APPENDIX

APPENDIX A

Court Of Appeal, Second Appellate District,
Division One – B309061

S272030

IN THE SUPREME COURT OF CALIFORNIA
En Banc

JADE GREEN, Plaintiff and Respondent,

v.

SHIPT, INC., Defendant and Appellant.

The petition for review was denied.

CANTIL-SAKAUYE
Chief Justice

[Filed January 19, 2022]

APPENDIX B

[Filed 10/21/2021]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

JADE GREEN,
Plaintiff and Respondent,

v.

SHIPT, INC.,
Defendant and Appellant.

B309061

(Los Angeles County Super. Ct. No. 20STCV01001)

APPEAL from an order of the Superior Court of Los Angeles County, Maurice A. Leiter, Judge. Affirmed.

Gibson, Dunn & Crutcher, Theane Evangelis, Michele L. Maryott, Bradley J. Hamburger and Dhananjay S. Manthripragada for Defendant and Appellant.

Blumenthal Nordrehaug Bhowmik De Blouw, Norman B. Blumenthal and Kyle R. Nordrehaug for Plaintiff and Respondent.

Plaintiff Jade Green sued defendant Shipt, Inc. under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.) alleging she and other workers in California were misclassified as independent contractors. Green's operative complaint seeks only civil penalties under the PAGA for the misclassification violation as well as additional wage and meal/rest period violations resulting from Shipt's failure to treat workers as employees. Shipt moved to compel "individual" arbitration under the parties' agreement, which requires arbitration as the exclusive forum for any dispute, and which prohibits workers from joining or bringing a "class and/or collective action" in any forum.

The trial court denied Shipt's motion, primarily relying on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), which held that agreements seeking to waive the right to bring PAGA representative actions are unenforceable. It rejected Shipt's contention that intervening United States Supreme Court authority had abrogated the *Iskanian* rule.

Although Shipt renews its assertion on appeal that *Iskanian* was wrongly decided, we remain bound by *Iskanian* because the specific issues in that case have yet to be decided by the United States Supreme Court. Any waiver of Green's PAGA claims remains unenforceable.

Shipt's suggestion that Green's PAGA action can be split off into an individual arbitrable claim was rejected in *Iskanian*, and we have previously held that threshold issues—such as Green's purported misclassification as an independent contractor—cannot be compelled to arbitration in the context of a PAGA-only suit.

As there is nothing in Green's PAGA-only suit to compel arbitration, we affirm the trial court's order.

BACKGROUND

Shipt operates a website and mobile application (app) that allows customers to purchase groceries and household items from local merchants. Once an order is placed, nearby "Shoppers" receive a notification via the Shipt app on their smart phone; they can then choose whether to accept the offer and fulfill the order by purchasing and delivering the items to the customer.

To sign up as a Shopper, individuals follow a "clickthrough" application process on the Shipt website. During this process, prospective Shoppers are asked to sign an "Independent Contractor Agreement" (IC Agreement) and an "Arbitration Agreement."[1] Shoppers must execute and sign both agreements in order to use Shipt services.

On October 15, 2018, Green signed both agreements. Between October 15, 2018 and October 1, 2019, Green completed 43 orders during her tenure as a Shopper. These orders were all shopped for and delivered to locations within the state of California.

A. The Arbitration Agreement

The Arbitration Agreement states that Shipt and Shoppers "agree that any and all disputes, claims, or controversies," "will be resolved through mandatory, binding arbitration." Such arbitrable disputes include

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[1] The IC Agreement expressly references and incorporates the Arbitration Agreement and States the Shopper agrees that "any and all claims arising out of or relating to [the IC Agreement] shall be resolved by binding arbitration pursuant to the Arbitration Agreement."

"any claims that a worker/independent contractor should be classified as an employee" and any disputes "regarding the scope, interpretation, validity, and enforceability of . . . [the] Arbitration Agreement."

The Arbitration Agreement also contains an express "Class Action Waiver," through which Shoppers agreed to waive their right to bring collective or class actions in any forum, and to arbitrate their disputes solely on an individual basis.

