Filed 11/2/16 Eaton v. Big League Dreams Manteca CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

DEREK EATON, Plaintiff and Respondent, v. BIG LEAGUE DREAMS MANTECA, LLC, Defendant and Appellant.	C079374 (Super. Ct. No. 39201400318301CUOESTK)

Derek Eaton brought a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) against his former employer, Big League Dreams Manteca, LLC (BLD). BLD moved to compel arbitration of Eaton's claims based on an arbitration agreement Eaton signed upon becoming a BLD employee. The trial court denied the motion.

BLD appeals, arguing that the trial court erred by denying the motion in reliance upon the anti-waiver rule announced in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). We agree. Unlike the arbitration agreement in *Iskanian*, the agreement before us does not contain an express waiver of the right to bring

a representative claim. Accordingly, we conclude that *Iskanian*'s anti-waiver rule is inapplicable.

The parties disagree as to whether representative PAGA claims can *ever* be sent to arbitration under *Iskanian*. We decline to resolve this question, which *Iskankian* arguably leaves open, as we conclude that other questions must be answered first: Does the arbitration agreement encompass representative PAGA claims? And, perhaps more fundamentally, who should decide whether the parties agreed to arbitrate representative PAGA claims? The trial court does not appear to have considered, and the parties have not addressed, these threshold issues. We shall therefore reverse and remand so that the parties may address the scope of their agreement to arbitrate and the trial court may decide, in the first instance, on the particular facts of this case, who—the court or the arbitrator—has the power to decide whether Eaton's representative PAGA claims are arbitrable.

I. BACKGROUND

Eaton worked for BLD in Manteca, California. On November 7, 2014, Eaton brought a representative action under the PAGA for failure to pay minimum wage, failure to provide accurate wage statements, failure to maintain accurate wage statements, failure to timely pay wages, violation of Labor Code section 450, and failure to pay wages upon discharge (together, PAGA claims). Eaton's complaint also asserted individual causes of action for retaliation, wrongful termination in violation of public policy, tortious interference, violation of Labor Code section 226, and violation of Labor Code section 1198.5 (together, non-PAGA claims).

The complaint alleges that Eaton was hired as a "front gate" employee sometime in 2007, and promoted to the position of umpire several months later. As pertinent here, the complaint alleges that BLD terminated Eaton on October 1, 2014, for complaining of unsafe working conditions. The complaint further alleges that, on October 9, 2014, BLD "caused Eaton to be suspended from all events sponsored or sanctioned by the United

States Specialty Sport Association ('USSSA')." "At that time," the complaint continues, "Eaton had both an existing business relationship with the USSSA and a probability of future economic benefit from a business relationship with USSSA, namely, as a paid umpire at USSSA events."

On December 10, 2014, BLD's counsel sent Eaton's counsel a letter enclosing a copy of Eaton's employment agreement. The agreement contains an arbitration provision stating: "Any claim by you or BLD relating to, or any controversy arising from, your employment with BLD or the termination thereof shall, on the written request of you or BLD, be submitted to arbitration and be governed by the Employment Dispute Resolution Rules of the American Arbitration Association (AAA) [(AAA Employment Rules)]. The arbitration shall be conducted at the AAA office nearest the BLD Sports Park at which you were last working unless we mutually agree on an alternate location. Such arbitration shall be the exclusive remedy of you and BLD and the award of the arbitrator shall be final and binding." The letter also asserts that Eaton resigned his position as a front gate employee to become an umpire, thereby acquiring the status of an independent contractor, rather than an employee.

On December 11, 2014, Eaton filed a first amended complaint (FAC) asserting the same causes of action as the initial complaint, but omitting the allegation that Eaton was originally hired as a "front gate employee." Instead, the FAC alleges that Eaton was "employed as an umpire" at all relevant times.

BLD filed a motion to compel arbitration on January 21, 2015. In the motion, BLD argued that all of Eaton's causes of action arise out of his employment with BLD, and were therefore covered by the arbitration provision. Eaton opposed the motion, arguing that PAGA claims are not subject to arbitration under *Iskanian*.

