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9
10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

12 19CV347249

13 ALEXANDER CHARLES and HENRY
14 MULAK,

15 Plaintiffs,

16 v.

17 VARSITY TUTORS, LLC,

18 Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
RELIEF**

COMPLEX

1 **INTRODUCTION**

2 1. Varsity Tutors LLC (“Varsity Tutors”) sells and provides private tutoring services to its
3 customers.

4 2. Plaintiffs Alexander Charles (“Charles”) and Henry Mulak (“Mulak”) seek declaratory
5 relief concerning the enforceability of certain provisions contained in a mandatory arbitration
6 agreement that they were required to sign upon commencing employment as tutors with Varsity Tutors.

7 **PARTIES**

8 3. Plaintiff Henry Mulak is a resident and citizen of California. He was employed by
9 Varsity Tutors as a tutor for five years, including three years in Santa Clara County. Mulak drove
10 throughout Santa Clara County and into surrounding areas for tutoring sessions, including as far north
11 as Palo Alto, as far east as Fremont, and as far south as Los Gatos.

12 4. Plaintiff Alexander Charles is a resident and citizen of California. He has been
13 employed by Varsity Tutors as a tutor in the greater Los Angeles area since May 2018.

14 5. Defendant Varsity Tutors LLC is a Missouri limited liability company. Varsity Tutors is
15 headquartered at 101 South Hanley Road, Suite 300, in Clayton, Missouri.

16 **JURISDICTION AND VENUE**

17 6. This Court has jurisdiction over the cause of action asserted herein because it arises out
18 of an employment relationship between Plaintiffs, who work and reside in California, and their
19 employer. Varsity Tutors has sufficient minimum contacts with the state of California and has
20 otherwise intentionally availed itself of the benefit of doing business within California so as to render
21 the exercise of jurisdiction over it by California state courts consistent with traditional notions of fair
22 play and substantial justice.

23 7. Venue is proper in this Court under Code of Civil Procedure §§ 395 and 395.5 because
24 the agreement to arbitrate was signed by Mulak, who performed substantial work under that agreement
25 in Santa Clara County.

1 **FACTUAL ALLEGATIONS**

2 **A. Background on Varsity Tutors**

3 8. Varsity Tutors provides private tutoring services for homework, exams, and
4 standardized test preparation, across a range of subject areas and grade levels. Varsity Tutors operates
5 an online platform, which individual students or their parents can use to request tutoring services.

6 9. According to Varsity Tutors’ website, varsitytutors.com, Varsity Tutors verifies
7 potential tutors’ academic background and prior teaching experience and interviews them.

8 10. At least 40,000 tutors work for Varsity Tutors nationwide. The San Francisco Bay Area
9 page of Varsity Tutors’ website advertises “personalized tutoring by top Stanford grads and others from
10 San Jose to Napa!” The site lists over 500 tutor profiles for tutors in the San Francisco Bay Area.

11 11. Varsity Tutors compensates Plaintiffs only for time spent during tutoring sessions, but
12 not for time spent traveling to and from tutoring sessions, preparing for tutoring sessions,
13 communicating with students or their parents, or scheduling and bookkeeping relating to the tutoring
14 sessions. Plaintiffs are never paid overtime, even if they work in excess of 40 hours per week and in
15 excess of 8 hours per day.

16 12. Mulak frequently drove directly from one client session to another, often needing to
17 drive a substantial distance. In one instance, Mulak spent two hours in rush hour traffic trying to travel
18 from a tutoring session in Fremont to a session in San Jose. Mulak was not compensated or reimbursed
19 for time spent driving.

20 13. Plaintiffs intend to bring a representative action under the Private Attorneys General Act
21 of 2004 (“PAGA”), Labor Code § 2699 *et seq.*, on behalf of themselves and other tutors concerning
22 Defendant’s practices related to compensation and expenses.

23 14. Varsity Tutors required Plaintiffs to agree to the Independent Contractor Agreement
24 (“the Agreement”) as a condition of their employment. A copy of the Agreement is attached hereto as
25 Exhibit A.

26 15. The Agreement contains an “Arbitration Provision” which includes a representative
27 action waiver that purports to waive Plaintiffs’ right to bring any claim related to their employment on a
28

1 representative basis: “Tutor understands and agrees that all claims covered by this Arbitration
2 Provision that Tutor may have against the Company must be brought in tutor’s individual capacity and
3 not as a plaintiff or class member in any purported class action, collective action or representative
4 action proceeding.” This waiver is unenforceable as a matter of California law.

