. PENNYMAC FINANCIAL SERVICES, INC. et al., Defendants and Appellants.	C081958 (Super. Ct. No. 34201500186855CUOEGDS)

Defendants and appellants Private National Mortgage Acceptance Company, LLC, PennyMac Financial Services, Inc., and PennyMac Mortgage Investment Trust (collectively, "PennyMac") appeal from orders denying successive petitions to compel arbitration of a dispute with a former employee, plaintiff and respondent Richard Smigelski. PennyMac advances a number of arguments on appeal. Of greatest significance, PennyMac argues the trial court erred in finding the parties' arbitration agreement contains unenforceable waivers of the right to bring claims under the Private

Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2699 et seq.), and erred in declining to sever the waivers and enforce the remainder of the agreement.[1] We disagree and affirm.

I. BACKGROUND

PennyMac is engaged in the business of mortgage origination and servicing throughout the United States, including California. Smigelski was employed as an account executive at PennyMac's branch office in Sacramento for six months, beginning in November 2014 and ending in April 2015.

A. The Arbitration Agreement

On his first day of work, Smigelski signed a document entitled, "Employee Agreement to Arbitrate" (employee agreement). The employee agreement acknowledges receipt of another document entitled, "Mutual Arbitration Policy" (MAP), and provides, "I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with [PennyMac], except as otherwise permitted by the MAP." The employee agreement further provides, "by agreeing to use arbitration to resolve my dispute, both PennyMac and I agree to forego any right we each may have had to a jury trial on issues covered by the MAP, and forego any right to bring claims on a representative or class basis." The employee agreement further provides, "If any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate."

The MAP, which Smigelski denies having received, similarly requires "mandatory binding arbitration of disputes, for all employees, regardless of length of service." As relevant here, the MAP "covers all disputes relating to or arising out of an employee's

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

employment with PennyMac," including "wage or overtime claims or other claims under the Labor Code." PennyMac adopted the MAP in 2008.

The MAP specifies that, "both you and PennyMac forego and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity, unless such procedures are agreed to by both you and PennyMac." The MAP further specifies that, "No remedies that otherwise would be available to you individually or to PennyMac in a court of law . . . will be forfeited by virtue of this agreement to use and be bound by the MAP."

The MAP incorporates the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association (AAA Employment Rules). The MAP further provides, "PennyMac will not modify or change the agreement between you and PennyMac to use final and binding arbitration to resolve employment-related disputes without notifying you and obtaining your consent to such changes, although specific MAP procedures or AAA Employment Rules may be modified from time to time as required by applicable law." "Also," the MAP provides, "the Arbitrator or a court may sever any part of the MAP procedures that do not comport with the Federal Arbitration Act."

B. The Complaint

On September 11, 2015, Smigelski provided notice to the Labor Workforce and Development Agency (LWDA) and PennyMac of his intent to pursue a cause of action for civil penalties under PAGA. On November 17, 2015, Smigelski filed a complaint asserting a single cause of action under PAGA.[2] The complaint, which was styled as a

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[2] LWDA had 33 days to notify Smigelski of its intent to investigate the violations alleged in the PAGA notice under the version of the statute in effect at the time. (Former § 2699.3, subd. (a)(2)(A).)

"Representative Action," alleged that PennyMac miscalculated overtime for hourly employees and failed to provide accurate, itemized wage statements. The complaint did not assert any individual claims and only sought to recover civil penalties under PAGA.

C. First Petition to Compel Arbitration

PennyMac filed a petition to compel arbitration of the complaint pursuant to the employee agreement and MAP (together, the arbitration agreement) in February 2016. Relying on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), PennyMac argued, *inter alia*, that (1) employers and employees may agree to arbitrate PAGA claims (*id.* at p. 391), (2) the arbitration agreement reflects such an agreement, (3) the Federal Arbitration Act (FAA) requires enforcement of the purported agreement to arbitrate PAGA claims, and (4) any unenforceable provisions in the arbitration agreement should be severed, and the remaining provisions enforced.[3] PennyMac also argued that the question of arbitrability was for the arbitrator to decide, not the trial court.

Smigelski opposed the petition, arguing that the arbitration agreement contains unenforceable PAGA waivers within the meaning of *Iskanian*. Smigelski additionally argued that the terms of arbitration agreement preclude severance of the PAGA waivers, rendering the agreement as a whole unenforceable. Smigelski also argued that the arbitration agreement does not "clearly and unmistakably" demonstrate that the parties intended to delegate questions of arbitrability to the arbitrator, and therefore, any questions of arbitrability must be decided by the trial court. (See *Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 781-782 (*Ajamian*).)

