APPENDIX

APPENDIX A

Court of Appeal, Second Appellate District,
Division Eight—No. B305546

August 11, 2021

S269214

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DAMARIS ROSALES, Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC., Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

Filed 4/30/21

CERTIFIED FOR PUBLICATION

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

DAMARIS ROSALES,
Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,
Defendant and Appellant.

B305546

(Los Angeles County
Super. Ct. No. BC685555)

APPEAL from an order of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed.

Littler Mendelson, Sophia Behnia and Andrew M. Spurchise for Defendant and Appellant.

Gold and Michael A. Gold for Plaintiff and Respondent.

SUMMARY

Defendant Uber Technologies, Inc. moved to compel arbitration in a case where the plaintiff, Damaris Rosales, alleged a single cause of action for wage violations under the Private Attorneys General Act (PAGA, Lab. Code, § 2698 et seq.). Plaintiff was an Uber driver under a written agreement stating she was an independent contractor and all disputes would be resolved by arbitration under the Federal Arbitration Act (FAA, 9 U.S.C. § 1 et seq.). The agreement delegated to the arbitrator decisions on the enforceability or validity of the arbitration provision. The trial court denied defendant's motion to compel arbitration.

Defendant contends plaintiff cannot bring a PAGA claim in court unless or until an arbitrator first decides whether she has standing to bring a PAGA claim—that is, whether she is an employee who can seek penalties under PAGA on behalf of the state, or an independent contractor who cannot. We conclude, as has every other California court presented with this or similar issues, that the threshold question whether plaintiff is an employee or an independent contractor cannot be delegated to an arbitrator. Accordingly, we affirm the trial court's order.

FACTS

In April 2018, plaintiff filed the operative first amended complaint. The complaint stated a representative action against defendant for penalties under PAGA, alleging defendant violated section 216 of the Labor Code (refusal to pay wages due).

In January 2020, after successive demurrers were overruled, defendant brought its motion to compel arbitration. Defendant sought an order compelling plaintiff "to arbitrate the issue of her independent

contractor status (*i.e.,* whether she was properly classified as an independent contractor) under the parties' arbitration agreement and/or questions of enforceability or arbitrability (*i.e.,* enforcing the arbitration agreement's delegation clause)." Alternatively, defendant sought to enforce the waiver of representative claims in the arbitration agreement, and to compel plaintiff to arbitrate her individual claim.

The arbitration agreement was a part of defendant's then-standard technology services agreement, which plaintiff executed on-line when she became a driver for defendant in March 2016. Defendant refers to this as the 2015 TSA. The parties agreed, with irrelevant exceptions, to arbitrate all disputes between them arising out of or related to the agreement and plaintiff's relationship with defendant, including disputes regarding wage and hour laws. The agreement delegated to the arbitrator the power to decide whether a dispute is arbitrable. It stated the arbitrator and not a court or judge would decide all disputes "arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision."

Plaintiff also agreed, to the extent permitted by law, not to bring a representative action on behalf of others under PAGA in any court or in arbitration. She agreed that any claim brought as a private attorney general would be resolved in arbitration on an individual basis only, and not to resolve the claims of others.

The trial court denied defendant's motion. The court held that "no part of the TSA, including the delegation provision, binds the State of California, on whose behalf [plaintiff] brings the PAGA claim."

Defendant filed a timely notice of appeal.

DISCUSSION

1. The Background

Before PAGA was enacted, only the state could sue employers for civil penalties under the Labor Code. (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 80 (*Kim*).) "Government enforcement proved problematic," for reasons including inadequate funding and staffing constraints. (*Id.* at p. 81.) "To facilitate broader enforcement, the Legislature enacted PAGA, authorizing 'aggrieved employee[s]' to pursue civil penalties on the state's behalf. [Citations.] 'Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the "aggrieved employees." ' " (*Ibid.*)

Kim explains that a PAGA claim "is legally and conceptually different from an employee's own suit for damages and statutory penalties. An employee suing under PAGA 'does so as the *proxy or agent of the state's labor law enforcement agencies*.' [Citation.] Every PAGA claim is 'a dispute between an employer and the *state*.' [Citations.] Moreover, the civil penalties a PAGA plaintiff may recover on the state's behalf are distinct from the statutory damages or penalties that may be available to employees suing for individual violations. [Citation.] Relief under PAGA is designed primarily to benefit the general public, not the party bringing the action. [Citations.] 'A PAGA representa-

tive action is therefore a type of qui tam action,' conforming to all 'traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.' [Citation.] The 'government entity on whose behalf the plaintiff files suit is always the real party in interest.' " (*Kim, supra,* 9 Cal.5th at p. 81.)

