Case No. S274671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three,
Case Nos. G059860, G060198

Orange County Superior Court
Case No. 30-2019-01103801
The Honorable Kirk H. Nakamura, Presiding

RESPONDENT'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES

Aashish Y. Desai (SBN 187394)
Adrianne De Castro (SBN 238930)
DESAI LAW FIRM, P.C.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626
Telephone: (949) 614-5830
Email: aashish@desai-law.com
adrianne@desai-law.com

*Michael Rubin (SBN 80618)
Robin S. Tholin (SBN 344845)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108
Tel: (415) 421-7151
E-mail: mrubin@altber.com
rtholin@altber.com

Additional counsel on following page

Andrew P. Lee (SBN 245903)
David Borgen (SBN 99354)
Mengfei Sun (SBN 328829)
GOLDSTEIN, BORGEN,
DARDARIAN & HO
155 Grand Ave., Suite 900
Oakland, CA 94612
Telephone: (510)763-9800
Email: alee@gbdhlegal.com

Attorneys for Plaintiff and Respondent Erik Adolph

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTRODUCTION

Pursuant to California Rule of Court 8.520(d), Plaintiff-Respondent Erik Adolph submits this supplemental brief to bring to the Court's attention five newly published Court of Appeal decisions that were not available in time to be included in Adolph's brief on the merits in this matter:

- *Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, *as modified on denial of reh'g* (Feb. 24, 2023), *review filed* (Mar. 28, 2023)
- *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281
- *Gregg v. Uber Techs., Inc.* (2023) 89 Cal.App.5th 786
- *Seifu v. Lyft, Inc.* (Cal. Ct. App. Mar. 30, 2023, No. B301774) 2023 WL 2705285
- *Nickson v. Shemran, Inc.* (Cal. Ct. App. Apr. 7, 2023, No. D080914) 2023 WL 2820860

Each of these cases support Adolph's principal position, that a PAGA plaintiff who has been compelled to arbitrate the "individual" component of his representative PAGA claim does not thereby lose standing to prosecute the "non-individual" component of that representative PAGA claim in court. (See Respondent's Brief on the Merits ("RB") 19-35; Respondent's Answer to Briefs of Amici Curiae ("RAB") 15-17.)

ARGUMENT

I. Five Recent Court of Appeal Decisions Support Adolph's Construction of PAGA Standing.

A. The five cases all conclude that PAGA plaintiffs are not stripped of standing when their individual claims are compelled to arbitration.

When this Court granted Uber's Petition for Review in July 2022, there were no state court trial or appellate decisions addressing the United States Supreme Court's analysis of PAGA standing in Part IV of *Viking River*

Cruises, Inc. v. Moriana (2022) 142 S.Ct. 1906, 1925. Since then, scores of state trial courts and several Courts of Appeal have considered the issue. The overwhelming majority have declined to follow the five-member *Viking River Cruises* majority, noting Justice Sotomayor's recognition that California courts "will have the last word" on interpretation of state law. (*Id.* at p. 1925 [Sotomayor, J., concurring].) In cases where the parties' arbitration agreement required them to arbitrate the individual component of the plaintiff's PAGA representative action, those courts have almost universally declined to dismiss with prejudice that PAGA plaintiff's non-individual representative claims for lack of statutory standing.[1]

Not until *Galarsa* was published on February 24, 2023, did any of the state's appellate courts decide this issue of post-*Viking River Cruises* PAGA standing in a published precedential decision. The Fifth District Court of Appeal's decision in *Galarsa* was followed in short order by four other published decisions, two from Division Four of the Second District Court of Appeal and one each from Divisions One and Three of the Fourth District Court of Appeal. Each of those appellate panels reached the same conclusion—that the majority in *Viking River Cruises* got California PAGA standing law wrong and that a PAGA plaintiff does not lose statutory standing to pursue civil penalties on behalf of the Labor and Workforce Development Agency ("LWDA") and other aggrieved employees after being compelled to arbitrate rather than litigate the individual component of her PAGA claim.

---

[1] *See* Robert Iafolla, *Arbitration of California Labor Law Claims Still Varies, for Now*, BLOOMBERG LAW (Dec. 23, 2022), https://news.bloomberglaw.com/daily-labor-report/arbitration-of-california-labor-law-claims-still-varies-for-now.