The trial court denied PennyMac's petition in a minute order dated March 3, 2016, which was incorporated into a formal order entered on March 11, 2016. The trial court

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[3] We discuss *Iskanian post.*

rejected as "strained" PennyMac's argument that the arbitration agreement contemplates arbitration of PAGA claims, stating: "There is no ambiguity in the [employee agreement] or the MAP. PAGA claims are prohibited in arbitration given that the employee waives any right to make representative claims or claims in a private attorney general capacity. Such a prohibition violates public policy and is unenforceable." The trial court also rejected PennyMac's invitation to sever the PAGA waivers, finding that severance would be inconsistent with the parties' intent, as expressed in the arbitration agreement. The trial court explained: "[W]hile the [employee agreement] contains an offending provision requiring [Smigelski] to forego any representative claim, that [a]greement specifically states that if 'any provision of the MAP is found to be unenforceable, that provision may be severed without affecting this agreement to arbitrate.' [Citation.] The [employee agreement] itself does not contain a provision allowing for severance. This express language reflects an intent not to sever any portion of the [employee agreement] and striking the provision would conflict with the parties' intent. [Citation.] Further, the MAP itself only provides for severance of any provision that does not comport with the FAA. [Citation.] But here, the waiver provisions do not comport with State law, and thus severance of the provision in the MAP would also conflict with the parties' intent." Accordingly, the trial court determined that the arbitration agreement was entirely unenforceable.

The trial court also rejected PennyMac's argument that questions of arbitrability must be determined by the arbitrator, noting that the MAP provides, "the Arbitrator *or a court* may sever any part of the MAP procedures that do not comport with the [FAA]." (Italics added.) "Thus," the trial court explained, "the [arbitration] agreements themselves indicate an intent that the [c]ourt itself may decide questions of arbitrability, or at a minimum[,] create an ambiguity on that point." Accordingly, the trial court concluded that the question of arbitrability was appropriate for judicial determination.

D. First Amended Complaint

On March 10, 2016, Smigelski filed a first amended complaint adding several non-PAGA causes of action to the original complaint. The first amended complaint, which is the operative pleading, alleges individual and putative class claims for unpaid overtime under sections 510 and 1194, penalties for failure to provide accurate wage statements under section 226, waiting time penalties under section 203, and violations of the Business and Professions Code section 17200, et seq. The first amended complaint seeks unpaid wages, statutory penalties, restitution, and damages according to proof, in addition to civil penalties under PAGA.

E. Motion for Reconsideration and Second Petition to Compel Arbitration

PennyMac responded to the first amended complaint with a motion for reconsideration and a second petition to compel arbitration. The motion sought reconsideration of the order denying the first petition to compel arbitration on the ground that the filing of the first amended complaint constituted a "new and different" fact or circumstance within the meaning of subdivision (a) of section 1008 of the Code of Civil Procedure. The petition sought to compel arbitration on the now familiar ground that the arbitration agreement requires arbitration of all claims, including PAGA claims, and any unenforceable PAGA waiver could be severed. The second petition to compel arbitration also argued, again, that the arbitration agreement delegates questions of arbitrability to the arbitrator.

Smigelski opposed the motion and petition, arguing that the filing of the first amended complaint was not a new and different fact or circumstance within the meaning of the reconsideration statute, and did not change the fact that the PAGA waivers were impermissible and the arbitration agreement unenforceable. Smigelski additionally argued that the second petition to compel arbitration was merely a repeat of the first, and should be rejected for the reasons stated in the trial court's order denying that petition.

The trial court denied the motion for reconsideration by written order dated April 22, 2016. The trial court explained: "[T]he [c]ourt finds that [Smigelski's] act of filing the [first amended complaint] containing new claims is not a new or different fact or circumstance which would allow the [c]ourt to reconsider its previous order denying [PennyMac's first] petition to compel arbitration. Indeed, to that end, it must be remembered that the [c]ourt in denying the petition found that the MAP and the [employment agreement] contained provisions that violated public policy and could not be severed thus rendering the entire MAP and [employment agreement] unenforceable. It is true that the [c]ourt's ruling extensively discussed the fact that [Smigelski] was only asserting a PAGA claim at the time. But the [c]ourt specifically found that even so, provisions prohibiting arbitration of PAGA claims could not be severed from the agreements and the agreements as a whole were therefore unenforceable. This of course would preclude arbitration of not only PAGA claims, but any claims whatsoever, including the new individual and class claims set forth in the [first amended complaint]." "In any event," the trial court concluded, "even if the court were to find that the [first amended complaint] was a new or different fact or circumstance for purposes of [section 1008], it would simply affirm its previous order denying [PennyMac's first] petition to compel arbitration."

The trial court denied PennyMac's second petition to compel arbitration the same day, stating that, "Even if the [c]ourt were to find that a successive petition were permitted as a result of the [first amended complaint] being filed, the [c]ourt extensively addressed and rejected these arguments in denying the original petition and the [c]ourt simply rejects the arguments for the reasons previously discussed."

F. Notice of Appeal

PennyMac appeals from the orders denying its first and second petitions to compel arbitration. PennyMac does not appeal from the order denying its motion for reconsideration.

II. DISCUSSION

On appeal, PennyMac argues the trial court erred in denying the petitions to compel arbitration for a number of reasons, many of which appear to build upon one another in ways that are not always easy to discern. As near as we can tell, PennyMac's argument can be reduced to four principal contentions: (1) the arbitration agreement does not contain invalid PAGA waivers, (2) any illegal aspects of the arbitration agreement should be severed, and the rest of the agreement enforced, (3) the parties delegated the question of arbitrability to the arbitrator, and (4) the FAA preempts any state law precluding employers from requiring employees to waive their right to a judicial forum for PAGA claims as a condition of employment.

