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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CRYSTAL CHRISTMAN,

Plaintiff and Respondent,

v.

APPLE AMERICAN GROUP II, LLC et al.,

Defendants and Appellants.

B271937
(Los Angeles County
Super. Ct. No. BC601526)

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Apple American Group and Natalja M. Fulton for Defendants and Appellants.

Matern Law Group, Matthew J. Matern and Tagore Subramaniam for Plaintiff and Respondent.

Appellants Apple American Group II, LLC, and Apple American Group, LLC, challenge the denial of their motion to compel individual arbitration of respondent Crystal Christman's claim under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.). They contend an agreement that Christman executed in connection with her employment with them obliged her to arbitrate her claim, or at minimum, her status as an "aggrieved employee" within the meaning of PAGA. We reject those contentions and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In November 2015, Christman filed the underlying action against respondents. Her complaint contains a single claim under PAGA for civil penalties "on behalf of herself and other current and former nonexempt employees" of respondents. The claim is predicated on alleged violations of the Labor Code and Industrial Welfare Commission Wage Order No. 5-2001 (Wage Order 5-2001)).[1] The complaint

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[1] The claim seeks penalties for failure to provide meal and rest periods (Lab. Code, §§ 226.7, 512; Wage Order 5-2001, §§ 11-12), failure to pay overtime wages (Lab. Code, §§ 510, 1194, 1198; Wage Order 5-2001, § 3), failure to pay minimum wages (Lab. Code, §§ 1194, 1197; Wage Order 5-2001, § 4), failure to pay timely wages (Lab. Code, § 204), failure to pay all wages due to former employees (Lab. Code, §§ 201, 202, 203), failure to maintain records (Lab. Code §§ 226, subd. (a), 1174, subd. (d);

(*Fn. continued on the next page.*)

asserts that Christman is an "aggrieved employee[]" for purposes of a representative action under PAGA, and that she complied with the requirements for commencing a representative action under PAGA.

Appellants filed a petition for an order to compel "individual arbitration" of Christman's PAGA claim (Code Civ. Proc., § 1281.2). Appellants contended that prior to commencing her employment, Christman signed an agreement to arbitrate any claim solely as an individual, rather than as a representative of others.

Supporting appellants' petition was a declaration from Jolie Kessel, a human resources field manager for a wholly-owned subsidiary of appellant Apple American Group, LLC. Kessel stated that from May 2014 to February 2015, appellants employed Christman, who executed an agreement to abide by appellants' dispute resolution program, which was described in a booklet Christman received. The agreement provides: "**[B]oth the [appellants] and I agree that all legal claims or disputes covered by the [a]greement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. We also agree that any arbitration between**

Wage Order 5-2001, § 7), failure to furnish itemized wage statements (Lab. Code, § 226, subd. (a); Wage Order 5-2001, § 7), and failure to indemnify employees for work-related expenses (Lab. Code, § 2802).

the [appellants] and me will be on an individual basis and not as a class or collective action. [¶] . . . [¶] This is an agreement to arbitrate all legal claims. Those claims include: claims for wages or other compensation . . . [and] claims for violation of any . . . non-criminal federal, state or other governmental law, statute, regulation or ordinance." (Bolding added.) The agreement further provides that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) "**shall govern the interpretation, enforcement, and proceedings under this [a]greement**." (Bolding added.)

Christman's opposition to the petition contended the arbitration agreement was unenforceable. Relying on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382 (*Iskanian*), Christman maintained that the agreement impermissibly purported to bar her from asserting a PAGA action in court.

On March 23, 2016, the trial court denied appellants' petition, concluding that PAGA claims are not subject to arbitration, and that Christman's claim could not be split into a nonarbitrable representative claim and an arbitrable individual claim. This appeal followed.

DISCUSSION

Appellants challenge the denial of their petition to compel on two grounds. They contend the trial court erred in concluding that Christman's PAGA claim is not subject to arbitration. Alternatively, they contend that at minimum,

Christman must submit to arbitration a threshold determination relevant to her PAGA claim, namely, whether she is an "aggrieved employee" who suffered Labor Code violations as an individual (Lab. Code, §§ 2699, subd. (c), 2699.3). As explained below, we reject those contentions.