The analyses in these five new appellate decisions differs slightly from one to the other, but not in any material respects. Some of the decisions use different nomenclature. For example, instead of the distinction drawn by the U.S. Supreme Court between the "individual" component of a "representative" PAGA claim and the "non-individual" component of a "representative" PAGA claim (which reinforces the point made by this Court in cases such as *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, and *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986, and by the U.S. Supreme Court in *Viking River Cruises* that *all* PAGA claims are "representative" in the sense that they are brought on behalf of the LWDA as well as on behalf of other aggrieved employees), the Fifth Appellate District in *Galarsa* instead distinguished between what it described as "Type A" PAGA claims (shorthand for the individual component that could be compelled to Arbitration) and "Type O" PAGA claims (the Other component), *see* 88 Cal.App.5th at pp. 649-650—a distinction that Adolph does not believe helps advance the inquiry or clarify the distinctions.[2]

The commonalities among these new cases are far greater than any differences. Each of the new appellate decisions rests its standing analysis upon the plain text of PAGA, the legislative purposes set forth in the statute, and this Court's unanimous decision in *Kim v. Reins Int'l Calif., Inc.* (2020) 9 Cal.5th 73, and each agrees that PAGA plaintiffs do not lose statutory standing upon being compelled to arbitrate the individual component of the LWDA's PAGA claims.

Several of the cases begin their state law analysis with the statutory text and its requirement that, to have PAGA standing, a plaintiff must be an "aggrieved employee." (See, e.g., *Galarsa*, 88 Cal.App.5th at pp. 652-653;

[2] None of the four subsequent cases adopted that terminology.

Gregg, 89 Cal.App.5th at p. 342; *Seifu*, 2023 WL 2705285 at pp. *3, *5.) Others begin with this Court's decision in *Kim,* which construed that same text, as well as PAGA's legislative history, in concluding that PAGA has "only two requirements for PAGA standing[:] The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim*, 9 Cal.5th at p. 83-84 [quoting Lab. Code § 2699(c)]; *see Piplack*, 88 Cal.App.5th at pp. 1284-1285, 1291; *Nickson*, 2023 WL 2820860 at pp. *1-2.) Wherever the analysis begins, all five cases conclude that PAGA plaintiffs who are compelled to arbitrate the individual component of their claim do not lose their aggrieved employee status as a result of having to pursue the LWDA's civil penalty remedies in two forums rather than one.

Each of the five published Court of Appeal decisions agrees that PAGA's broad remedial purposes fully support that plain meaning construction. (See, e.g., *Galarsa*, 88 Cal.App.5th at p. 653 ["This interpretation of the term 'aggrieved employee' is consistent with, rather than contrary to, PAGA's remedial purpose."]; *id. a*t 654 ["it is the interpretation of PAGA that best effectuates the statute's purpose, which is 'to ensure effective code enforcement.'"] [citations omitted]; *Seifu*, 2023 WL 2705285 at p. *6 ["This interpretation is consistent with PAGA's remedial purpose, because revoking an employee's standing to pursue non-individual claims would 'severely curtail[] PAGA's availability to police Labor Code violations.'" [citations omitted].). Each also agrees that PAGA standing is an issue of California state law, not federal law. (See, *Seifu*, 2023 WL 2705285 at pp. *1, *5 [rejecting defendant's argument that "the *Viking River* court's dismissal of the plaintiff's non-individual PAGA claims for lack of standing was part of a 'federal rule of decision to implement its mandate that the FAA

applies to PAGA claims when a valid arbitration agreement exists.'"]; *Galarsa*, 88 Cal.App.5th at p. 652; *Piplack*, 88 Cal.App.5th at p. 1291; *Gregg*, 89 Cal.App.5th at p. 342; *Nickson*, 2023 WL 2820860 at p. *1.)

B. The five cases reject Uber's arguments about PAGA standing.

Several of the recent Court of Appeal decisions directly address, and reject, other arguments raised by Uber as well. For example, several cases reject the argument that an order compelling arbitration effects a "severance" of plaintiffs' PAGA claim into two separate claims that each require independent standing. (See Appellant's Opening Brief on the Merits 32-33; Appellant's Reply Brief on the Merits 33-34, *Piplack*, 88 Cal.App.5th at p. 1292 [concluding that application of FAA preemption under *Viking River Cruises* does not effect a "severance" of plaintiff's PAGA claim, and that "the individual PAGA claims in arbitration remain part of the same lawsuit as the representative claims remaining in court. Thus, plaintiffs are pursuing a single PAGA action 'on behalf of [themselves] and other current or former employees,' albeit across two fora."] [alteration in original]; *Gregg*, 89 Cal.App.5th at p. 345 [rejecting Uber's argument that FAA preemption under *Viking River* effects a severance of plaintiff's "single action" into "two . . . separate and distinct actions"] [citations omitted]; *Seifu*, 2023 WL 2705285 at p. *7 [same].)