Before addressing the substance of PennyMac's contentions, we pause to review the applicable statutory scheme and standard of review. Because PennyMac's contentions require an understanding of PAGA, we will also review the characteristics of a PAGA representative action and the California Supreme Court's ruling in *Iskanian*. After we have reviewed the relevant statutory background, we will address the substance of the parties' contentions.

A. Statutory Scheme and Standard of Review

California's procedures for a petition to compel arbitration apply in California courts even if the arbitration agreement is governed by the FAA. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410.) The party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving any defense by a preponderance of the evidence. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) In ruling on a petition to compel arbitration, "the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question, construing the

agreement to the limited extent necessary to make this determination. [Citation.] If such an agreement exists, the court must order the parties to arbitration unless arbitration has been waived or grounds exist to revoke the agreement. [Citation.]" (*California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204-205.)

" 'The scope of arbitration is a matter of agreement between the parties.' [Citation.] 'A party can be compelled to arbitrate only those issues it has agreed to arbitrate.' [Citation.] Thus, 'the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.' [Citation.] For that reason, 'the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration' by the court. [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705 (*Molecular*).) "Any doubts or ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 386; accord *Molecular, supra,* at p. 705.)

An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a).) If the trial court's order denying a petition to compel arbitration is based on a decision of fact, then the substantial evidence standard applies; if the order is based on a decision of law, then the de novo standard applies. (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686; *Robertson of Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) " '[W]e review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record.' " (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 571, fn. 3.)

B. PAGA

PAGA was enacted to improve enforcement of our labor laws. (See *Caliber Bodyworks v. Superior Court* (2005) 134 Cal.App.4th 365, 370 [noting that the "stated goal" of the PAGA was "improving enforcement of existing Labor Code obligations"].)

"The Legislature enacted PAGA to remedy systemic underenforcement of many worker protections. This underenforcement was a product of two related problems. First, many Labor Code provisions contained only criminal sanctions, and district attorneys often had higher priorities. Second, even when civil sanctions were attached, the government agencies with existing authority to ensure compliance often lacked adequate staffing and resources to police labor practices throughout an economy the size of California's. [Citations.] The Legislature addressed these difficulties by adopting a schedule of civil penalties ' "significant enough to deter violations" ' for those provisions that lacked existing noncriminal sanctions, and by deputizing employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545 (*Williams*).)

Under PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980 (*Arias*).) Before bringing a PAGA claim, "an aggrieved employee acting on behalf of the state and other current or former employees must provide notice to the employer and the responsible state agency 'of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation.' [Citations.] If the agency elects not to investigate, or investigates without issuing a citation, the employee may then bring a PAGA action." (*Williams, supra,* 3 Cal.5th at p. 545.) "Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency [LWDA], leaving the remaining 25 percent for the 'aggrieved employees.' " (*Arias, supra,* at pp. 980-981; see also *Iskanian, supra,* 59 Cal.4th at p. 360 [PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state"].)

An action under PAGA " ' "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." ' " (*Iskanian, supra,* 59 Cal.4th at p. 381.) As one court of appeal has explained: "The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions." (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1300.) The aggrieved employee sues "as the proxy or agent of the state's labor law enforcement agencies." (*Arias, supra,* 46 Cal.4th at p. 986.) Thus, an action brought under the PAGA is "a type of qui tam action." (*Iskanian, supra,* at p. 382.)

Our Supreme Court examined the differences between representative PAGA actions and class actions in *Arias.* There, the court explained that PAGA actions and class actions are both forms of "representative action," in which "the plaintiff seeks recovery on behalf of other persons." (*Arias, supra,* 46 Cal.4th at p. 977, fn. 2.) While recognizing that PAGA actions and class actions share common attributes as "representative actions," the court observed that PAGA actions are fundamentally different from class actions, in that the former seek to vindicate the public interest in enforcing the state's labor laws by imposing civil penalties, while the latter confer a private benefit on the plaintiff and similarly situated employees. (*Id.* at pp. 986-987; see also *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003 ["In bringing such an action, the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties"].) As such, the court concluded, PAGA plaintiffs need not satisfy class action requirements. (*Arias, supra,* at p. 975.) As we shall discuss, the differences

between representative and class actions, which have been part of the legal landscape since *Arias,* inform our understanding of the parties' arbitration agreement.

C. Iskanian

Having reviewed the basic statutory scheme for PAGA claims, we now consider our Supreme Court's opinion in *Iskanian*. There, a driver for a transportation company signed an arbitration agreement providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration. (*Iskanian, supra,* 59 Cal.4th at p. 360.) The agreement also contained a waiver of the employee's right to pursue class or representative claims against the defendant employer in any forum. (*Id.* at pp. 360-361.)