A. *Governing Principles*

A petition to compel arbitration is a suit in equity seeking specific performance of an arbitration agreement. (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 347.) Under Code of Civil Procedure section 1281.2, a petition to compel arbitration of a claim may be denied when the arbitration agreement is unenforceable (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425) or the claim is not subject to the arbitration agreement (*Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 474 (*Fitzhugh*); see *Sky Sports, Inc. v. Superior Court* (2011) 201 Cal.App.4th 1363, 1367-1368). Because the trial court's denial of appellants' petition to compel presents only questions of law on undisputed facts, we review that ruling de novo. (*Robertson, supra,* 132 Cal.App.4th at p. 1425.)

The key issues before us concern the arbitrability of PAGA claims. Under the Labor Code, the California Labor and Workforce Development Agency (LWDA) and its constituent departments and divisions are authorized to collect civil penalties for specified labor law violations by

employers. (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370 (*Caliber Bodyworks*).) To enhance the enforcement of the labor laws, the Legislature enacted PAGA. (*Caliber Bodyworks, supra,* at p. 370.) PAGA permits aggrieved employees to recover civil penalties that previously could be collected only by the LWDA, as well as newly established "default" penalties. (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 335; *Caliber Bodyworks, supra*, 134 Cal.App.4th at p. 375; Lab. Code § 2699, subds. (a), (f).)

Under PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. [Citation.] Of the civil penalties recovered, 75 percent goes to the [LWDA], leaving the remaining 25 percent for the 'aggrieved employees.' [Citation.]" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981 *(Arias*), fn. omitted.) As the LWDA has "the initial right to prosecute and collect civil penalties" under the Labor Code, PAGA requires aggrieved employees to provide a specified notice to LWDA before asserting a PAGA claim. (*Caliber Bodyworks, Inc., supra*, 134 Cal.App.4th at pp. 376-377.)

PAGA actions are "a substitute for an action by the government itself," in which the aggrieved employee acts as "the proxy or agent of the state's labor law enforcement agencies." (*Arias*, *supra*, 46 Cal.4th at p. 986.) As explained in *Iskanian*, "[a] PAGA representative action is therefore a type of *qui tam* action. 'Traditionally, the requirements for

enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.' [Citation.] The PAGA conforms to these 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." (*Iskanian*, *supra*, 59 Cal.4th at p. 382.)[2]

In *Iskanian*, our Supreme Court examined two related questions regarding the arbitrability of PAGA claims, namely, whether arbitration agreements obliging employees to waive their right to bring PAGA actions are unenforceable under state law, and whether the FAA preempts any state law rule precluding such waivers. (*Iskanian*, *supra*, 59 Cal.4th at pp. 382-383.) The court held that predispute waivers -- that is, waivers made "before any dispute arises" -- requiring employees as a condition of employment to give

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[2] We observe that *Iskanian* applies the term "representative" to PAGA claims in two distinct ways. *Iskanian* characterizes PAGA claims as representative because they are brought by employees acting as representatives -- that is, as agents or proxies -- of the state. (*Iskanian*, *supra*, 59 Cal.4th at p. 387.) *Iskanian* also describes an employee's PAGA claim as representative when it seeks penalties on behalf of other employees. (*Iskanian*, *supra*, at pp. 383-384.) When necessary, we clarify the meaning of "representative" applicable to our analysis.

up the right to assert a PAGA claim on behalf of other employees are unenforceable, concluding that they "harm the state's interest in enforcing the Labor Code," and thus are contrary to public policy. (*Iskanian*, *supra*, at pp. 360, 383-384.) The court further concluded that the FAA did not preempt that state law rule, stating: "[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 [LWDA] or aggrieved employees -- that the employer has violated the Labor Code." (*Iskanian*, *supra*, at p. 386.) The court explained: "[T]he FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement. It does not aim to promote arbitration of claims belonging to a government agency, and that is no less true when such a claim is brought by a statutorily designated proxy for the agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances." (*Id*. at p. 388.)

B. *Christman's PAGA Claim*

Appellants challenge the denial of their petition to compel, arguing that Christman is obliged to arbitrate her PAGA claim, or at minimum, her status as an aggrieved employee for purposes of that claim. They maintain that the terms of her arbitration agreement encompass the claim,

and that nothing in *Iskanian* precludes the arbitration of PAGA claims.