Several of those decisions also point out that, as here, the PAGA plaintiff did, in fact, seek relief on behalf of others, in addition to himself or herself and the LWDA when they filed their state court complaints, and that the only reason an issue of standing has arisen is because *defendants* sought to split plaintiffs' otherwise unitary PAGA claim into two forums. (See, e.g., *Gregg,* 89 Cal.App.5th at p. 344 [noting that plaintiff's complaint sought relief on behalf of plaintiff and other aggrieved employees and that "[h]is

agreement to arbitrate his individual claim does not nullify these allegations. . . . It merely requires him to litigate a portion of his PAGA claim in an alternative forum governed by different procedures."]; *Seifu*, 2023 WL 2705285 at p. *6 [same].)

Finally, although each of these decisions ultimately concluded that the parties' arbitration agreements required the plaintiffs to arbitrate the individual component of their PAGA claims, it bears emphasis that none of those agreements had the same arbitration language as Uber's agreement in this case, which does *not* require plaintiff to arbitrate any portion of his PAGA claim. (RB 47-52; RAB 14, fn. 4.)[3]

---

[3] *Compare, e.g., Piplack*, 88 Cal.App.5th at p. 1285 ["The . . . Private Attorney General Waiver . . . shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration."], *Gregg*, 89 Cal.App.5th at pp. 335-336, 341 ["[F]or any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and [Uber] agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law" and "[S]everance of the unenforceable provision [of the PAGA Waiver] shall have no impact whatsoever on the Arbitration Provision or the [p]arties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision"] *and Seifu*, 2023 WL 2705285 at p. *2 ["for any claim brought on a private attorney general basis, including under the California PAGA, both you and Lyft agree that any such dispute shall be resolved in arbitration on an individual basis only . . . ."] *with* 1-CT-142, § 15.3, subd. (v) ["If the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Arbitration Provision; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempts to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction."].

At the time Adolph entered into his arbitration agreement with Uber (the relevant date for determining the contracting parties' intent), the only possible meaning of the contractual requirement that "representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction" was that *all* components of plaintiffs' unitary PAGA claim must be litigated rather than arbitrated. No other construction could have been envisioned at the time. Consequently, as Adolph has previous explained, the Court of Appeal on remand should be instructed to determine based on its de novo review of the contract language whether the parties intended to require arbitration of any component of Adolph's "representative" PAGA action.

Dated: April 26, 2023

Respectfully submitted,

Michael Rubin
Robin S. Tholin
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108

Aashish Y. Desai
Adrianne De Castro
DESAI LAW FIRM, P.C.
3200 Bristol Ave., Suite 650
Costa Mesa, CA 92626

Andrew P. Lee
David Borgen, Of Counsel
Mengfei Sun
GOLDSTEIN, BORGEN, DARDARIAN & HO
155 Grand Ave., Suite 900
Oakland, CA 94612

By: /s/ Michael Rubin
Michael Rubin
Attorneys for Plaintiff-Respondent Erik Adolph

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(d)(2) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 1,933 words, as counted by Microsoft Word.

Date: April 26, 2023

By: */s/Michael Rubin*
Michael Rubin

PROOF OF SERVICE

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 26, 2023, I served the following document(s):

RESPONDENT'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES

By Filing via TrueFiling: I filed such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service pursuant to CRC 8.212(b)(1), (c), as follows:

ADDRESSEE	**PARTY**
Anthony G. Ly (228883) Sophia B. Collins (289318) Andrew M. Spurchise (245998) LITTLER MENDELSON, P.C. 2049 Century Park East Fifth Floor Los Angeles, California 90067 Telephone: (310) 553-0308 Facsimile: (310) 553-5583 ALy@littler.com	Attorneys for Defendant/Appellant
Theane D. Evangelis (243570) Blaine H. Evanson (254338) Bradley J. Hamburger (266916) GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue Los Angeles, California 90071 Telephone: (213) 229-7000 Facsimile: (213) 229-7520 TEvangelis@gibsondunn.com	Attorneys for Defendant/Appellant

By First-Class Mail: I am familiar with Altshuler Berzon LLP's practice of collection and processing correspondence for mailing with the United States Postal Service, and I placed a true copy thereof, via U.S. Mail enclosed in a sealed envelope, postage pre-paid, addressed as follows:

Hon. Kirk Nakamura
Judge Presiding
Orange County Superior Court
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed April 26, 2023, at San Francisco, California.