2. The Authorities

The issue presented for our review has been resolved adversely to defendant in two cases decided during and after briefing in this case: *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982 (*Provost*) and *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461 (*Contreras*).[1]

In *Provost*, as here, the defendant contended an arbitrator must first decide the threshold issue whether the plaintiff was an independent contractor or an employee. Until that issue is resolved in arbitration, the defendant argued, the plaintiff had no standing to pursue a representative PAGA action, because he could not show he was an "aggrieved employee." (*Provost, supra,* 55 Cal.App.5th at p. 996.) The court rejected those assertions, following cases that "consistently, and, in our view, properly hold that threshold issues involving whether a plaintiff is an 'aggrieved employee' for purposes of a representative PAGA-only action cannot be split into individual arbitrable and representative nonarbitrable components." (*Ibid.*)

Contreras similarly held that a PAGA plaintiff "may not be compelled to arbitrate whether he or she

---

[1] Before the opinion in *Contreras* was published, defendant asked us to take judicial notice of the trial court's order in that case. The request for judicial notice is now moot.

is an aggrieved employee." (*Contreras, supra,* 61 Cal.App.5th at p. 477; *id.* at p. 472 ["PAGA claims cannot be arbitrated without state consent" (italics omitted)]; *id.* at p. 473 [the preliminary question whether the petitioners were "aggrieved employees" under PAGA "may not be decided in private party arbitration" (capitalization omitted)].)

We are not persuaded to depart from the analyses in *Provost* and *Contreras* and all the authorities they cite. As we shall see, these authorities cogently answer each of defendant's arguments.

3. Defendant's Contentions

Defendant contends the FAA governs the arbitration provision, and under the FAA, the parties' agreement to delegate the issue of arbitrability to the arbitrator is enforceable. But our Supreme Court has held the FAA does *not* govern a PAGA claim. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 (*Iskanian*).)

As relevant here, *Iskanian* held that "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." (*Iskanian, supra,* 59 Cal.4th at p. 360.) This is referred to as the *Iskanian* rule. The court further concluded "that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." (*Ibid.*)

Iskanian explained that "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. It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian, supra,* 59 Cal.4th at pp. 386–387.)

Defendant contends *Iskanian* has been effectively overruled by the high court in *Epic Systems Corp. v. Lewis* (2018) ___ U.S. ___ [138 S.Ct. 1612] (*Epic Systems*), a case that reiterated the FAA's broad preemptive scope. *Epic Systems* held the FAA requires courts to enforce arbitration agreements according to their terms, including terms in an employment agreement requiring individualized arbitration proceedings rather than class or collective action procedures. (*Epic Systems,* at p. ___ [138 S.Ct. at p. 1619]; *id.* at p. 1621 ["this much the Arbitration Act seems to protect pretty absolutely"].) The court held that, contrary to the plaintiff's contention, the National Labor Relations Act does not "offer[] a conflicting command." (*Epic Systems,* at p. ___ [138 S.Ct. at p. 1619]; *ibid.* ["This Court has never read a right to class actions into the NLRA."].)

Defendant's argument that *Epic Systems* rendered the *Iskanian* rule invalid has been made and rejected several times. For example, in *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602 (*Correia*), the court explained that 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." (*Id.* at p. 619.) *Epic Systems* addressed an issue "pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the

NLRA." (*Correia,* at p. 619.) *Iskanian,* on the other hand, "held that a ban on bringing PAGA actions in any forum violates public policy and that this rule is not preempted by the FAA because the claim is a governmental claim." (*Correia,* at p. 619.) *Epic Systems* did not consider that issue and so "did not decide the *same* question differently." (*Correia,* at p. 619.)