The Class Action Waiver states: "No Class Actions or Joinder of Additional Parties. YOU AND SHIPT WAIVE ANY RIGHT FOR ANY DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A CLASS AND/OR COLLECTIVE ACTION AND THE ARBITRATOR WILL HAVE NO AUTHORITY TO HEAR OR PRESIDE OVER ANY SUCH CLAIM . . . ."

The Class Action Waiver further provides: "You agree that You will not serve as a class representative or participate as a class member in an arbitration proceeding . . . . A dispute between us that is required to be arbitrated under this Arbitration Agreement will be arbitrated only between us, even if there are additional parties to the dispute or even if You make allegations that Your dispute should be handled as a class and/or collective action."

Shoppers wishing to opt out of the Arbitration Agreement could do so by submitting an "Arbitration Opt Out Form" within 30 days of accepting the IC Agreement.[2]

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[2] Green did not opt out of the Arbitration Agreement.

B. The Complaint for Civil Penalties Under the PAGA

1. *The Complaint*

On January 9, 2020, Green filed a lawsuit against Shipt alleging individual, PAGA, and class action claims.

On February 24, 2020, Green amended her complaint to dismiss her individual and class claims, leaving only a single cause of action for civil penalties under the PAGA. The complaint alleges that she and other Shoppers in California were misclassified as independent contractors in violation of the California Labor Code and that Shipt is further liable for additional Labor Code violations (such as wage and meal/rest period requirements) resulting from the misclassification. The complaint expressly states that Green "does not seek to recover anything other than penalties as permitted by California Labor Code [section] 2699 [the PAGA]" (bold and underscoring omitted) and that she is acting "[o]n behalf of the State of California and with respect to all [a]ggrieved employees." (Capitalization omitted.)

2. *Background on the PAGA*

The California Legislature enacted the PAGA in 2003 after deciding that lagging labor law enforcement resources made additional private enforcement necessary " 'to achieve maximum compliance with state labor laws.' " (*Iskanian, supra,* 59 Cal.4th at p. 379, quoting *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) "The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." (*Brown v. Ralphs Grocery Co*. (2011) 197 Cal.App.4th 489,

501.) Seventy-five percent of any penalties collected by a PAGA representative are distributed to the Labor Workforce Development Agency (LWDA), while the remaining 25 percent are distributed to the aggrieved employees.[3] (Lab. Code, § 2699, subd. (i).)

C. The Motion to Compel Individual Arbitration

In April 2020, Shipt moved to compel "individual" arbitration under the Arbitration Agreement. Shipt pointed out that Green waived her right to bring a representative PAGA action under that agreement and agreed to resolve all disputes—including any disputes regarding her classification as an independent contractor—"on an individual basis." Shipt further argued that our high court's holding in *Iskanian* (that PAGA waivers are unenforceable) had been abrogated by *Epic Systems Corp. v. Lewis* (2018) 584 U.S. ___ [138 S.Ct. 1612, 200 L.Ed.2d 887] (*Epic Systems*) and was therefore no longer good law.

On September 22, 2020, the trial court denied Shipt's motion to compel arbitration, primarily relying on *Iskanian*, which held that agreements seeking to waive the right to bring PAGA

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[3] Labor Code section 2699.3 of the PAGA requires a plaintiff to "notify the employer and the [LWDA] of the specific labor violations alleged, along with the facts and theories supporting the claim." (*Kim v. Reins International California, Inc*. (2020) 9 Cal. 5th 73, 81; see Lab. Code, § 2699.3, subd. (a)(1)(A).) The employee may commence a PAGA action only "[i]f the [LWDA] does not investigate, does not issue a citation, or fails to respond to the notice within 65 days." (*Kim*, *supra*, at p.81; see Lab. Code, § 2699.3, subd. (a)(2).) On October 15, 2019, Green sent the requisite PAGA notice to the LWDA and Shipt, detailing the facts and theories in support of her allegations of Labor Code violations.

representative actions were unenforceable and rejected Shipt's contention that *Epic Systems* had abrogated the *Iskanian* rule.