J Perley

Jean Perley

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ADOLPH v. UBER TECHNOLOGIES**
Case Number: **S274671**
Lower Court Case Number: **G059860**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mrubin@altber.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Adolph Supp Authorities Brief Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
Michael Rubin Altshuler Berzon, LLP 80618	mrubin@altber.com	e-Serve	4/26/2023 5:24:02 PM
Patrick Fuster Gibson, Dunn & Crutcher LLP 326789	PFuster@gibsondunn.com	e-Serve	4/26/2023 5:24:02 PM
Theodore Boutrous Gibson Dunn & Crutcher LLP 132099	tboutrous@gibsondunn.com	e-Serve	4/26/2023 5:24:02 PM
Nicole Welindt Office of the Attorney General 330063	nicole.welindt@doj.ca.gov	e-Serve	4/26/2023 5:24:02 PM
Theane Evangelis Gibson Dunn & Crutcher, LLP 243570	tevangelis@gibsondunn.com	e-Serve	4/26/2023 5:24:02 PM
Jeffrey Raskin Greines, Martin, Stein & Richland 223608	jraskin@gmsr.com	e-Serve	4/26/2023 5:24:02 PM
Apalla Chopra O'Melveny & Myers 163207	achopra@omm.com	e-Serve	4/26/2023 5:24:02 PM
Aileen Mcgrath Akin Gump Strauss Hauer & Feld LLP 280846	AMcGrath@akingump.com	e-Serve	4/26/2023 5:24:02 PM
Fred Hiestand Attorney at Law 44241	fhiestand@aol.com	e-Serve	4/26/2023 5:24:02 PM
Stephen Duvernay	steve@benbrooklawgroup.com	e-	4/26/2023

Benbrook Law Group, PC 250957		Serve	5:24:02 PM
Michael Rubin Altshuler Berzon, LLP 80618	mrubin@altshulerberzon.com	e-Serve	4/26/2023 5:24:02 PM
Cynthia Rice California Rural Legal Assistance, Inc. 87630	crice@crla.org	e-Serve	4/26/2023 5:24:02 PM
Jamin Soderstrom Soderstrom Law PC 261054	jamin@soderstromlawfirm.com	e-Serve	4/26/2023 5:24:02 PM
Archis Parasharami Mayer Brown LLP 321661	aparasharami@mayerbrown.com	e-Serve	4/26/2023 5:24:02 PM
Jamin Soderstrom Soderstrom Law Firm 261054	diana@soderstromlawfirm.com	e-Serve	4/26/2023 5:24:02 PM
Sophia Behnia Littler Mendelson, P.C. 289318	sbehnia@littler.com	e-Serve	4/26/2023 5:24:02 PM
File Clerk Goldstein,Borgen,Dardarian, Ho	efile@gbdhlegal.com	e-Serve	4/26/2023 5:24:02 PM
Andrew Lee Goldstein Borgen Dardarian & Ho 245903	alee@gbdhlegal.com	e-Serve	4/26/2023 5:24:02 PM
Alden Parker Fisher Phillips 196808	aparker@fisherphillips.com	e-Serve	4/26/2023 5:24:02 PM
Andrew Spurchise Littler Mendelson PC 245998	aspurchise@littler.com	e-Serve	4/26/2023 5:24:02 PM
Mengfei Sun Goldstein Borgen Dardarian & Ho 328829	msun@gbdhlegal.com	e-Serve	4/26/2023 5:24:02 PM
Aashish Desai Desai Law Firm, P.C.	aashish@desai-law.com	e-Serve	4/26/2023 5:24:02 PM
Michael Singer Cohelan Khoury & Singer 115301	msinger@ckslaw.com	e-Serve	4/26/2023 5:24:02 PM
Vernica MelNdez California Rural Legal Assistance Foundation 294106	vmelendez@crlaf.org	e-Serve	4/26/2023 5:24:02 PM
Anthony Ly Littler Mendelson 228883	aly@littler.com	e-Serve	4/26/2023 5:24:02 PM
Lisa Ramon Akin Gump Strauss Hauer & Feld LLP	lramon@akingump.com	e-Serve	4/26/2023 5:24:02 PM
Aashish Desai Desai Law Firm PC 187394	sonia@desai-law.com	e-Serve	4/26/2023 5:24:02 PM

Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	4/26/2023 5:24:02 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	4/26/2023 5:24:02 PM
BENJAMIN SHATZ Manatt Phelps & Phillips LLP 160229	bshatz@manatt.com	e-Serve	4/26/2023 5:24:02 PM
David Borgen Goldstein, Demchak, Baller, Borgen, Dardarin & Ho 099354	dborgen@gbdhlegal.com	e-Serve	4/26/2023 5:24:02 PM
Robin Tholin 344845	rtholin@altber.com	e-Serve	4/26/2023 5:24:02 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/26/2023

Date

/s/Michael Rubin

Signature

Rubin, Michael (80618)

Last Name, First Name (PNum)

Altshuler Berzon LLP

Law Firm