Correia describes in detail how the cause of action at issue in *Epic Systems* "differs fundamentally from a PAGA claim." (*Correia, supra,* 32 Cal.App.5th at p. 619; *id.* at pp. 619–620.) The court concluded: "*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. Because *Epic* did not overrule *Iskanian*'s holding, we remain bound by the California Supreme Court's decision." (*Correia,* at p. 620; see, e.g., *Provost, supra,* 55 Cal.App.5th at pp. 997–998 [reaffirming the *Correia* analysis that *Epic Systems* did not overrule *Iskanian* and observing our Supreme Court reaffirmed *Iskanian* in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185, 197]; *Contreras, supra,* 61 Cal.App.5th at p. 471 [agreeing that, "even after *Epic Systems,* PAGA claims, which seek to vindicate state interests, not private party agreements, are not covered by the FAA"].) We too are bound by the *Iskanian* rule.

Contreras points out that while *Iskanian* held a PAGA claim cannot be waived by an employment agreement, *Iskanian* "did not directly address whether an employer may contractually require a PAGA claim to be arbitrated." (*Contreras, supra,* 61 Cal.App.5th at p. 472.) But that issue, too, has been resolved in several Court of Appeal cases holding that "an individual PAGA plaintiff may not be required to

arbitrate his or her PAGA claim." (*Contreras,* at p. 472, citing cases; *ibid.* ["PAGA claims cannot be arbitrated without state consent" (italics omitted)].)

Defendant relies on federal district court cases that have concluded, in other contexts, that a threshold worker classification issue must be determined by an arbitrator where the arbitration agreement contains a delegation clause. Those cases do not apply here because none involves a PAGA claim where the plaintiff is the proxy or agent of the state.[2]

Next, defendant tells us that even if plaintiff's representative claim is not subject to arbitration, the threshold classification issue is subject to the FAA because "it is not a PAGA claim at all" but rather "a private dispute between [plaintiff and defendant] regarding the nature of their business relationship." *Contreras* disposed of the same claim in a detailed discussion, concluding the question whether a plaintiff is an "aggrieved employee" under PAGA may not be decided in private party arbitration. (*Contreras, supra,* 61 Cal.App.5th at pp. 473–477.) The court characterized the argument as "fallacious wordsmithing," and explained: "If an arbitrator rules that petitioners are not 'aggrieved employees,' there will be no remaining PAGA claim anywhere. By virtue of an arbitration to

---

[2] See *Lamour v. Uber Technologies, Inc.* (S.D.Fla. Mar. 1, 2017, No. 1:16-CIV-21449-MARTINEZ/GOODMAN) 2017 U.S.Dist.Lexis 29706, at pages *29–31; *Ali v. Vehi-Ship* (N.D.Ill. Nov. 27, 2017, No. 17 CV 02688) 2017 U.S.Dist.Lexis 194456, at pages *14–15; *Richemond v. Uber Technologies, Inc.* (S.D.Fla. 2017) 263 F.Supp.3d 1312, 1317; *Olivares v. Uber Technologies, Inc.* (N.D.Ill. July 14, 2017, No. 16 C 6062) 2017 U.S.Dist.Lexis 109348, at page *9; *Sakyi v. Estee Lauder Companies, Inc.* (D.D.C. 2018) 308 F.Supp.3d 366, 381; *Johnston v. Uber Technologies, Inc.* (N.D.Cal. Sept. 16, 2019, No. 16-cv-03134-EMC) 2019 U.S.Dist.Lexis 161256, at pages *16–17.

which it did not consent, the state will have lost one of its weapons in the enforcement of California's labor laws. This result would be at odds with . . . several appellate opinions . . . , e.g., *Correia*: 'Without the state's consent, a predispute 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.' (*Correia, supra,* 32 Cal.App.5th at p. 622.) [¶] Characterizing the process as resolving only an 'arbitrability,' 'delegatable' or 'gateway' issue, or the adjudication of an 'antecedent' fact, does not extinguish the risk to the state that it is an arbitrator, not a court, who nullifies the state's PAGA claim." (*Contreras,* at p. 474.)