The employee filed a class action complaint against the employer for failure to pay overtime, failure to provide meal and rest periods, failure to reimburse business expenses, failure to provide accurate and complete wage statements, and failure to pay final wages in a timely manner. (*Iskanian, supra,* 59 Cal.4th at p. 361.) The employer moved to compel arbitration, and the trial court granted the motion. (*Ibid.*) Shortly thereafter, our Supreme Court issued its decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*), invalidating class action waivers under certain circumstances. (*Iskanian, supra,* at p. 361; see also *Gentry, supra,* at pp. 463-464.) The court of appeal issued a writ of mandate directing the superior court to reconsider its ruling in light of *Gentry.* (*Iskanian, supra,* at p. 361.)

On remand, the employer voluntarily withdrew its motion to compel, and the parties proceeded to litigate in the trial court. (*Iskanian, supra,* 59 Cal.4th at p. 361.) Sometime later, the employee amended the complaint to add representative claims under PAGA. (*Ibid.*)

During the pendency of the litigation, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*), raising doubts as to the continued viability of *Gentry.* (*Iskanian, supra,* 59 Cal.4th at pp. 361-362.) The employer renewed its motion to compel, arguing that *Concepcion* invalidated *Gentry.*

(*Id.* at p. 361.) The trial court granted the motion, ordering arbitration of the employee's individual claims and dismissing the class claims with prejudice. (*Ibid.*) The court of appeal affirmed, and the California Supreme Court granted review and reversed. (*Id.* at pp. 361-362.)

The court concluded that the arbitration agreement was valid and enforceable, despite the class action waiver. (*Iskanian, supra,* 59 Cal.4th at p. 362-378.) Under *Concepcion,* the court concluded, arbitration agreements may properly include class action waivers. (*Id.* at pp. 365-366.) However, the court, following *Arias,* reaffirmed that PAGA claims are fundamentally different from class actions claims. (*Id.* at pp. 379-382.) Unlike class actions, which are brought as a means of recovering damages suffered by individuals, representative actions under PAGA are brought as a means of recovering penalties for the state. (*Id.* at p. 379.) The court explained: "The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Id.* at p. 383.)

In recognition of PAGA's public purpose, the court concluded that, "an employee's right to bring a PAGA action is unwaivable." (*Iskanian, supra,* 59 Cal.4th at p. 383.) Consequently, "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." (*Id.* at p. 360.) Put another way, an arbitration agreement compelling the waiver of representative PAGA claims is "contrary to public policy and unenforceable as a matter of state law." (*Id.* at p. 384.) The court did not examine the severability of the PAGA waiver, presumably because the issue was not raised on appeal. (*Id.* at pp. 360-361.)

Next, the court considered whether the rule prohibiting waiver of representative PAGA claims (the anti-waiver rule) was preempted by the FAA. (*Iskanian, supra,* 59 Cal.4th at pp. 384-389.) Relying on the fact that PAGA serves as a mechanism by which

the state seeks to enforce its labor laws and collect monetary penalties, the court explained: "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Id.* at pp. 386-387.) Accordingly, the court concluded, "California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [Labor and Workforce Development] Agency's interest in enforcing the Labor Code, does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution." (*Id.* at pp. 388-389.)

Finally, the court made clear that the employer would have to answer the employee's representative PAGA claims on remand in some forum, whether arbitral or judicial. (*Iskanian, supra,* 59 Cal.4th at p. 391.) The court observed that the arbitration agreement "gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration," (*id*. at p. 391) thereby raising "a number of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2?" (*Id.* at pp. 391-392.) The court concluded that the parties could address these questions on remand. (*Id.* at p. 392.)

D. The Arbitration Agreement Contains Invalid PAGA Waivers

PennyMac argues the arbitration agreement does not contain unenforceable PAGA waivers, but rather, reflects the parties' agreement to submit all employment disputes, including PAGA claims, to arbitration. According to PennyMac, the employee agreement, which contains an agreement to "forego any right to bring claims on a

representative or class basis," is ambiguous as to the meaning of the term "representative," and should be narrowly interpreted as an enforceable waiver of the right to bring a class action only, rather than broadly interpreted as an enforceable waiver of the right to bring a class action *and* an unenforceable waiver of the right to bring a PAGA action. PennyMac argues (incorrectly) that PAGA "does not use the word 'representative' at all," and urges us to construe the purported ambiguity in a manner that renders the employee agreement enforceable, rather than void. (See § 2699, subd. (l)(1) [requiring that "aggrieved employee or representative" provide the LWDA with a file-stamped copy of a complaint alleging a PAGA cause of action].) We are not persuaded.

"The ordinary rules of contract interpretation apply to arbitration agreements. [Citation.] 'The court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made. [Citations.]' 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' [Citation.] ' "A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach' [citation.]" ' [Citation.] An interpretation that leaves part of a contract as surplusage is to be avoided." (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 185-186.)