Before the trial court, appellants sought to compel "[i]ndividual [a]rbitration" of Christman's PAGA claim, arguing that her agreement (1) required her to arbitrate all enumerated claims and (2) limited arbitration to claims she asserted as an individual. They placed special emphasis on the agreement's provisions requiring the arbitration of "all legal claims or disputes" within certain categories and specifying that any such arbitration would be "on an individual basis and not as a class or collective action."

On appeal, appellants abandon the argument that Christman may assert only individual claims in arbitration. For the first time, they seek a determination that under the agreement, Christman's PAGA claim on behalf of herself and other employees -- or at minimum, her status as an aggrieved employee for purposes of such a claim -- is properly subject to arbitration. Our focus is therefore on the propriety of any such determination. [3]

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[3] Appellants' abandonment of the argument they made below limits the relief they seek on appeal. In denying appellants' petition to compel, the trial court concluded that under *Iskanian*, to the extent the agreement amounted to a waiver of Christman's right to assert a PAGA claim, it was unenforceable. On appeal, appellants do not seek reversal of that aspect of the trial court's ruling, although they make critical remarks regarding it. As explained below, we reject the contentions of error those remarks suggest.

(*Fn. continued on the next page.*)

1. *Nonarbitrability of the PAGA Claim*

We begin with appellants' contention that Christman's PAGA claim "as a whole" is subject to arbitration. *Iskanian* did not expressly address the circumstances -- if any -- under

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Relying on post-*Iskanian* decisions by federal district courts and pre-*Iskanian* decisions by the United States Supreme Court and federal circuit courts, appellants maintain that *Iskanian* incorrectly resolved the FAA-related issues discussed in that case. However, in the absence of a post-*Iskanian* decision by the United States Supreme Court directly contradicting *Iskanian*, we are bound by the determinations in *Iskanian*. (*Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 673-674 (*Tanguilig*).) Appellants have identified no such decision.

Appellants contend *Iskanian* is inapplicable because Christman's execution of the arbitration agreement was not a condition of her employment. However, as explained in *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1122, the public policy rationale underlying *Iskanian*'s holding does not hinge on whether the employer required execution of the agreement as a condition of employment. In any event, the record shows that Christman was required to participate in appellants' dispute resolution program, as the booklet describing it states: "This program is a condition of your employment . . . ." (Capitalization omitted.)

Appellants also contend Christman's agreement contains no waiver of the right to assert a PAGA claim akin to that found contrary to public policy in *Iskanian*, arguing that the agreement "is silent on, and does not require waiver of, any potential PAGA claims." (Bolding omitted.) As explained below (see pt. B.2. of the Discussion, *post*), we discern no material difference between the waiver discussed in *Iskanian* and Christman's agreement.

which predispute arbitration agreements might properly subject PAGA claims to arbitration.[4] Following *Iskanian*, two appellate courts have concluded that because a PAGA plaintiff asserts that claim as an agent of the state, a predispute arbitration agreement the plaintiff has executed as an individual does not subject the claim to arbitration because the right underlying the claim is then subject to the state's control. (*Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 445-446; *Tanguilig*, *supra*, 5 Cal.App.5th at p. 678.) As discussed below, we find that rationale dispositive of appellants' contention.

Our Supreme Court has explained that "'*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee -- the plaintiff bringing the action -- or as to other employees as well, is a

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[4] We recognize that in *Iskanian*, the court, in remanding the matter before it for further proceedings, stated: "[The defendant] must answer the representative PAGA claim" -- that is, the claim seeking penalties on behalf of the plaintiff and other employees -- "in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration." (*Iskanian*, *supra*, 59 Cal.4th at p. 391.) In our view, those remarks do not establish when -- if ever -- a predispute arbitration agreement may properly subject a PAGA claim to arbitration, as they are unaccompanied by any discussion of that issue. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 243 ["[A]n opinion is not authority for an issue not considered therein"].)

representative action on behalf of the state.'" (*Iskanian*, *supra*, 59 Cal.4th at p. 387, quoting *id.* at p. 394, conc. opn. of Chin, J.) A PAGA action is thus ultimately founded on a right belonging to the state, which -- though not named in the action -- is the real party in interest. (*Iskanian, supra,* at p. 387.) That is because PAGA does not create any new substantive rights or legal obligations, but "is simply a procedural statute allowing an aggrieved employee to recover civil penalties -- for Labor Code violations -- that otherwise would be sought by state labor enforcement agencies." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.)