Finally, defendant contends its case is different from authorities holding that a "single cause of action under PAGA cannot be split into an arbitrable 'individual claim' and a nonarbitrable representative claim." (*Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 645; see, e.g., *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 ["determination of whether the party bringing the PAGA action is an aggrieved party should not be decided separately by arbitration"].) The difference, defendant says, is that in *Williams* and *Hernandez*, the threshold question was whether the plaintiff was "aggrieved" (that is, subjected to a Labor Code violation), not whether the plaintiff was an "employee." But, as we have just seen, the *Contreras* case presented the identical threshold issue of employee status, and so did *Provost.* And both resolved the issue adversely to defendant's position. (*Contreras, supra,* 61 Cal.App.5th at p. 474; *id.* at p. 477 ["a PAGA plaintiff may not be compelled

to arbitrate whether he or she is an aggrieved employee"]; *Provost, supra,* 55 Cal.App.5th at p. 988 [the employer "cannot require [the plaintiff] to submit by contract any part of his representative PAGA action to arbitration"; "a PAGA-only representative action is *not* an individual action at all, but instead is one that is indivisible and belongs solely to the state"].)

DISPOSITION

The order is affirmed. Plaintiff shall recover costs of appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

OHTA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

March 12, 2020

DAMARIS ROSALES, individually
and on behalf of all others
similarly situated,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC.,
and Does 1-50,

Defendants.

Case No : BC685555

ORDER DENYING DEFENDANT'S MOTION
TO COMPEL ARBITRATION

Hearing Date: March 12, 2020
Hearing Time: 11:00 a.m.
Dept: 7

Defendant Uber Technologies, Inc. ("Uber") moves this Court to compel Plaintiff Damaris Rosales ("Rosales") to arbitrate the issue of whether she is an "aggrieved employee" within the meaning of the California Labor Code Private Attorneys General Act of 2004.

For the following reasons, the Court DENIES Uber's motion to compel arbitration.

I. Procedural History

On December 4, 2017, Rosales[1] filed a Class Action Complaint against Uber[2] alleging five causes of action. On April 6, 2018, she amended her Complaint by dismissing the five class action allegations and alleging only a representative action as an "aggrieved employee" seeking civil penalties on behalf of herself and other current and former Uber employees under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). (First Amended Complaint ("FAC"), 2, 7; Joint Stipulation and Proposed Order, Dec. 4, 2017, 1:9-11.)

Uber twice unsuccessfully demurred to the FAC. Uber first demurred that, among other things, Rosales failed to plead that "she had an employment relationship with Uber." (Demurrer (Jun. 1, 2018) 2.) The Court overruled Uber's demurrer, finding that "[f]or pleading purposes, Rosales's allegations that she is an 'aggrieved employee' are sufficient." (Order Overruling Defendant's Demurrer (Jul. 31, 2018) 1.) Uber then unsuccessfully appealed the court's order overruling its demurrer. (Joint Status Conference Statement (Oct. 22, 2019) 1.) Uber demurred a second time that Rosales failed to provide notice to Uber and the California Labor and Workforce Development Agency. This Court overruled Uber's second demurrer. (Order Overruling Defendant's Renewed Demurrer (May 16, 2019.)

Uber now moves this Court to compel Rosales to arbitrate the issue of whether she is an "aggrieved

---

[1] The Court DENIES Rosales's request for judicial notice of Exhibit 7, the "Littler lawfirm webpage." The Court GRANTS Rosales's all other requests for judicial notice.

[2] The Court GRANTS Uber's requests for judicial notice.

employee" within the meaning of PAGA. Rosales opposes Uber's motion.

II. Statement of Facts

Rosales signed up to use Uber's "Uber Rides App" as a driver on or around March 25, 2016. (Rosenthal Decl.,¶ 12.) All drivers at the time were required to first enter into a Technology Services Agreement ("TSA") with Rasier-CA, LLC, a wholly-owned Uber subsidiary. *(Id.* at ¶¶ 4, 8.) The TSA contains an Arbitration Provision, of which drivers have an opportunity to opt-out. *(Id.* at ¶ 13.) Rosales accepted the TSA on March 28, 2016. *(Id.* at ¶ 12.) She did not opt out of the Arbitration Provision. *(Id.* at ¶ 13.)