On November 13, 2020, Shipt timely appealed the trial court's order.

DISCUSSION

A. Standard of Review

Where, as here, the trial court's order denying a motion to compel arbitration "rests solely on a decision of law," we review that decision de novo. (*Robertson v. Health Net of California, Inc*. (2005) 132 Cal.App.4th 1419, 1425.)

B. The Federal Arbitration Act

In 1925, the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) was enacted in response to widespread judicial hostility to arbitration agreements.[4] (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339 [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*).) Section 2 of the FAA states in relevant part: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

Although "[t]he FAA contains no express pre-emptive provision" and does not "reflect a

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[4] The Arbitration Agreement signed by Green expressly states it "is made pursuant to a transaction involving interstate commerce and shall be governed by the [FAA]."

congressional intent to occupy the entire field of arbitration" (*Volt Info Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477), it preempts state law "to the extent that 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" (*Ibid.*)

For example, in *Concepcion*, the United States Supreme Court held that the FAA preempted California's rule classifying class action or collective action waivers in consumer contracts of adhesion as unconscionable. (*Concepcion*, *supra*, 563 U.S. at pp. 340-352.) The *Concepcion* court noted that while California's rule did not explicitly discriminate against arbitration (see *id.* at pp. 341-343,) it "interfer[ed] with fundamental attributes of arbitration" (*id.* at p. 344), by effectively imposing formal classwide arbitration procedures on the parties against their will. (*Id.* at pp. 345-347.) As such, the rule was preempted by the FAA. (*Concepcion*, at p. 352.)

C. The *Iskanian* Rule

In *Iskanian*, the plaintiff-employee signed an agreement which provided that " 'any and all claims' " arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator and that neither the employee nor the employer could " 'assert class action or representative action claims against the other.' " (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) The employee subsequently brought both a class action and a PAGA representative action against his employer. (*Iskanian*, at p. 361.)

The *Iskanian* court first determined that, under *Concepcion*, the refusal to enforce a class action waiver in an employment arbitration agreement

would conflict with the FAA by interfering with the fundamental attributes of arbitration. (*Iskanian*, *supra*, 59 Cal.4th at p. 364.)

The court reached a different conclusion with respect to the waiver of the employee's PAGA action. It held that a complete ban on PAGA actions was contrary to public policy, and unenforceable as a matter of state law, because it would "disable one of the primary mechanisms for enforcing the Labor Code"—the use of deputized citizen-employees to augment the limited enforcement capability of the LWDA and pursue the civil penalties used to deter such violations. (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) The court held that such a rule did not conflict with the FAA because the FAA was intended to govern "the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state . . . [a]gency." (*Iskanian*, at p. 384.) The court analogized a PAGA claim to a qui tam action and stated that such actions generally fall outside the FAA's purview. (*Iskanian*, at pp. 382, 387.)

Since *Iskanian*, several California Courts of Appeal have held that any PAGA arbitration requirement in a predispute arbitration agreement is unenforceable. (See, e.g., *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 472; *Correia v. NB Baker Electric, Inc*. (2019) 32 Cal.App.5th 602, 620; *Julian v. Glenair, Inc*. (2017) 17 Cal.App.5th 853, 869-872; *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445-449.)

Conversely, federal courts have concluded that PAGA claims *can* be arbitrated under *Iskanian* but "may not be waived outright." (*Sakkab v. Luxottica Retail North American, Inc*. (9th Cir. 2015) 803 F.3d 425, 434; see also *Valdez v. Terminix Internal. Co. Ltd*

Partnership (9th Cir. 2017) 681 Fed.Appx. 592; *Wulfe v. Valero Refining Co*. (9th Cir. 2016) 641 Fed.Appx 758, 760; *Cabrera v. CVS Rx Services, Inc*. (2018) 2018 U.S.Dist. LEXIS 43681].)

