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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SIDNEY TRUSS, Plaintiff and Respondent, v. ROADRUNNER PIZZA, INC. et al., Defendants and Appellants.	B284147 (Los Angeles County Super. Ct. No. BC640086)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Wiley, Jr., Judge. Affirmed and remanded with direction.

Zaller Law Group, Anthony J. Zaller, Lisa J. Borodkin and Hanna G. Shafran for Defendants and Appellants.

Matern Law Group, Matthew J. Matern, Mikael Stahle, Irina A. Kirnosova and Debra J. Tauger for Plaintiff and Respondent.

Respondent Sidney Truss brought this action under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.)[1] against appellants Roadrunner Pizza, Inc., 2 Musketeers Pizza, Inc., Good Guys Pizza, Inc., A&A Pizza, Inc., 3 Amigos Pizza, Inc., 3F Enterprises, Inc., Farnad Ferdows, and Armen Sedrak. Appellants filed a petition to compel arbitration, which the trial court denied. Appellants contend the court erred, arguing the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) required the court to enforce respondent's arbitration agreement with Roadrunner Pizza. We affirm.

BACKGROUND

In January 2014, respondent started working for appellant Roadrunner Pizza. Before his employment began, respondent signed an arbitration agreement providing for final arbitration of "any claim or dispute arising out of or related to the employment relationship or its termination including, but not limited to, claims of wrongful termination, harassment, discrimination, breach of contract, tort claims, violation of statute, non-payment of wages, and all other similar claims." The agreement delegated to the arbitrator "sole[] responsib[ility] for resolving any disputes over [its] interpretation or application . . . ." As to the applicable law, the arbitration agreement stated: "[T]he interpretation, scope and enforcement of this . . . Agreement and all

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

procedural issues shall be governed by the procedural and substantive provisions of the [FAA], the federal decisional law construing the FAA, and the Rules of the Arbitrator . . . ."

In November 2016, after ending his employment with Roadrunner, respondent brought this action against appellants, asserting a single cause of action under PAGA and alleging various violations of the wage and hour laws.[2] Among other requests for relief, the complaint sought civil penalties, "including but not limited to the amount of any unpaid wages of [respondent] and other aggrieved employees" under section 558.[3]

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[2] The complaint alleged Roadrunner and the other appellants were "joint employers."

[3] Section 558, subdivision (a), provides: "Any employer . . . who violates . . . a section of this chapter . . . shall be subject to a civil penalty as follows: [¶]

"(1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. [¶]

"(2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. [¶]

"(3) Wages recovered pursuant to this section shall be paid to the affected employee."

Appellants filed a petition to compel arbitration under respondent's arbitration agreement with Roadrunner, arguing that the FAA required the trial court to enforce the agreement, and that the agreement delegated any question regarding its application to the arbitrator. The court denied the petition, relying on *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439 (*Betancourt*), which held that the FAA did not apply to actions under PAGA, and concluded a similar delegation provision in an employee's predispute arbitration agreement was ineffective to compel arbitration of the employee's PAGA claim. (*Betancourt, supra,* at pp. 445-448.) This appeal followed.[4]

DISCUSSION

On appeal, appellants renew their contention the arbitration agreement required an arbitrator to decide whether respondent's PAGA action was arbitrable. They claim the FAA would preempt any state law rule to the contrary.

Absent a challenge to underlying factual findings, we review de novo a trial court's ruling on a petition to compel arbitration. (*Laymon v. J. Rockcliff, Inc.* (2017) 12 Cal.App.5th 812, 819.) "A petition to compel arbitration is a suit in equity seeking specific performance of an arbitration

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[4] An order denying a petition to compel arbitration is immediately appealable. (*Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787, citing Code Civ. Proc., § 1294, subd. (a).)

agreement. [Citation.] Under Code of Civil Procedure section 1281.2, a petition to compel arbitration of a claim may be denied when the arbitration agreement is unenforceable [citation] or the claim is not subject to the arbitration agreement [citations]." (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 863-864 (*Julian*).)