The TSA's Arbitration Provision reads, in relevant part:

> IMPORTANT: This Arbitration Provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis, except as provided below, pursuant to the terms of the Agreement unless you choose to opt out of the Arbitration Provision. Except as provided below, this provision will preclude you from bringing any class, collective, or representative action (other than actions under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code § 2698 et seq. ("PAGA")) against the Company or Uber, and also precludes you from participating in or recovering relief under any current or future class, collective, or representative (non-PAGA) action brought against the Company or Uber by someone else.
>
> * * *

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving interstate commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse you from utilizing any informal procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, such disputes include without limitation disputes

> arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge. However, as set forth below, the preceding sentences shall not apply to disputes relating to the interpretation or application of the Class Action Waiver or PAGA Waiver[3] below, including their enforceability, revocability or validity.
>
> Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to all disputes between You and the Company or Uber, as well as all disputes between You and the Company's or Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act,

---

[3] Because the Court finds that the Arbitration Provision does not require Rosales to arbitrate her PAGA claim, the Court declines to reach the merits of whether the Arbitration Provision's "PAGA Waiver" is valid.

> Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for individual claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims. This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision.

(Rosenthal Decl., Exh. C, §§ 15.3, 15.3(i) (bolding original).)

III. Uber Fails to Meet Its Burden of Proving that an Arbitration Agreement Exists Between It and the State of California, on Whose Behalf Rosales Asserts Her PAGA Claim

Uber moves to compel Rosales to arbitrate the issue of whether she is an "aggrieved employee" within the meaning of PAGA, California Labor Code § 2698 *et seq*.

The party moving to compel arbitration "bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden

of proving by a preponderance of the evidence any fact necessary to its defense." *(Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination." *(Ibid.)* The party seeking to compel arbitration generally meets its initial burden of proving an arbitration agreement exists by attaching a copy of the agreement to the motion or petition to compel arbitration. *(Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 764-65; Cal. R. Ct., Rule 3.1330.)

"California contract law applies to determine whether the parties formed a valid agreement to arbitrate." *(Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1170.) The parties' consent to contract is an essential contract component. (Cal. Civ. Code § 1550.)

A PAGA claim "is a dispute between an employer and the *state,* which alleges directly or through its agents – either the Labor and Workforce Development Agency or aggrieved employees – that the employer has violated the Labor Code." *(Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386-87 (italics original).) A private party cannot bring a PAGA claim solely on its behalf; instead, it brings the suit in a "representative capacity" on the State of California's behalf. *(Reyes v. Mary's, Inc.* (2011) 202 Cal.App.4th 1119, 1124 [holding that "[b]ecause the PAGA claim is not an individual claim, it was not within the scope of [the employer's] request that individual claims be submitted to arbitration. . . ." (second bracketed insertion original)].) The representative private party's agreement to arbitrate

is "not relevant" to a PAGA claim because the party represents the state and the "state is not bound" by the agreement. *(Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 448.)

An employee "cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an 'aggrieved employee.'" *(Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 649; *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 [affirming trial court's denial of a motion to compel arbitration of the issue of whether plaintiff was a PAGA "aggrieved employee"].)

Here, Uber submits with its motion a copy of the TSA. (Rosenthal Decl., Exh. C.) Uber also submits images of the smartphone screens on which aspiring Uber drivers enter into the TSA. (Id. at Exhs. A, B.) Uber's Director of Strategic Operational Initiatives explains:

> "To advance past the screen that contains the link to the [TSA], the driver has to click 'YES, I AGREE' to the applicable agreement. Directly above "YES I AGREE," the Uber Rides App states the following: "By clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." After clicking "YES, I AGREE," the driver is prompted to confirm acceptance a second time. On the second screen, the Uber Rides App states the following: "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS."

(Rosenthal Decl., ¶ 9.)

Lastly, Uber submits an electronic receipt showing Rosales accepted the TSA. (Rosenthal Decl., Exh. D.) "This receipt only could have been generated by someone using Rosales's unique username and password and hitting "YES, I AGREE" twice . . ." *(Id.* at ¶ 12.)

However, Uber fails to submit any evidence showing that the State of California entered into the TSA. Rosales is bringing her PAGA claim on the State's behalf, and the State is not bound by the TSA. As Uber acknowledges, "[o]rdinary state law principles governing the formation of contracts are used to determine whether the parties agreed to arbitrate." (Motion, 15-16.) The parties' consent to contract is an essential contract component. (Cal. Civ. Code § 1550.) Uber lacks evidence that the State of California consented to the Arbitration Provision.