D. The *Iskanian* Rule Remains Binding Authority Regarding Enforceability of PAGA Waivers

Shipt claims the United States Supreme Court's interpretation of the FAA preemption clause in recent cases annuls *Iskanian*'s holding and requires California courts to enforce PAGA representative action waivers. Shipt relies on *Epic Systems*, *supra*, 584 U.S. ___ [138 S.Ct. 1612] and *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. ___ [139 S.Ct. 1407, 1412, 203 L.Ed.2d 626] (*Lamps Plus*). We are not persuaded.

"On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently." (*Correia v. NB Baker Electric, Inc*., supra, 32 Cal.App.5th at p. 619; see also *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 221 [51 S.Ct. 453, 75 L.Ed 983]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 955-957.)

In *Epic Systems*, an accountant sued his employer for violations of the federal Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.) and California overtime law. (*Epic Systems*, *supra*, 584 U.S. at p. ___ [138 S.Ct. at p. 1620].) The employee had signed an arbitration agreement that "specified individualized arbitration, with claims 'pertaining to different [e]mployees [to] be heard in separate proceedings.' " (*Ibid*.) The accountant sought to litigate the state law

claim as a class action and the FLSA claim on behalf of a nationwide class under FLSA's collective action procedures. (*Epic Systems*, at p. ___ [138 S.Ct. at p. 1620].)

In compelling arbitration, the United States Supreme Court reconfirmed Concepcion's holding that the FAA requires enforcement of class action waivers. It also rejected the employee's argument, as did the *Iskanian* court, that the National Labor Relations Act's guarantee of the right to engage in "concerted activit[y]" (29 U.S.C. § 157) overcame the FAA on this issue. (*Epic Systems*, *supra*, 584 U.S. at p. ___ [138 S.Ct. at pp. 1623-1630]; *Iskanian*, *supra*, 59 Cal.4th at p. 372.)

Courts considering the continuing vitality of *Iskanian* have unanimously concluded that, in light of the unique nature of a PAGA action, the United States Supreme Court's interpretation of the FAA's preemptive scope in *Epic Systems* does not abrogate *Iskanian*'s holding for purposes of an intermediate appellate court applying the law. (*See Correia v. NB Baker Electric, Inc*., *supra*, 32 Cal.App.5th at p. 620; cf. *Sakkab v. Luxottica Retail North American, Inc*., *supra*, 803 F.3d at pp. 435-436; *Rivas v. Coverall N. Am., Inc*. (2021) 842 Fed.Appx. 55, 56.)

We agree with these and other appellate courts that have recognized the limited reach of *Epic Systems* in the context of PAGA suits. (See, e.g., *Winns v. Postmates Inc*. (2021) 66 Cal.App.5th 803, 812; *Olson v. Lyft, Inc*. (2020) 56 Cal.App.5th 862, 872; *Provost v. YourMechanic, Inc*. (2020) 55 Cal.App.5th 982, 998; *Collie v. The Icee Co*. (2020) 52 Cal.App.5th

477; *Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 620.)[5]

Under the doctrine of stare decisis, we are bound to follow our Supreme Court's decision in *Iskanian*. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at pp. 455-456.)[6]

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[5] In *Lamps Plus*, the Ninth Circuit construed an arbitration agreement against its drafter, Lamps Plus, and approved a classwide arbitration order. (*Lamps Plus*, *supra*, 587 U.S. at p. __ [139S.Ct. at pp. 1413-1414].) The high court reversed, holding the FAA preempted California's contra proferentem rule (requiring agreements be held against the drafter) when the rule is used "to impose class arbitration in the absence of the parties' consent." (*Lamps Plus*, at p. ___ [139 U.S. at pp. 1415, 1418], fn. omitted.) The *Lamps Plus* decision did not consider or resolve whether a worker could waive a right to bring a representative action on behalf of a state government, and it neither mentions PAGA nor similar laws from other states. We fail to discern how *Lamps Plus* would compel us to abandon *Iskanian*.