PennyMac begins by asking us to construe the waiver of "any right to bring claims on a representative or class basis" as a waiver of the right to bring claims on a class basis only, with the word "representative," operating as an illustration or amplification of the concept of a class action.[4] PennyMac's proposed interpretation ignores the differences

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[4] We note in passing that the *Iskanian* court uses the term "representative" in two distinct ways: (1) in the sense that an aggrieved employee brings a PAGA claim as a "representative"—i.e., a proxy or agent—of the state (*Iskanian, supra,* 59 Cal.4th at p. 387), and (2) in the sense that an aggrieved employee brings a PAGA claim on behalf of other employees (*id.* at pp. 383-384). (See also *Julian v. Glenair, Inc.* (2017) 17

between representative and class actions, which were well established by the time the employee agreement was entered. Although a claim brought on a class basis is representative in the sense that it seeks recovery on behalf of other people (*Arias, supra,* 46 Cal.4th at p. 977, fn. 2), a claim brought on a representative basis need not seek recovery on behalf of a class. (*Id.* at p. 975; see also *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757 ["[A] representative action under PAGA is not a class action"].) It follows that a claim brought on a representative basis is not coextensive with a claim brought on a class basis, an interpretation reinforced by the use of the conjunction "or," which indicates that the parties intended to give the terms different meanings, consistent with the established technical usage at the time of contracting. (See *Arias, supra,* at pp. 986-987; and see Civ. Code, § 1645 ["Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense"]; and cf. *United States v. Woods* (2013) 571 U.S. 31, 45 [recognizing that while the connection of terms "by the conjunction 'or' . . . can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it ('Vienna or Wien,' 'Batman or the Caped Crusader')—its ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings' "].)

Giving the terms of the employee agreement their settled legal meaning, and giving meaning to each term to avoid surplusage, we are convinced the waiver of the right to bring a "representative" claim entails something more than a mere recapitulation of the waiver of the right to bring a claim on a "class basis." (See *Weinreich Estate Co. v. A.J. Johnston Co.* (1915) 28 Cal.App. 144, 146 ["legal terms are to be given their legal

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Cal.App.5th 853, 866, fn. 6 (*Julian*).) PennyMac does not argue that the double meaning of the term "representative," as used in the *Iskanian* court's discussion of PAGA claims, renders the term ambiguous in the context of the arbitration agreement. Accordingly, we decline to consider the issue further.

meaning unless obviously used in a different sense"]; and see *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 783 [" '[c]ourts must interpret contractual language in a manner which gives force and effect to every provision' [citation], and avoid constructions which would render any of its provisions or words 'surplusage' "].) We therefore reject PennyMac's attempt to read an ambiguity into the terms of the waiver.

Having rejected PennyMac's contention that the waiver is ambiguous, we likewise reject the related contention that the purported ambiguity should be construed in a manner that renders the arbitration agreement enforceable. As a general proposition, *ambiguous* terms should be construed, where *reasonable,* in favor of arbitration. (*Pearson v. Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682; see also *Ajamian, supra,* 203 Cal.App.4th at p. 801.) But that rule does not apply where, as here, the terms of the agreement do not lend themselves to a lawful interpretation. (*Ajamian, supra,* at p. 801) We therefore conclude that the arbitration agreement must be construed as waiving *both* the right to bring class action claims *and* the right to bring representative PAGA claims.

As we have discussed, an employment agreement that compels the waiver of representative claims under PAGA is unenforceable under *Iskanian.* (*Iskanian, supra,* 59 Cal.4th at p. 384 ["We conclude that where, as here, 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"].) Here, the arbitration agreement unambiguously requires employees to waive their rights to bring representative PAGA claims. We agree with the trial court that the PAGA waivers set forth in the arbitration agreement are invalid as against public policy and unenforceable under *Iskanian.*

In an attempt to avoid this result, PennyMac argues somewhat confusingly that (1) *Iskanian* leaves open the possibility that parties may agree to arbitrate PAGA claims (*Iskankian, supra,* 59 Cal.4th at pp. 391-392), (2) the arbitration agreement does not bar employees from bringing PAGA claims, and (3) the MAP and AAA Employment Rules

empower the arbitrator to award any statutorily authorized civil penalty, including PAGA penalties. Connecting the dots, we understand PennyMac to argue that the arbitration agreement does not contain impermissible PAGA waivers because, though employees may waive their right to bring *representative* claims in any forum, they retain their right to bring *individual* PAGA claims in arbitration. To the extent we understand PennyMac's argument, we reject it.

Following *Iskanian,* several courts of appeal have considered—and rejected—similar arguments, reasoning that predispute agreements to arbitrate PAGA claims are unenforceable because the employee who signs the agreement is not then authorized to waive the state's right to a judicial forum. (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 667-680 (*Tanguilig*) [PAGA claim cannot be arbitrated pursuant to predispute arbitration agreement without state's consent]; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445-448 (*Betancourt*) [PAGA action not subject to arbitration, as state not bound by employee's predispute agreement]; *Julian, supra,* 17 Cal.App.5th at pp. 869-873 [same].) The *Julian* court, following *Tanguilig* and *Betancourt*, elaborated on its reasoning as follows: "In *Iskanian,* our Supreme Court explained that ' "*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." ' [Citation.] A PAGA action is thus ultimately founded on a right belonging to the state, which—though not named in the action—is the real party in interest. [Citation.] That is because PAGA does not create any new substantive rights or legal obligations, but 'is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.' [Citation.]" (*Julian, supra,* at p. 871.)

