

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 29 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CARLOS RIVAS, in his capacity as Private
Attorney General Representative,

Plaintiff-counter-
defendant-Appellant,

v.

COVERALL NORTH AMERICA, INC.,

Defendant-counter-claimant-
Appellee.

No. 22-56192

D.C. No. 8:18-cv-01007-JGB-KK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted February 22, 2024
San Francisco, California

Before: BYBEE, FISHER,** and LEE, Circuit Judges.

In November 2007, Carlos Rivas entered into a franchise agreement with Coverall North America, Inc., a purveyor of cleaning franchises. In June 2018,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

Rivas brought a Private Attorneys General Act (PAGA) claim against Coverall, alleging that Coverall misclassified him and other similarly situated individuals as independent contractors instead of employees. The district court initially denied Coverall's motion to compel arbitration of Rivas' claim on an individual basis, which the Ninth Circuit affirmed. *Rivas v. Coverall N. Am., Inc.*, 842 F. App'x 55 (9th Cir. 2021).

But in light of *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), the Supreme Court vacated and remanded that determination for further consideration. *Coverall N. Am., Inc. v. Rivas*, 142 S. Ct. 2859 (2022). *Viking River* held that arbitration agreements could divide "PAGA actions into individual and non-individual claims." 596 U.S. at 662. Post-*Viking River*, individual PAGA claims can be compelled to arbitration while non-individual PAGA claims remain in federal court. The district court then granted Coverall's renewed motion to compel Rivas' individual PAGA claim to arbitration, and dismissed Rivas' bifurcated non-individual PAGA claim for lack of statutory standing. Rivas now appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings.

1. Waiver. We affirm the district court's determination that Coverall did not waive its right to compel arbitration through litigation conduct. The right to arbitrate, like any other contractual right, may be waived. A party asserting waiver

must demonstrate that its opponent (1) knew of an “existing right to compel arbitration” and (2) engaged in “intentional acts inconsistent with that existing right.” *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023). We review a district court’s determination as to whether a party waived its right to arbitrate de novo. *Id.*

In response to Rivas’ assertion of waiver, Coverall successfully invokes the doctrine of futility. “The doctrine of futility establishes that a party unable to assert a right due to the prevailing state of the law is excused from conduct otherwise constituting waiver.” *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 479 (9th Cir. 2023). We conclude that it would have been futile for Coverall to move to compel Rivas’ individual PAGA claim to arbitration before the Supreme Court’s decision in *Viking River*.

When this case was filed in June 2018, California courts of appeal had consistently interpreted the California Supreme Court’s opinion in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), to create indivisibility between individual and non-individual PAGA claims. *See, e.g., Moriana v. Viking River Cruises, Inc.*, 2020 WL 5584508, at *2 (Cal. Ct. App. Sept. 18, 2020), *rev’d and remanded*, 596 U.S. 639. Under the so-called *Iskanian* rule, parties could not arbitrate a plaintiff’s individual PAGA claims without also arbitrating their non-individual PAGA claims. Only after *Viking River*—where the Supreme Court

struck down that rule because it “coerces parties to opt for a judicial forum” and is thus “incompatible” with the Federal Arbitration Act—could Rivas’ PAGA claim have been bifurcated into an arbitrable individual PAGA claim and non-arbitrable non-individual PAGA claim. 596 U.S. at 662. Because it would have been futile for Coverall to compel arbitration of Rivas’ individual PAGA claim until the Supreme Court decided *Viking River* in 2022, Rivas cannot invoke waiver.

2. Effective Vindication. We affirm the district court’s determination that the agreement does not impermissibly prohibit the effective vindication of Rivas’ rights. The arbitration provision of the parties’ franchise agreement includes a cost-splitting clause and delegates the issue of arbitrability to an arbitrator. Before filing this action, Rivas first filed his PAGA claim in arbitration with the American Arbitration Association (AAA). The AAA requested a \$4,000 initial deposit, which Rivas states he could not pay. As a result, the AAA closed Rivas’ arbitration case. On appeal, Rivas argues that he “cannot effectively vindicate his rights in arbitration” because the delegation clause “purported to require cost-splitting just to appoint an arbitrator to decide gateway issues of arbitrability.”

The “effective vindication” exception to the FAA is a judge-made doctrine under which courts may “invalidate, on ‘public policy’ grounds, arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies.’” *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235

(2013) (alterations in original) (emphasis omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). The Supreme Court has stated that this exception may “perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.” *Id.* at 236 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)). But this exception “does not extend to state statutes” and so does not apply to Rivas’ PAGA claim. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013).

Rivas asserts that cases like *Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493 (Ct. App. 2013), have extended this doctrine to California state law claims. But *Roldan*—and several other cases cited by Rivas—actually rely on California’s contract doctrine of unconscionability. And Rivas has not sufficiently raised that argument on appeal.

3. Non-Individual Claim. Finally, we reverse the district court’s dismissal of Rivas’ non-individual PAGA claim. The district court dismissed that claim for lack of statutory standing in reliance on *Viking River*. *See* 596 U.S. at 663 (noting that, once an individual PAGA claim was committed to arbitration, the plaintiff likely “lack[ed] statutory standing to continue to maintain her non-individual claims in court”). But, as we discussed in *Johnson v. Lowe’s Home Centers, LLC*, 93 F.4th 459, 464 (9th Cir. 2024), California’s Supreme Court in *Adolph v. Uber*

Technologies, Inc., 532 P.3d 682 (Cal. 2023), has since clarified that interpretation of California law. Thus, under *Adolph*, Rivas retains statutory standing to bring his bifurcated non-individual PAGA claim. *Id.* at 691 (“Standing under PAGA is not affected by enforcement of an agreement to adjudicate a plaintiff’s individual claim in another forum.”).

Article III standing, however, is a separate inquiry governed by federal law. *See Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). We have not yet addressed whether plaintiffs retain Article III standing to bring bifurcated non-individual PAGA claims. Because the district court did not reach this issue, we remand for the district court to do so in the first instance. If Rivas lacks Article III standing to bring his bifurcated non-individual PAGA claim, then that claim must be dismissed.

For these reasons, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for the district court to consider whether Rivas has Article III standing to bring his non-individual PAGA claim.