[6] We further reject Shipt's contention that *Iskanian* is inapplicable because Green had an opportunity to opt out of the arbitration agreement. Several courts have pointed out that *Iskanian*'s underlying public policy rationale does not turn on how the employer and worker entered into the agreement, or its mandatory or voluntary nature. Rather, it turns on fact that a PAGA claim provides a remedy that inures to the state and that private agreements seeking to waive such public rights are precluded. (*Winns v. Postmates Inc.*, *supra*, 66 Cal.App.5th at pp. 810-811; *Provost v. YourMechanic Inc.*, *supra*, 55 Cal.App.5th at pp. 993-994; *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 647-648).

E. Green May Not Be Compelled Either to Arbitrate Her PAGA Action on an "Individual" Basis or to Arbitrate Threshold Issues

Shipt requests an order compelling Green to "arbitrate any and all claims against Shipt on an individual basis." However, the *Iskanian* court directly held that "a single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code." (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) Because compelling a single-claimant procedure would frustrate the core objectives of the PAGA, the court held that the right to bring a representative PAGA case could neither be waived nor bifurcated and compelled to arbitration on an "individual" basis. (*Iskanian*, at p. 384.)

It also makes no difference whether Green expressly agreed to arbitrate threshold issues "regarding the scope, interpretation, validity, and enforceability of . . . [the] Arbitration Agreement" or "any claims that a worker/independent contractor should be classified as an employee." These issues are indivisible and nonarbitrable. (*Bautista v. Fantasy Activewear, Inc*. (2020) 52 Cal.App.5th 650, 656-658 [rejecting contention that preliminary questions regarding arbitrability must be sent to arbitrator in representative PAGA-only action notwithstanding agreement to do so]; see also *Rosales v. Uber Technologies, Inc*. (2021) 63 Cal.App.5th 937, 940; *Contreras v. Superior Court* (2021) 61 Cal.App.5th

461, 474; *Provost v. YourMechanic, Inc.*, supra, 55 Cal.App.5th at p. 988.)[7]

As there is nothing in Green's operative PAGA-only complaint to compel to arbitration, we affirm the trial court's order.

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[7] Relatedly, the Class Action Waiver provides that "any claim that all or part of the Class Action Waiver . . . is invalid, unenforceable, unconscionable, void or voidable, *may be determined only by a court of competent jurisdiction and not by an arbitrator*." (Italics added.) This provision also runs counter to Shipt's argument that threshold questions must be determined by an arbitrator. Further, in our Bautista decision we deemed the decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. ___ [139 S.Ct. 524, 202 L.Ed.2d 480]—also cited by Shipt in this case—inapplicable in the context of a PAGA-only action. (*Bautista v. Fantasy Activewear, Inc.*, *supra*, 52 Cal.App.5th at p. 656.)

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Green shall recover her costs on appeal.[8]

CRANDALL, J.*

We concur:

ROTHSCHILD, P.J.

CHANEY, J.

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[8] Green characterizes Shipt's arguments as "frivolous" and "sanctionable" and "submits that there should be repercussions" for such tactics. Of course, a sanctions request cannot be made in a brief. (Cal. Rules of Court, rule 8.276(b)(1); *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 ["Sanctions cannot be sought in the respondent's brief"].)

* Judge of the San Luis Obispo County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
CIVIL DIVISION
SOUTH CENTRAL DISTRICT
COMPTON COURTHOUSE, DEPARTMENT A

20STCV01001 September 22, 2020
JADE GREEN vs. SHIPT, INC. 9:30 AM

Judge: Honorable Maurice A. Leiter
Judicial Assistant: Denna Salisberry/Aveline Santiago
Courtroom Assistant: Kim Johnson
CSR: Adra Pittma, CSR #13298
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Ricardo Ehmann (Telephonic) by Jeffrey S. Herman via LACourtConnect

For Defendant(s): Dhananjay Saikrishna Manthripragada via LACourtConnect (Telephonic)

NATURE OF PROCEEDINGS: Status Conference; Hearing on Motion to Compel Arbitration and Stay Proceedings; Hearing on Motion for Sanctions

The matters are called for hearing.

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Adra L. Pittman, CSR # 13298, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Counsel submit to the Court's tentative ruling.