The *Julian* court continued: "Ordinarily, when a person who may act in two legal capacities executes an arbitration agreement in one of those capacities, the agreement

does not encompass claims the person is entitled to assert in the other capacity. [Citations.] That rule reflects general principles regarding the significance of legal capacities." (*Julian, supra,* 17 Cal.App.5th at pp. 871-872.)

The *Julian* court concluded: "Under the rule set forth above, an arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action. Prior to satisfying those requirements, an employee enters into the agreement as an individual, rather than as an agent or representative of the state. As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee. Thus, such a predispute agreement does not subject the PAGA claim to arbitration. [Citations.] For that reason, enforcing any such agreement would impair PAGA's enforcement mechanism." (*Julian, supra,* 17 Cal.App.5th at p. 872.)

We agree with the reasoning in *Julian* and adopt its analysis as our own. Following *Julian*, we conclude that the arbitration agreement does not encompass the PAGA claim. (*Julian, supra,* 17 Cal.App.5th at p. 871.) The record establishes that Smigelski executed the employee agreement as a condition of his employment in November 2014, before he satisfied the statutory requirements for bringing a PAGA claim, which occurred sometime in October 2015. (Former § 2699.3, subd. (a)(2)(A).) Prior to the time he satisfied those requirements, Smigelski was not authorized to assert a PAGA claim as an agent of the state, which retained control of the right underlying the claim. (See *Arias, supra,* 46 Cal.4th at pp. 980-981; *Julian, supra,* at p. 872.) Because Smigelski entered the arbitration agreement as an individual, and not as an agent or representative of the state, the agreement cannot encompass the PAGA claim, which relies on the right to recover penalties then belonging to the state. (*Julian, supra,* at p. 872; see also *Betancourt, supra,* 9 Cal.App.5th at p. 448.) It follows that any predispute agreement to arbitrate individual PAGA claims was ineffective. (*Tanguilig, supra,* 5

Cal.App.5th at p. 680 ["the right to litigate a PAGA claim in court is not subject to predispute waiver—with respect to an 'individual' *or* a group claim—by an individual employee pursuant to a private employment arbitration agreement"].)

These authorities lead us to reject PennyMac's apparent argument that the arbitration agreement can or should be viewed as requiring a waiver of the right to bring a representative PAGA action in any forum, on the one hand, while preserving the right to bring an individual PAGA claim in arbitration, on the other. In the absence of any enforceable agreement to arbitrate individual PAGA claims, the arbitration agreement can only be viewed as requiring a complete waiver of the right to bring PAGA claims. As we have discussed, such waivers are invalid under *Iskanian.*

E. The PAGA Waivers Are Not Severable

Having concluded that the PAGA waiver is unenforceable, we must next determine whether the waiver is severable from the rest of the arbitration agreement. (*Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1124 (*Securitas*).) PennyMac argues the waiver is severable; Smigelski maintains the waiver renders the entire arbitration agreement unenforceable. We agree with Smigelski.

The arbitration agreement contains two provisions dealing with severability. We begin with the employee agreement. The employee agreement, which contains a PAGA waiver, provides, "If any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate." The employee agreement does not authorize severance of unenforceable terms in the employee agreement itself. Thus, the employee agreement does not authorize severance of the PAGA waiver found within the employee agreement. The MAP, which contains a separate PAGA waiver, provides that "the Arbitrator or a court may sever any part of the MAP procedures that do not comport with the [FAA]." Here, however, the PAGA waivers fail to comport with state law, not the FAA. Reading the arbitration agreement as a whole, and applying the principle that specific language controls general language (Civ. Code, § 3534), we

conclude that the parties only intended to sever unenforceable provisions from the MAP, and then only on the ground that the unenforceable provision fails to comport with the FAA. (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1017 ["a specific provision of a contract controls over a general provision to the extent there is an inconsistency"].) Applying the maxim *expressio unius est exclusio alterius*, we further conclude that the parties did *not* intend to sever any other unenforceable provisions from the arbitration agreement. (Cf. *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1175 [under maxim *expressio unius est exclusio alterius*, where parties' contract expressly provided that certain consequences would flow from termination of plaintiff's employment, this tended to negate inference that parties also intended another consequence to flow from the same event].)

PennyMac argues that other provisions of the arbitration agreement—specifically, the provision stating that "specific MAP procedures or AAA Rules may be modified from time to time as required by applicable law"—evince "an intention to have any unenforceable provisions or terms excised in order to maintain the enforceability of the heart of the arbitration agreement—i.e.[,] the mutual obligation to use arbitration as the exclusive forum in which to resolve any employment relate[d] disputes." But PennyMac's argument ignores the arbitration agreement's specific severability provisions, which are the clearest expression of the parties' intent with respect to severability. (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47 [the parties' expressed objective intent, not their unexpressed subjective intent, governs].)