Uber asks the Court to enforce the TSA's clause delegating to the arbitrator "disputes arising out of or relating to interpretation or application of this Arbitration Provision, **including the enforceability, revocability, or validity of the Arbitration Provision or any portion of the Arbitration Provision**." (Motion, 14:20-23 (emphasis original) [citing Rosenthal Decl., Exh. C, § 15.3(i)].) However, no part of the TSA, including the delegation provision, binds the State of California, on whose behalf Rosales brings the PAGA claim.

Uber misinterprets a PAGA claim's nature by moving the Court to "enforce the agreement between the parties." (Motion, 14:20-23.) The TSA that Rosales entered into with Uber is "not relevant" to Rosales's PAGA claim because Rosales is acting on the State's behalf, and the State did not consent to, and

thus is not bound by, the TSA — including its Arbitration Provision. *(Betancourt v. Prudential Overall Supply, supra,* at p. 448.)

Several of Uber's authorities on delegating arbitrability issues to the arbitrator are not on point because they do not involve PAGA claims. *(AT&T Technologies, Inc. v. Communication Workers of America* (1986) 475 U.S. 643 [collective bargaining dispute], *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63 [federal employment discrimination suit]; *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 884 [alleged home improvement and home solicitation law violations]; *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 528 [federal and state antitrust violations]; *Lee v. Uber Technologies, Inc.* (2016) 208 F.Supp.3d 886, 888 [various Illinois state law claims]; *Johnson v. Uber Technologies* (N.D. Cal. 2019) 2019 WL 4417682, 1 [federal WARN Act violation]; *Ali v. Vehi-Ship* (N.D. Illinois 2017) 2017 WL 5890876 [federal and Illinois state labor law violations]; *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1616 [National Labor Relations Act violations].) None of these cases involve a cause of action brought by a private employee on the state's behalf, as with a PAGA claim.

Uber's authorities involving PAGA claims are distinguishable. *Mohamed v. Uber Technologies, Inc.* (2016) 848 F.3d 1201, 1208 found that an arbitration agreement delegated to an arbitrator the issue of whether a PAGA waiver was enforceable, whereas here the issue is whether Rosales is an "aggrieved employee" within PAGA's meaning. *O'Connor v. Uber Technologies, Inc.* (2018) 904 F.3d 1087, fn. 2 (citing *Mohamed v. Uber Technologies, Inc., supra, at* p.

1212-14) affirmed the trial court's order denying "delegation of the California's Private Attorneys General Act ("PAGA") claims to the arbitrator . . . ." where the arbitration agreement "clearly and unmistakably delegated the question of arbitrability to the arbitrator *except* as pertained to the arbitrability of class action, collective action, and *representative claims,"* including PAGA claims. *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1247 affirmed the non-arbitrability of PAGA claims and arbitrability of private claims to recover unpaid wages.

Uber also ignores the *Williams v. Superior Court, supra,* at p. 649 holding's plain language that plaintiff "cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an 'aggrieved employee.'" The *Williams* court dismissed the argument, similar to Uber's, that whether Rosales is an "aggrieved employee" is not part of the PAGA claim but an "underlying controversy." *(Ibid.)* The court found "no legal authority" that supported splitting a PAGA claim into arbitrable and non-arbitrable elements and reiterated that a PAGA representative plaintiff "does not bring the PAGA claim as an individual claim, but 'as the proxy or agent of the state's labor law enforcement agencies." *(Ibid.* [citing *Reyes v. Macy's, Inc., supra,* at p. 1123].)

In sum, Uber fails to meet its initial burden of establishing, by a preponderance of the evidence, that an arbitration agreement exists between it and the State of California, on whose behalf Rosales asserts her PAGA claim.

IV. Conclusion

The Court DENIES Uber's motion to compel Rosales to arbitrate.

Dated: 3/12/2020

/s/ Amy D. Hogue
AMY D. HOGUE
JUDGE OF THE
SUPERIOR COURT

APPENDIX D

Statutory Provisions Involved

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

California Labor Code § 2699

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3.

(e)

(1) For purposes of this part, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions,

boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g)

(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l)

(1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant

to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

(Amended by Stats. 2016, Ch. 31, Sec. 189. (SB 836) Effective June 27, 2016.)