The Court's tentative ruling is adopted as its final ruling as follows:

I. Background

Plaintiff Jade Green brings this Private Attorney General Act ("PAGA") action on behalf of similarly aggrieved employees of defendant Shipt, Inc. Green alleges Shipt misclassified employees as independent contractors. Shipt operates a website and mobile application marketplace allowing customers (referred to as "members") to purchase groceries and household items from local merchants. "Shoppers," such as Green, would then purchase the items from the merchants and deliver the orders to the customers.

The First Amended Complaint ("FAC") alleges violations of the Private Attorneys General Act. All individual and class claims were dismissed.

Shipt now moves to compel arbitration and stay the action. Green moves for sanctions on the basis that Shipt's motion to compel arbitration is frivolous. Both motions are opposed.

II. Motion to compel arbitration

a. Standard

"Public policy favors contractual arbitration as a means of resolving disputes. [Citation.]" (Espejo v.

Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047, 1057.) Code of Civil Procedure § 1281.2 governs petitions to compel arbitration. A party to an alleged arbitration agreement may file a petition or motion with the trial court. If the court finds that an agreement exists, the court shall order arbitration unless: (1) The right to compel has been waived by the petitioner, or (b) grounds exist for rescission of the agreement.

A written agreement to submit to an arbitration agreement is valid unless grounds exist for it revocation such as any contract. (C.C.P., § 1281.) " '[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists, and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence.' [Citation.]" (Flores v. Nature's Best Distribution, LLC (2016) 7 Cal.App.5th 1, 8–9.)

The Federal Arbitration Act ("FAA") governs contracts involving interstate commerce. (Mastick v. TD Ameritrade, Inc. (2012) 209 Cal.App.4th 1258, 1263.) " '[T]he phrase " 'involving commerce' " in the FAA is the functional equivalent of the term " 'affecting commerce,' " which is a term of art that ordinarily signals the broadest permissible exercise of Congress's commerce clause power.' [Citation.]" (Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227, 238.)

b. Analysis

Shipt contends Green signed an arbitration agreement that encompasses this action when she agreed to become a Shopper.

1. Delegation of agreement's validity to the arbiter

Shipt contends the parties agreed any dispute as to the validity and scope of the arbitration agreement would be decided by the arbiter. Green contends the arbitration agreement is inapplicable to PAGA claims.

An action under the PAGA is not a class action, but a representative action where the Plaintiff stands in the shoes of the State Labor Commissioner, acting to recover penalties for California labor law violations payable both to the State and other aggrieved employees. (Arias v. Superior Court (2009) 46 Cal.4th 969, 985–986.) PAGA was enacted to address the inadequate resources available to the State Labor Commissioner's Office to enforce California's wage and hour laws. (See Stats 203 Ch. 906, § 2.) Relying on legislative findings, the Supreme Court in Iskanian v. CLS Transportation Los Angeles (2014) 59 Cal.4th 348, 381, held that a PAGA " 'action to recover civil penalties is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." ' "

The signing of a pre-dispute arbitration agreement does not preclude an employee from maintaining a subsequent PAGA action, because they signed the agreement in an individual capacity. (Correia v. NB Baker Electric, Inc. (2019) 32 Cal.App.5th 602, 622.) "Without the state's consent, a pre-dispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the

claim and the real party in interest, and the state was not a party to the arbitration agreement." (Ibid.) Although an employee may choose to forego a PAGA claim, the Court in Iskanian found "it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises. [Citation.]" (Iskanian, supra, 59 Cal.4th at 387.)

Further, "[n]othing in the text or legislative history of the FAA nor in the [United States Supreme Court]'s construction of the statute suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions. Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." (Iskanian, supra, 59 Cal.4th at 387.)

The arbitration agreement, signed by Green in her individual capacity, does not require that this PAGA action be sent to arbitration.

2. Epic Systems Corp. v. Lewis

Shipt argues that the U.S. Supreme Court's recent decision in Epic Systems Corp. v. Lewis (2018) 138 S.Ct. 1612 (Epic) abrogates the holding in Iskanian. Epic involved whether the guarantee of workers' rights to concerted activity in the National Labor Relations Act conflicted with class action waivers under the FAA. (Id. at 1624.) This argument was addressed in Correia.