PennyMac also argues that a proper severability analysis would focus, not on the severability provisions in the arbitration agreement, but the objects of the contract. (See Civ. Code, § 1599 [contract with "several distinct objects" may be void as to an unlawful one and valid as to a lawful one].) We disagree. As the trial court appropriately recognized, " 'the rule relating to severability of partially illegal contracts is that a contract is severable if the court can, *consistent with the intent of the parties,* reasonably

relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side.' " (*Securitas, supra,* 234 Cal.App.4th at p. 1126.) Here, as we have discussed, the terms of the arbitration agreement evince an intention to limit severability to circumstances not present here. Following *Securitas*, we conclude that the terms of the arbitration agreement—which we must rigorously enforce—preclude severance. (*Id.* at p. 1125; see also *American Exp. Co v. Italian Colors Restaurant* (2013) 570 U.S. 228, 233 ["courts must 'rigorously enforce' arbitration agreements according to their terms"].)

PennyMac argues *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947 (*Franco III*), is controlling and compels severance. *Franco III*, though factually similar, is distinguishable. There, the plaintiff, a truck driver, filed an initial complaint alleging a mix of PAGA and non-PAGA claims. (*Id.* at pp. 951-952.) The defendant filed a petition to compel arbitration pursuant to a "mutual arbitration policy" that appears to have contained the same provisions as the MAP in our case. (*Id.* at pp. 952-953.) The trial court granted the motion, and the appellate court reversed, holding that the class action waiver in the MAP was unenforceable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1282 (*Franco I*).) Following an unsuccessful petition for certiorari to the U.S. Supreme Court, the matter returned to the trial court, where the defendant filed a second petition to compel arbitration, relying, again, on the MAP. (*Franco III, supra,* at p. 954.) The second petition to compel arbitration argued that the authorities forming the basis for the appellate court's decision in *Franco I* had been overruled by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.* (2010) 559 U.S. 662 (*Stolt-Nielsen*), rendering the MAP enforceable. (*Franco III*, *supra,* at p. 954.) The trial court denied the petition, and the defendant appealed again, arguing that *Stolt-Nielsen* and *Concepcion* overruled *Gentry,* on which *Franco I* relied. (*Id.* at p. 955.) The appellate court affirmed. (*Ibid.*) Our Supreme Court granted review and remanded for reconsideration in light of *Iskanian*. (*Franco, III, supra,* at p. 951.)

Following *Iskanian*, the *Franco III* court concluded, "the MAP's waivers of Franco's right to pursue non-PAGA claims as a class representative are enforceable, precluding the prosecution of those claims in any forum; however Franco's purported waiver of his right to prosecute the statutory claims afforded by the PAGA is unenforceable, and his PAGA claims are not subject to arbitration." (*Franco III, supra,* 234 Cal.App.4th at p. 957.) The plaintiff asked the court to find the MAP unenforceable on the ground of unconscionability. (*Id.* at p. 965.) The court declined, reasoning that the central purpose of the MAP was not tainted with illegality and could not be said to have been drafted with an intention to thwart the policy announced in *Iskanian,* which was decided some 10 years after the MAP was implemented. (*Ibid.*) *Franco III* does not help PennyMac.

Although the *Franco III* court appears to have considered the same MAP, the court does not appear to have considered the arbitration agreement's severability provisions, as the plaintiff in that case does not appear to have relied on them. Instead, the plaintiff in *Franco III* argued that the arbitration agreement was *unconscionable*, an argument Smigelski does not advance. (*Franco III, supra,* 234 Cal.App.4th at p. 965.) Though *Franco III* may compel the conclusion that the MAP is not unconscionable, that question is not before us. As the trial court correctly recognized, *Franco III* does not address the severability provisions in the arbitration agreement, and cannot be viewed as controlling on the dispositive question of severance. (*Ulloa v. McMillin Real Estate &Mortgage, Inc.* (2007) 149 Cal.App4.th 333, 340 [" ' "It is axiomatic that cases are not authority for propositions not considered" ' "].) Nothing in *Franco III* causes us to doubt our conclusion that the severability provisions preclude enforcement of the arbitration agreement as a whole. If anything, *Franco III* supports our conclusion that the arbitration agreement requires employees to waive their PAGA claims, and therefore runs afoul of *Iskanian*. (*Franco III, supra,* at p. 963.)

Doubling down on *Franco III*, PennyMac argues the trial court ignored "controlling precedent" in refusing to compel arbitration of Smigelksi's non-PAGA claims. Again, *Franco III* is distinguishable. There, the appellate court reversed the order denying the petition to compel arbitration and remanded with directions to grant the petition with respect to the plaintiff's non-PAGA claims and stay the PAGA claims. (*Franco III, supra*, 234 Cal.App.4th at pp. 965-966.) That outcome was appropriate because the arbitration agreement as a whole was found to be enforceable. As we have discussed, that finding was limited to a conclusion that the MAP is not unconscionable. (*Id.* at p. 965.) Here, by contrast, we have concluded that the arbitration agreement as a whole is unenforceable by virtue of the severability provisions. Because the arbitration agreement has been found to be unenforceable, PennyMac cannot compel arbitration of any of Smigelski's causes of action, including causes of action that would otherwise be arbitrable. That PennyMac must now litigate non-PAGA causes of action is the result, not of the trial court's error, but its own drafting decisions.