The Labor Code authorizes the Labor and Workforce Development Agency (LWDA) to collect civil penalties for specified labor law violations by employers. (*Julian*, *supra*, 17 Cal.App.5th at p. 865.) The Legislature enacted PAGA "[t]o enhance the enforcement of the labor laws . . . ." (*Julian, supra,* at p. 865.) "This statute 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." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 (*Iskanian*).) "PAGA actions are 'a substitute for an action brought by the government itself,' in which the aggrieved employee acts as 'the proxy or agent of the state's labor law enforcement agencies.'" (*Julian*, *supra*, at p. 865, quoting *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

Under the FAA, "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

(9 U.S.C § 2.) "The FAA thereby places arbitration agreements on an equal footing with other contracts, [citation], and requires courts to enforce them according to their terms, [citation]. Like other contracts, however, they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 67-68 [130 S.Ct. 2772, 2776] (*Rent-A-Center*).)

In *Iskanian*, *supra*, 59 Cal.4th at page 387, our Supreme Court held that the FAA does not apply to PAGA claims. There, the plaintiff signed a predispute arbitration agreement that, among other things, precluded representative claims, but later brought a PAGA claim against his former employer. (*Iskanian*, *supra*, at pp. 360-361.) Before the California Supreme Court, the employer argued: (1) under California law, the agreement's representative-action waiver barred the plaintiff from asserting a PAGA claim; and (2) the FAA preempted any state law rule precluding such waivers. The court rejected both contentions. (*Iskanian, supra,* at pp. 383, 384.)

First, it held that predispute PAGA waivers are unenforceable because they are contrary to public policy. (*Iskanian*, *supra*, 59 Cal.4th at pp. 383-384.) Second, the Court held that the FAA did not preempt this state law rule: "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 [LWDA] or aggrieved employees -- that the employer has violated the Labor Code." (*Iskanian, supra,* at p. 386.) The Court explained: "[T]he FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances." (*Id.* at p. 388.)

Following *Iskanian*, several Courts of Appeal, including this one, have concluded that "a predispute agreement to arbitrate is ineffective to compel arbitration of a PAGA claim, as the employee who signs the agreement is not then authorized to waive the state's right to a judicial forum." (*Julian*, *supra*, 17 Cal.App.5th at p. 871; accord, *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 622; *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677-680; *Betancourt*, *supra*, 9 Cal.App.5th at pp. 445-448.) As particularly relevant here, the arbitration agreement in *Betancourt* included a delegation provision, under which an arbitrator was to decide the scope and application of the agreement to arbitrate.[5] (*Betancourt,*

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[5] Under the FAA, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question
(*Fn. is continued on the next page*.)

supra, at p. 447.) The Court of Appeal rejected the employer's argument that the arbitrator was to decide if the plaintiff's PAGA claims were arbitrable. (*Betancourt, supra,* at p. 448.) Relying on *Iskanian*'s analysis that a PAGA case is an enforcement action by the state against the employer, the court concluded the state was not bound by the employee's predispute arbitration agreement. (*Betancourt*, at p. 448.)

Our Supreme Court's recent decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 (*ZB*) further supports the unanimous conclusion of the Courts of Appeal. There, an employer challenged the trial court's denial of its motion to compel arbitration of an employee's request for unpaid wages under section 558 in a purported PAGA action. (*ZB, supra,* at pp. 182-184.) Our Supreme Court held that a PAGA claim does not include claims for unpaid wages under section 558 and thus, there was no arbitrable claim. (*ZB,* at pp. 197-198.) Although apparently not a point of contention there, in announcing its holding, the Court recognized that "[a]n employee's predispute agreement to individually arbitrate her claims is unenforceable where it blocks an employee's PAGA claim from proceeding." (*Ibid.*)

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of arbitrability' for a court to decide." (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84 [123 S.Ct. 588].) However, the United States Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability'" -- often referred to as a "delegation" agreement. (*Rent-A-Center*, *supra*, 561 U.S. at p. 68.)

Faced with these adverse authorities, appellants make two main arguments that respondent's arbitration agreement compels arbitration of his PAGA action. First, they claim these cases are distinguishable because unlike respondent's arbitration agreement, the agreements in those cases did not reference federal decisional law. We find that a distinction without a difference. If, as caselaw holds, employees cannot bind the state to private predispute arbitration agreements, neither can they bind the state to a choice-of-law provision in those same agreements. (Cf. *Betancourt*, *supra*, 9 Cal.App.5th at pp. 447-448 [delegation provision does not apply to PAGA claim because state is not bound by employee's predispute arbitration agreement].)[6]

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[6] Appellants also attempt to distinguish *Betancourt* by claiming it involved a waiver of the right to bring PAGA claims in any forum, rather than a mere agreement to arbitrate. They are mistaken. While the predispute arbitration agreement in *Betancourt* included a waiver of representative claims, the defendant in that case did not rely on the waiver, but instead sought to compel arbitration under the agreement. (*Betancourt,* s*upra*, 9 Cal.App.5th at pp. 443-444.) As discussed, the court concluded the defendant could not compel arbitration of the plaintiff's PAGA action based on the parties' arbitration agreement. (*Betancourt, supra,* at p. 448.)