The trial court heard argument on BLD's motion to compel arbitration on March 13, 2015. In anticipation of the hearing, the trial court issued a tentative ruling granting the motion to compel arbitration of Eaton's non-PAGA claims, denying the motion to

compel arbitration of Eaton's PAGA claims, and staying the PAGA claims pending arbitration of the non-PAGA claims. The tentative ruling explains: "In *Iskanian*, the Supreme Court held that the waiver of the employees' right to representative action under PAGA violated public policy, the FAA does not preempt state law as to unenforceability of waivers of PAGA, and PAGA does not violate the separation of powers doctrine. Thus, this Court is excising the PAGA causes of action from the binding arbitration requirement in this action." [1] (Italics added.) The trial court acknowledged the parties' dispute as to whether or not Eaton was an "employee" during the relevant period, stating: "the arbitrator will decide that as a threshold issue to the causes of action that will be arbitrated."

At the hearing on the motion, Eaton dismissed all of the non-PAGA claims, except his claim for tortious interference. After hearing oral argument, the trial court confirmed the tentative ruling and ordered supplemental briefing on the question whether the PAGA claims should be stayed pending arbitration of the claim for tortious interference.

The parties submitted supplemental briefs. In its supplemental brief, BLD argued that Eaton's status as an "employee" or "aggrieved employee" was a "threshold issue" that should be decided by the arbitrator prior to litigation of the PAGA claims in the trial court. Eaton, for his part, argued that none of his remaining claims were subject to arbitration, and none should be stayed, as the tortious interference "does not presume any employment relationship (only an '*economic* relationship')."

On March 17, 2015, the trial court issued a subsequent tentative ruling, stating: "The Court now questions whether the . . . cause of action for tortious interference with prospective economic advantage is even subject to the arbitration agreement at all." The

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[1] We shall discuss *Iskanian* at greater length momentarily.

trial court noted that the FAC alleges that BLD " 'intentionally interfered with [Eaton's] prospective economic advantage by causing Eaton to be suspended permanently from any event sponsored or sanctioned by the [USSSA].' " The trial court continued, "it appears the [tortious interference] cause of action is premised on events occurring after [Eaton's] termination, and if that is a correct reading of the [tortious interference] cause of action, it would thereby fall outside of the Arbitration Clause." Accordingly, the trial court invited oral argument on the question whether Eaton's tortious interference claim was rooted in his employment relationship with BLD.

Following oral argument, the trial court denied the motion to compel arbitration, stating: "[Eaton's tortious interference] cause of action is independent of his establishing his employment with [BLD], such that the cause of action is not subject to mandatory arbitration and there is nothing to stay. Thus, all causes shall proceed forthwith in the Superior Court." BLD filed a timely notice of appeal.[2]

II. DISCUSSION

A. Standard of Review

We review the trial court's order denying BLD's motion to compel arbitration independently. " 'We have no need to defer, because we can ourselves conduct the same analysis,' which 'involves a purely legal question or a predominantly legal mixed question.' [Citation.]" (*Mercury Ins. Group. v. Superior Court* (1998) 19 Cal.4th 332, 348-349; see also *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71 [appellate courts review the denial of a petition to compel arbitration de novo].)

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[2] After the close of briefing, BLD filed a "motion for consideration of new, novel authority and/or leave to submit supplemental briefing" asking us to consider an entirely new defense theory based on a trial court's order in *Daniel Dell, et al. v. Servicemaster Global Holdings, Inc.*, (Super. Ct. Alameda County, 2016, No. RG15768384). We deny the motion as unnecessary in light of our disposition of the appeal.

B. The PAGA and Iskanian

On appeal, BLD contends the trial court erroneously relied upon *Iskanian* to deny the motion to compel arbitration of Eaton's PAGA claims. BLD's contention requires an understanding of the PAGA and our Supreme Court's opinion in *Iskanian*. Accordingly, we begin with an overview of the applicable law.

