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June 22, 2022

Chief Justice Tani Gorre Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Defendant/Appellant's Supplemental Letter Brief in Adolph v. Uber Technologies, Inc.
Supreme Court Case No.: S274671

Dear Chief Justice and Associate Justices:

On June 15, 2022, the U.S. Supreme Court issued its decision in *Viking River Cruises, Inc. v. Moriana*, ___ S.Ct. ___, 2022 WL 2135491 (Case No. 20–1573) ("*Viking River*"). *Viking River* held that (1) the Federal Arbitration Act ("FAA") applies to an agreement to arbitrate a claim for civil penalties under the California Labor Code Private Attorneys General Act ("PAGA"); (2) the FAA preempts the state-law rule against "splitting" a PAGA claim into an individual component involving a plaintiff's alleged Labor Code violations and a non-individual component involving other individuals' alleged violations; (3) the FAA requires state courts to enforce agreements to arbitrate individual PAGA claims; and (4) a plaintiff lacks standing to pursue a PAGA claim when his individual PAGA claim has been compelled to arbitration. Because the Court of Appeal's affirmance of the trial court's denial of a petition for compel arbitration conflicts with *Viking River* and involves significant issues of prevalent importance, Defendant/Appellant Uber Technologies, Inc. ("Uber") respectfully requests that this Court grant its Petition for Review and transfer the matter to the Court of Appeal to apply *Viking River*. See Cal. Rules of Court, rule 8.528(d).

The *Viking River* Decision

In *Viking River*, the U.S. Supreme Court addressed whether the FAA preempts the rules regarding PAGA and enforcement of arbitration agreements that this Court established in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348. *Viking River's* holdings require the granting of Uber's motion to compel arbitration here:

To start, contrary to this Court's decision in *Iskanian*, *Viking River* held that the FAA applies to PAGA claims because "disputes resolved in PAGA actions" satisfy the requirement in section 2 of the FAA that the dispute "'arise out of' the parties' contractual relationship." 2022 WL 2135491, at *7 n.4. That remains true, *Viking River* explained, "regardless of whether a PAGA action is in some sense also a dispute between an employer and the State" because "nothing in the FAA categorically exempts claims belonging to sovereigns." *Ibid.*

Next, *Viking River* held that “the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.” *Id.* at *11. By joining the claims together, *Iskanian* had the effect of “coerc[ing]” parties “into giving up a right they enjoy under the FAA”—the right to determine, by consent, “which claims are subject to arbitration.” *Id.* at *10.

Relatedly, the preemption of this state joinder rule meant that, under the FAA, the defendant was “entitled to compel arbitration of [the] individual claim.” *Id.* at *11. The defendant in *Viking River* moved to compel the individual component of the PAGA claim, which the U.S. Supreme Court held must be arbitrated because that portion of the PAGA waiver was severable from the agreement’s wholesale waiver of the right to pursue a PAGA claim. *See ibid.*

Finally, *Viking River* held that because “PAGA provides no mechanism to enable a court to adjudicate non-individual claims once an individual claim has been committed to a separate proceeding,” “the correct course is to dismiss [the] remaining claims.” *Id.* at *11.

The Court of Appeal’s Decision

After Plaintiff/Respondent Erik Adolph (“Adolph”) filed an amended complaint raising a PAGA claim, Uber petitioned for an order compelling arbitration. The trial court denied that petition, and the Court of Appeal affirmed. The judgment below conflicts with *Viking River* in multiple ways:

The Court of Appeal held that while the parties’ arbitration agreement was governed by the FAA, “a PAGA claim is outside the FAA because it is not a dispute between an employer and an employee arising out of an arbitration provision in the employment agreement.” *Adolph v. Uber Techs., Inc.* (Apr. 11, 2022) 2022 WL 1073583, at *2–3, citing *Iskanian*, 59 Cal.4th at pp. 386–387. *Viking River* held the opposite. *See* 2022 WL 2135491, at *7 n.4.

The Court of Appeal also rejected Uber’s argument that *Iskanian* “improperly obstruct[ed] the FAA’s objective to promote arbitration.” *Adolph*, 2022 WL 1073583, at *4. Again, *Viking River* held that the PAGA joinder rule established in *Iskanian* “is incompatible with the FAA.” 2022 WL 2135491 at *11.

On this basis, the Court of Appeal affirmed the denial of Uber’s petition to compel arbitration. But *Viking River* requires the enforcement of parties’ arbitration agreements in PAGA actions. Contrary to the Court of Appeal’s conclusion, *Viking River* instructs that the parties’ agreement to arbitrate individual claims and disputes, which would include Adolph’s individual classification dispute, must be compelled to arbitration. 2022 WL 2135491 at *2, citing *Lamps Plus v. Varela* (2019) 139 S.Ct. 1407, 1416 (“[t]his prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine ‘the issues subject to arbitration’ and ‘the rules by which they will arbitrate.’”). Additionally, like the arbitration agreement at issue in *Viking River*, *id.* at *1, 11, the agreement here calls for arbitration of individual PAGA claims to the extent that a wholesale PAGA waiver is not enforceable: “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" (Clerk's Transcript, Volume 6, page 1574 ("6-CT-1574.")) That agreement must be enforced under *Viking River*.

* * *

This Court should grant the Petition for Review and transfer the matter to the Court of Appeal to reconsider its decision in light of *Viking River*. *Viking River*, when applied in this case, plainly entitles Uber to compel arbitration of Adolph's individual claims, including his individual misclassification dispute and individual PAGA claim. See 2022 WL 2135491, at *11. The Court of Appeal, in fact, recognized that *Viking River* could affect its decision, although it felt bound to follow *Iskanian* until the U.S. Supreme Court "directly overrules it." *Adolph*, 2022 WL 1073583, at *4–5. The Supreme Court has now done exactly that. The disposition that best preserves judicial resources to resolve issues of widespread importance therefore would be a grant-and-transfer order under California Rules of Court, rule 8.528(d).

Respectfully submitted,



Anthony G. Ly
Shareholder

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I, the undersigned, state:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is LITTLER MENDELSON, P.C., 333 Bush Street, 34th Floor, San Francisco, California 94104.

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**SUPPLEMENTAL LETTER BRIEF IN ADOLPH V. UBER
TECH.**

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Maria R. Flores

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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TECHNOLOGIES**

Case Number: **S274671**

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Date

/s/Sophia B. Collins

Signature

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