Appellants further contend "the court in *Betancourt* erroneously held that *Iskanian* . . . precludes arbitration of PAGA claims" and "failed to consider that, in other contexts, [c]ourts have never held *Iskanian* to bar waiver of PAGA claims in private settlement agreements." Not so. The *Betancourt* court expressly limited its holding to *pre-dispute* arbitration

(*Fn. is continued on the next page*.)

Second, appellants argue that the FAA preempts these authorities' limitation on the arbitrability of PAGA actions. They assert that the distinction between pre- and post-dispute arbitration agreements "[does not reflect] generally accepted contract principle," but an arbitration-specific rule that treats arbitration agreements less favorably than other contracts, which the FAA does not permit.

Appellants do not explain why they believe this distinction relies on an arbitration-specific rule. It does not. As this court explained in *Julian*, *supra*, 17 Cal.App.5th at p. 872, the distinction "reflects general principles regarding the significance of legal capacities." "Prior to satisfying [the] requirements [for bringing a PAGA action], 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."[7]

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agreements, in accord with *Iskanian*, and recognized parties may still be able to arbitrate PAGA claims under appropriate circumstances. (*Betancourt*, *supra*, 9 Cal.App.5th at p. 449 ["while a PAGA action might be subject to arbitration, relying on a predispute agreement with a private party will not suffice to compel arbitration of a PAGA claim"].)

[7] Relatedly, in their reply brief, appellants assert in conclusory fashion that *Iskanian* has been implicitly overruled by *DIRECTV, Inc. v. Imburgia* (2015) ___ U.S. ___ [136 S.Ct. 463]. However, they have forfeited any contention in this regard by
(*Fn. is continued on the next page*.)

(*Ibid.*; cf. *Sackett v. Los Angeles City School Dist.* (1931) 118 Cal.App. 254, 258 [school district not bound by restrictions in land deed because "the state and its various political subdivisions may not be bound by the terms of a private contract to which it was not a party"].)

Appellants initially argued in their briefs that even if the FAA did not apply to PAGA actions generally, it required respondent to arbitrate the portion of his PAGA cause of action pertaining to unpaid wages under section 558. They contended that portion of respondent's action sought individualized relief payable in full to respondent and was therefore essentially a private dispute between the parties, subject to the FAA and to compelled arbitration. In supplemental briefs following our Supreme Court's decision in *ZB*, the parties acknowledge that a PAGA action does not include unpaid wages under section 558, and thus that

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failing to raise it their opening brief and failing to support it with a reasoned argument. (See *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 726 [failure to raise argument in opening brief constitutes forfeiture]; *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 [contentions unsupported by reasoned argument and citation to authority are forfeited].) We note, moreover, that courts have rejected similar contentions that subsequent United States Supreme Court decisions have invalidated *Iskanian*. (See *Tanguilig v. Bloomingdale's, Inc.*, *supra*, 5 Cal.App.5th at pp. 674-675 [*DIRECTV* did not invalidate *Iskanian*]; *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 620 [*Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S.Ct. 1612] did not undermine *Iskanian*].)

arbitration as to that requested relief is unavailable. Accordingly, the trial court did not err in denying appellants' petition to compel arbitration.[8] On remand, the trial court shall strike respondent's allegations requesting unpaid wages under section 558.

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[8] In their reply and supplemental briefs, appellants assert respondent's complaint included multiple other requests for individualized relief. Relying on *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, they argue all such claims are subject to the FAA and must be arbitrated. In their opening brief, however, the only requested relief appellants cited in this context was respondent's request for "individualized unpaid wages . . . under Labor Code section 558." They identified none of the other claims they now argue must be arbitrated under *Esparza v. KS Industries, L.P.* Appellants have therefore forfeited any contention in this regard. (See *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295 ["we will not address arguments raised for the first time in the reply brief"].)

DISPOSITION

The judgment is affirmed, and the matter is remanded for further proceedings consistent with this opinion. Respondent is awarded his costs on appeal.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.