The PAGA was enacted to improve enforcement of our labor laws. (See *Caliber Bodyworks, Inc. 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"].)[3] Under the 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*).) "Of the civil penalties recovered, 75 percent goes to the [LWDA], leaving the remaining 25% for the 'aggrieved employees.' " (*Id.* 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 the 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

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[3] The PAGA was enacted in response to two perceived problems: (1) Many Labor Code provisions were unenforced because they only provided for punishment in the form of criminal misdemeanors, with no civil penalties attached, and district attorneys rarely investigated Labor Code violations; and (2) even where the Labor Code did provide civil penalties, the Labor and Workforce Development Agency (LWDA) did not have the resources to pursue every violation. (*Iskanian, supra,* 59 Cal.4th at pp. 379-380.)

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." (*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.)

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, 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 the 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 (*ibid*.), and the California Supreme Court granted review and reversed. (*Id*. at pp. 362, 392.)

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 found 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 pp. 381, 386-387.) 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 the 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.)

Next, the court considered whether the rule prohibiting waiver of representative PAGA claims (the anti-waiver rule) was preempted by the Federal Arbitration Act (FAA). (*Iskanian, supra*, 59 Cal.4th at pp. 384-389.) Relying on the fact that the PAGA serves as a mechanism by which *the state* seeks to enforce its labor laws and collect monetary penalties, 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.) Accordingly, the court concluded that, "California's public policy prohibiting waiver of PAGA claims, whose sole purpose is to vindicate the [LWDA]'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," 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.)

C. Arbitrability of Representative PAGA Claims

BLD contends the trial court erred by denying the motion in reliance upon the anti-waiver rule announced in *Iskanian*. We agree. Unlike the arbitration agreement in *Iskanian*, the parties' agreement does not contain an express waiver of the right to bring a representative claim. We therefore conclude that *Iskanian*'s anti-waiver rule does not apply here.

Having so concluded, we next consider whether *Iskanian* nevertheless prohibits arbitration of Eaton's representative PAGA claims. BLD contends *Iskanian* leaves open the question whether representative PAGA claims should be arbitrated or litigated. Eaton responds, and the trial court apparently believed, that representative PAGA claims can *never* be sent to mandatory arbitration under *Iskanian*. Neither party's interpretation of *Iskanian* is unreasonable.

On the one hand, *Iskanian* suggests that representative PAGA claims are *not* subject to mandatory arbitration. For example, *Iskanian* says, "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." (*Iskanian, supra,* 59 Cal.4th at p. 386.) Rather, "[i]t 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." (*Id*. at pp. 386-387.) *Iskanian* also says that the FAA "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." (*Id*. at p. 388.) And Justice Chin's concurring opinion takes issue with "the majority's view that the FAA permits either California or its courts to declare private agreements to arbitrate PAGA claims categorically unenforceable." (*Id*. at p. 396 (conc. opn. of Chin, J.).)

"Based on this language," one court of appeal has observed, "one could reasonably conclude that a court could never *compel* arbitration of a PAGA claim unless *the state*, as

opposed to the individual plaintiff, had entered into an arbitration agreement with the defendant." (*Garden Fresh Restaurant Corp. v. Superior Court* (2014) 231 Cal.App.4th 678, 688, fn. 3 (*Garden Fresh*).) Indeed, one federal district court appears to have reached precisely such a conclusion. (See *Valdez v. Terminix International Company Limited Partnership* (C.D. Cal. July 14, 2015, No. CV 14-09748 DDP (Ex)) 2015 U.S. Dist. Lexis 92177, pp. 27-28 ["As a matter of logic, if the claim belongs primarily to the state, it should be the state and not the individual defendant that agrees to waive the judicial forum"].)[4]

On the other hand, *Iskanian* suggests that representative PAGA claims *can* be arbitrated. As noted, in remanding the case, the court stated that the employer "must answer the representative PAGA claims in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration." (*Iskanian, supra*, 59 Cal.4th at p. 391.) Thus, the court appears to have left open the possibility that the parties might have agreed to arbitration of representative PAGA claims. Indeed, it would be incongruous to raise the possibility of arbitration if the court intended to foreclose it.