F. The Arbitration Agreement Does Not Delegate Questions of Arbitrability to the Arbitrator

Next, PennyMac argues the trial court erred in adjudicating the arbitrability of the parties' dispute because the arbitration agreement delegates such determinations to the arbitrator. We are not persuaded.

At the outset, we reiterate that a PAGA case "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*." (*Iskanian, supra,* 59 Cal.4th at p. 386.) Unlike a usual employment case, "the state is the real party in interest." (*Id.* at p. 387.) As a result, the fact that Smigelski may have agreed to delegate questions of arbitrability to an arbitrator is irrelevant. (See *Betancourt, supra,* 9 Cal.App.5th at p. 448 ["The fact that Betancourt, in 2006, agreed to arbitrate his private employment disputes with Prudential is not relevant. Betancourt's lawsuit is a PAGA claim, on behalf of the state. The state is not

bound by Betancourt's predispute arbitration agreement"].) It is therefore unnecessary for us determine whether the parties agreed to delegate questions of arbitrability to the arbitrator.

But even if we perceived a need to consider PennyMac's argument, we would reject it. "[C]ourts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrablity[,]' . . . such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " (*BG Group, PLC v. Republic of Argentina* (2014) 572 U.S. 25, 34, quoting *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84.) However, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-69.) "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943.) "Although threshold questions of arbitrability are ordinarily for courts to decide in the first instance under the FAA [citation], the '[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement.' " (*Pinela v. Neiman Marcus Group* (2015) 238 Cal.App.4th 227, 239.)

"There are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability." (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242; see also *Rent-A-Center, West, Inc. v. Jackson, supra,* 561 U.S. at pp. 68, 69, fn. 1.) The "clear and unmistakable" test reflects a "*heightened* standard of proof" that reverses the

typical presumption in favor of the arbitration of disputes. (*Ajamian, supra,* 203 Cal.App.4th at p. 787.)

Here, the arbitration agreement incorporates the AAA Employment Rules, which provide, in pertinent part, "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." PennyMac argues the incorporation of the AAA Employment Rules demonstrates the parties intended to submit questions of arbitrability to the arbitrator. Different courts have reached different conclusions as to whether the incorporation of arbitral rules serves as clear and unmistakable evidence of an intent to delegate questions of arbitrability to an arbitrator. (See, e.g., *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1442 [in a commercial dispute between a trust and affiliated companies, an arbitration agreement incorporating JAMS rules constituted clear and convincing evidence of the parties' intent to delegate power to the arbitrator to decide gateway issues of arbitrability]; *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557 [in a contract dispute, arbitration agreement incorporating AAA Commercial Arbitration Rules constituted "clear and unmistakable evidence of the intent that the arbitrator will decide whether a Contested Claim is arbitrable"]; but see *Ajamian, supra,* 203 Cal.App.4th at p. 790 [expressing doubts as to whether mere reference to AAA Employment Rules constitutes clear and unmistakable evidence of intent in the employment context].) We need not resolve this difference of opinion, as the arbitration agreement indicates that questions of arbitrability may be decided by the arbitrator *or* a court.

As noted, the MAP provides, "the Arbitrator *or a court* may sever any part of the MAP procedures that do not comport with the [FAA]." (Italics added.) Faced with this language, the trial court concluded—and we agree—that the arbitration agreement reflects an intent that "the [c]ourt itself may decide questions of arbitrability, or at a

minimum[,] create ambiguity on that point." We would therefore reject PennyMac's arbitrability argument, were we to address it.

G. The FAA Does Not Preempt State Law Rules Applicable To PAGA Claims

Finally, PennyMac argues the FAA requires us to enforce the parties' purported agreement to arbitrate PAGA claims. We assume for the sake of argument that PennyMac has carried its burden of establishing the existence of such an agreement. Even so assuming, PennyMac's argument lacks merit.

As previously discussed, the *Iskanian* court held that the state law rule against PAGA waivers does not frustrate the objectives of the FAA because "the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Agency." (*Iskanian, supra,* 59 Cal.4th at p. 384, emphasis omitted.) "Read in its entirety, the *Iskanian* opinion clearly holds that the state is the real party in interest in a PAGA claim regardless of whether the claim is brought in an individual or representative capacity. . . . For this reason, the FAA, which is primarily concerned with private disputes, does not preempt the state law bar against a private predispute waiver of a PAGA claim." (*Tanguilig, supra,* 5 Cal.App.5th at p. 680; see also *Franco III, supra,* 234 Cal.App.4th at p. 964 ["the FAA does not preempt California's state law rule precluding predispute waivers of enforcement rights under the PAGA"].) Applying these authorities, we conclude that PennyMac's preemption argument, like much of its appeal, is foreclosed by *Iskanian*.

III. DISPOSITION

The orders denying PennyMac's petitions to compel arbitration are affirmed. Smigelski is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RENNER, J.

We concur:

HULL, Acting P. J.

ROBIE, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

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