The court there concluded that "the PAGA claim was outside [the] rule because the employee [has] been deputized by the state to bring the qui tam claim on

behalf of the state, not on behalf of other employees." (Correia, supra, 32 Cal.App.5th at 620 [emphasis omitted].) "Epic did not reach the issue regarding whether a governmental claim of this nature is governed by the FAA, or consider the implications of a complete ban on a state law enforcement action." (Ibid.) Moreover, the California Supreme Court affirmed the continued vitality of

the holding in Iskanian that the FAA does not preempt the rule prohibiting such a waiver. (ZB, N.A. v. Superior Court, 8 Cal. 5th 175, 185 (2019).)

Shipt's argument that Iskanian has been abrogated is unpersuasive. The motion to compel arbitration is denied.

3. Request for stay under Code of Civil Procedure § 1281.4

Code of Civil Procedure § 1281.4 states, in full:

"If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or

proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only."

"Any party to a judicial proceeding 'is entitled to a stay of those proceedings whenever (1) the arbitration of a controversy has been ordered, and (2) that controversy is also an issue involved in the pending action.' [Citation.]" (Heritage Provider Network, Inc. v. Superior Court (2008) 158 Cal.App.4th 1146, 1152.) A "controversy" can be a single question of law or fact; a single overlapping issue is sufficient to require the imposition of a stay. (Id. at 1152–1153.)

Shipt argues it is currently arbitrating eight individual claims based on similar allegations, so this action should be stayed pending their resolution. (Decl. Manthripragada, Exhs. E–L.) As Green notes, these individual arbitrations were not ordered by a court. The plain language of the statute requires the arbitrations to have been ordered, not elected by the parties. The arbitration of these claims does not require a stay under Code of Civil Procedure § 1281.4.

Shipt also argues that it is defending two previously-filed PAGA actions involving claims related to the classification of its shoppers. (Decl. Manthripragada, Exhs. A–C.) One involves a representative who opted out of the arbitration agreement. (Id. at Exh. C.) However, in Turner v. Shipt, Inc. (19STCV28802), an action pending in Department 39, the representative did not opt out of the arbitration agreement and Shipt

has applied for an order to arbitrate. (Id. at Exh. B.) That hearing is set for November 3, 2020. Here, the plain language of the second paragraph of section 1281.4 operates against Green. The PAGA actions include overlapping issues of fact and law, so the mandatory language section 1281.4 requires this Court to stay this action pending the outcome of that petition.

The Court will stay this matter pending the determination of the Turner petition to arbitrate. Should the Turner petition to compel arbitration be denied, section 1281.4 would no longer present an issue. After that petition is decided, the Court would consider a renewed motion addressing whether this action should be stayed in favor of a pre-existing PAGA action, or for any other reason.

III. Motion for sanctions

Code of Civil Procedure § 128.5 is one of the principal statutes for the imposition of sanctions against an attorney or a party for frivolous actions. (Levy v. Blum (2001) 92 Cal.App.4th 625, 635.) Section 128.5(a) "authorizes a trial court 'to order a party, the party's attorney, or both to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.' "(Nunez v. Penisi (2015) 241 Cal.App.4th 861, 879.)

Green argues the motion to compel arbitration or, alternatively, to stay this action was frivolous. The Court disagrees and, as noted, has granted in part the request for stay.

The motion for sanctions is denied.

IV. Ruling

The motion to compel arbitration is denied.

The motion for stay is granted in part. This case is stayed until the next hearing set on December 4, 2020. The motion for stay is otherwise denied without prejudice.

The motion for sanctions is denied. Defendant's Counsel is to give notice of motions.

Case Management Conference is scheduled for 12/04/20 at 08:30 AM in Department A at Compton Courthouse.

Order to Show Cause Re: Dismissal for Failure to Prosecute is scheduled for 12/04/20 at 08:30 AM in Department A at Compton Courthouse.

Notice is waived.