Against this background, we conclude that the question whether representative PAGA claims can ever be subject to mandatory arbitration remains unsettled. (See *Garden Fresh, supra,* 231 Cal.App.4th at p. 689, fn. 4 ["the decision in *Iskanian, supra,* 59 Cal.4th at pages 367-387, raises a question as to whether [the plaintiff's] PAGA claims can be sent to arbitration at all"].) We need not resolve this question, at least not today, because we conclude that other questions must be answered first: Did the parties

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[4] Eaton finds additional support for the proposition that representative PAGA claims are not subject to arbitration in *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119 and *Williams v. Superior Court* (2015) 237 Cal.App.4th 642. Neither of these cases directly addresses the question before us.

agree to arbitrate representative PAGA claims? And who should decide the scope of their agreement?

D. Remand is Necessary to Determine Whether the Parties Agreed to Arbitrate Representative PAGA Claims and Whether They Delegated the Power to Decide Arbitrability to the Arbitrator

Arbitration is a matter of contract. (*American Express Co. v. Italian Colors Restaurant* (2013) ___ U.S. ___ [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417, 421] [it is an "overarching principle that arbitration is a matter of contract"]; accord, *Oxford Health Plans LLC v. Sutter* (2013) ___ U.S. ___ [133 S.Ct. 2064, 2066, 186 L.Ed.2d 113, 116].) As with any contract, the parties may structure their arbitration agreement as they see fit: They may limit the issues they choose to arbitrate, define the rules under which arbitration will proceed, designate who will serve as the arbitrator and even limit with whom they choose to arbitrate. (*Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 559 U.S. 662, 683-684 (*Stolt-Neilsen*); see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 626 ["as with any other contract, the parties' intentions control"]; *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1096 [same].) As our Supreme Court recently explained, when it comes to the threshold question of "who decides," "no universal rule allocates this decision in all cases to either arbitrators or courts. Rather, who decides is in the first instance a matter of agreement, with the parties' agreement subject to interpretation under state contract law." (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 241.)

1. Does the arbitration agreement encompass representative PAGA claims?

The arbitration agreement does not specifically reference representative or class claims. As noted, the agreement provides, in part, "Any claim *by you or BLD* relating to, or any controversy arising from, *your employment* with BLD or the termination thereof shall, on the written request of you or BLD, be submitted to arbitration and be governed by the [AAA Employment Rules]." (Italics added.) On remand, the parties should

address whether this language can be reasonably interpreted as requiring arbitration of representative PAGA claims. (See *Stolt-Nielsen, supra,* 559 U.S. at p. 684 ["a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so"]; see also *Nelsen v. Legacy Partners Residential, Inc*. (2012) 207 Cal.App.4th 1115, 1128 ["consent to class arbitration cannot be inferred solely from the agreement to arbitrate, and the decision cannot be based on the court's view of sound policy regarding class arbitration but must be discernible in the contract itself"].) We express no opinion on this question, which raises potential factual issues regarding the parties' intent and may or may not require the consideration of extrinsic evidence. (See *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 [" 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties"].) These issues are more appropriately addressed to the trier of fact in the first instance. Before reaching the question whether the parties agreed to arbitrate representative PAGA claims, however, they may need to address yet another threshold issue: Who should decide the scope of the parties' arbitration agreement?