5 16. The representative action waiver is part of an arbitration provision that requires any
6 claims to be exclusively determined by binding arbitration:

7 Both the Company and Tutor agree that any claim, dispute, and/or
8 controversy that either Tutor may have against the Company . . . or that the
9 Company may have against Tutor, arising from, related to, or having any
10 relationship or connection whatsoever with Tutor seeking an independent
11 contractor relationship with, providing independent contractor service to, or
12 other association with the Company shall be submitted to and determined
13 exclusively by binding arbitration.

14 17. The Agreement states that the scope of the arbitration provision includes all disputes
15 with the exception of, among other things, “claims brought under [t]he California Labor Code Private
16 Attorneys General Act of 2004.”

17 18. Plaintiffs now seek declarations that: (i) the above-referenced blanket prohibition on
18 bringing “representative” actions was and is void as contrary to the public policy of the State of
19 California as definitively interpreted and set forth in Labor Code § 2699 subd. (a), and illegal within the
20 meaning of California Civil Code § 1667 and California Labor Code § 432.5 as a result; (ii) there was
21 no meeting of the minds or other mutual consent in the parties’ Agreement that would require
22 Plaintiffs’ representative claims, if any, to be decided in arbitration; and (iii) this civil action or any
23 civil claim against Defendant predicated in whole or in part on this illegal contractual provision –
24 including a representative PAGA claim based in any way on this illegal provision – must now be
25 maintained in a court of law rather than in arbitration.

26 **FIRST CAUSE OF ACTION**

27 **(DECLARATORY RELIEF – CCP § 1060)**

28 19. Plaintiffs reallege and incorporate by reference the foregoing paragraphs as though fully
set forth herein.

20. When Plaintiffs were hired by Defendant, they were required to enter into the

1 Agreement.

2 21. There currently exists an actual and real controversy between Plaintiffs and Defendant
3 regarding the legality and enforceability of specific language contained in the Agreement. Clarification
4 of the parties' rights and obligations under the Agreement is both necessary and proper at this time so
5 that Plaintiffs can determine where they can and should maintain the representative claim they are
6 preparing to commence at this time.

7 22. The Agreement between the parties purports to require Plaintiffs to waive all rights to
8 pursue any dispute on a representative basis.

9 23. California Civil Code § 1667 defines "unlawfulness" as either "(1) Contrary to an
10 express provision of law; (2) Contrary to the policy of express law, though not expressly prohibited; or
11 (3) Otherwise contrary to good morals."

12 24. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014), the
13 California Supreme Court found that even if class-action waivers in arbitration agreements are
14 enforceable, where "an employment agreement compels the waiver of representative claims under the
15 PAGA, it is contrary to public policy and unenforceable as a matter of state law."

16 25. Plaintiffs now thus seek from the Court declarations that:

17 a. As a result, *inter alia*, of *Iskanian v. CLS Transportation Los Angeles, LLC*, 59
18 Cal. 4th 348 (2014), the representative action waiver in the Agreement's arbitration provision is
19 unenforceable, invalid, unconscionable, void, and voidable with respect to any claims under the
20 California PAGA;

21 b. Given, *inter alia*, the plain language of the Agreement excepting claims under
22 the California PAGA from the mandatory arbitration provision and the lack of consent of the
23 State of California to mandatory arbitration of such claims, there was and is no meeting of the
24 minds or other evidence of mutual consent that could require Plaintiffs to maintain any
25 representative PAGA claim they may bring in arbitration.

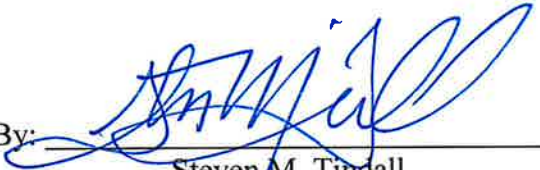
26 c. Plaintiffs may maintain a representative PAGA action in Court.

27 **PRAYER FOR RELIEF**

28 26. WHEREFORE, PLAINTIFFS pray for judgment as follows:

- i. For a declaration that the provisions in the Agreement between Plaintiffs and Defendant purporting to ban maintenance of representative PAGA actions in any forum – civil or arbitral – was and is void as against public policy and illegal;
- ii. For a declaration that there is no evidence of an intention or meeting of the minds in the Agreement that would require that Plaintiffs’ representative claims, if any, be heard and decided in arbitration rather than in civil court;
- iii. For a declaration that Plaintiffs may maintain a representative PAGA action in Court;
- iv. For reasonable costs of suit herein; and attorneys’ fees incurred pursuant to CCP § 1021.5 or to the maximum extent available by law; and
- v. For such other and further relief as the Court may deem just and proper.

Dated: May 1, 2019

By: 
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