2. Who should decide whether the parties agreed to arbitrate representative PAGA claims?

"[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) ___ U.S. ___ [134 S.Ct. 1198, 1206, 188 L.Ed.2d 220, 228] 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 (*Rent-A-Center*).) "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; see also *Sandquist v*. *Lebo Automotive, supra,* 1 Cal.5th at p. 243 ["No universal one-size-fits-all rule allocates that question to one decision maker or the other in every case. Rather, 'who decides' is a matter of party agreement"].) "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.' [Citation.]" (*Pinela v*. *Neiman Marcus Group, Inc*. (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, 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 v*. *CantorCO2e, L.P*. (2012) 203 Cal.App.4th 771, 787 (*Ajamian*).)

Here, the agreement incorporates rule 6, subdivision (a) of the AAA Employment Rules, which provide in 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." [5]

The parties' incorporation of the AAA Employment Rules raises the possibility that they intended to submit questions of arbitrability to the 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].) [6]

Neither the trial court nor the parties appear to have asked the threshold question of "who decides" arbitrability. We note that the question of "who decides" raises

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[5] We take judicial notice of the AAA Employment Rules on our own motion. (See Evid. Code, § 452, subd. (h) [authorizing judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy']; Evid. Code, § 459, subd. (a) ["reviewing court may take judicial notice of any matter specified in Section 452"]; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 719, fn. 4 ["We may properly take judicial notice of the AAA's rules in resolving this dispute"].)

[6] The question whether the incorporation by reference of AAA Rules constitutes clear and unmistakable evidence of the parties' intent is currently before our Supreme Court. (*Universal Protection Service, LP v. Superior Court* (2015) 239 Cal.App.4th 697, review granted Oct. 28, 2015, S229442 (*Parnow*); see also *Universal Protection Service, LP v. Superior Court* (2015) 234 Cal.App.4th 1128, review granted June 11, 2015, S225450 (*Franco*).)

potential factual issues concerning the parties' expectations and the circumstances surrounding the making of their agreement, which may or may not require the consideration of extrinsic evidence. (See *Rent-A-Center, supra,* 561 U.S. at p. 69, fn. 1 [explaining that the "clear and unmistakable" requirement "is an 'interpretive rule,' based on an assumption about the parties' expectations"].) A trier of fact is in the best position to consider such issues. [7] (Accord, *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414 [where enforceability of an arbitration clause depends on which of two conflicting factual accounts is to be believed, "the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination"]; and see *Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1258, fn. 4 ["[Petitioner] asks this court to determine whether the arbitration clause in the account agreements is unconscionable. It is not our province, however, to decide this issue in the first instance"].) We therefore remand to give the trial court the opportunity to address the threshold question of "who decides." [8]

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[7] We note further that the question of "who decides" may raise a subsidiary question as to who decides whether the delegation clause is enforceable. We direct the trial court's attention to *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551 for guidance on this issue.

[8] At oral argument, BLD insisted that an arbitrator should decide whether Eaton was an "employee," and if so, whether he was an "aggrieved employee" within the meaning of PAGA. (Labor Code, § 2699, subd. (a).) Although BLD raised a similar argument in its appellate papers, the argument was presented as an alternative to BLD's primary theory that *Iskanian* does not foreclose arbitration of representative PAGA claims. We need not reach BLD's alternative argument, given our resolution of its primary theory on appeal. We note, however, that the Court of Appeal for the Second District, Division 7, considered and rejected a similar argument in *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 419-421.

III. DISPOSITION

The trial court's order denying Big League Dreams Manteca, LLC's petition to compel arbitration is reversed. On remand, the trial court is directed to conduct such further proceedings as may be required to determine whether the parties' arbitration agreement encompasses representative PAGA claims and whether incorporation of the AAA Employment Rules constitutes clear and unmistakable evidence of their intent to delegate questions of arbitrability to the arbitrator. If the trial court answers the latter question in the affirmative, the court shall stay the entire action pending the arbitrator's determination of the scope of his or her jurisdiction to decide Eaton's representative PAGA claims. The parties shall bear their own costs on appeal.

/S/

RENNER, J.

We concur:

/S/

NICHOLSON, Acting P. J.

/S/

MURRAY, J.