Ordinarily, when a person who may act in two legal capacities executes an arbitration agreement in one of those capacities, the agreement does not encompass claims the person is entitled to assert in the other capacity. (*Fitzhugh*, *supra*, 150 Cal.App.4th at pp. 474-475 [son who executed arbitration agreement for father did not subject his own claims as an individual to arbitration]; *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990 [corporate officer who executed arbitration agreement as agent for the corporation did not subject his claims as individual to arbitration]; see *Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 377 [daughter who executed arbitration agreement relating to mother's medical treatment solely as party responsible for mother's medical payments, and not as mother's agent, did not subject mother's claims to arbitration].) That rule

reflects general principles regarding the significance of legal capacities. (*Benasra*, *supra*, at p. 990.)

Here, the record establishes that Christman, as a condition of her employment, executed the arbitration agreement in May 2014, long before she satisfied the statutory requirements for asserting a PAGA claim, which occurred in September 2015. Until Christman satisfied those requirements, she was not authorized to assert the PAGA claim as an agent of the state, which retained control of the right underlying the claim. (See *Arias*, *supra*, 46 Cal.4th at pp. 980-981.) As Christman entered into the agreement as an individual, rather than as an agent or representative of the state, the agreement does not encompass the PAGA claim, which relies on the right to recover penalties then belonging to the state. (See *Mikes v. Strauss* (S.D.N.Y. 1995) 889 F.Supp. 746, 755 [arbitration agreement plaintiff executed as an individual did not encompass plaintiff's *qui tam* claim as a "private representative of the government" because "the government was not a party to the [a]greement"].)

Appellants contend the PAGA claim is subject to arbitration because the agreement provides that it is governed by the FAA. We disagree. Within the context of the FAA, courts resolving disputes regarding whether the parties agreed to arbitrate a certain matter ordinarily employ state law principles regarding the formation of contracts. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944.) As explained above, under California

law, the agreement does not subsume Christman's PAGA claim. Accordingly, we reject appellants' contention that the PAGA claim "as a whole" is subject to arbitration.[5]

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[5] Relying primarily on *Valdez v. Terminix Intern. Co. Ltd. Partnership* (9th Circ. 2017) 681 Fed.Appx. 592, 595-596 (*Valdez*), appellants contend that PAGA claims may be subject to arbitration. There, the pertinent agreement required arbitration of "'covered Disputes'" relating to the "'employment relationship'" and arising under a state employment law. (*Valdez, supra,* at pp. 594-595.) In holding that the agreement obliged the plaintiff to arbitrate his PAGA claim, the Ninth Circuit reasoned that it fell within the scope of the agreement, and that the plaintiff, as the state's representative, was free to agree to arbitration. (*Valdez, supra,* at pp. 594-595.)

We regard *Valdez* as unpersuasive for two reasons. In *Iskanian*, our Supreme Court determined that a PAGA claim "is *not* a dispute between an employer and an employee arising out of their contractual relationship." (*Iskanian*, *supra*, 59 Cal.4th at p. 386, italics added.) Furthermore, as explained above, because Christman executed the agreement before she became the state's representative, she acted only as an individual, and thus lacked the authority to submit the PAGA claim to arbitration.

Appellants' reply brief also contends a delegation clause in the agreement requires us to remand the issue of the arbitrability of the PAGA claim to the trial court, with directions to decide whether that issue is properly assigned to the arbitrator. The clause in question authorizes the arbitrator "to resolve any dispute relating to the interpretation, arbitrability, enforceability, or formation of th[e a]greement . . . ." Because this contention is not found in appellants' opening brief, it has been forfeited. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp. 769-771.)

2. *Nonarbitrability of Christman's Status as an Aggrieved Employee*

We turn to appellants' contention that at minimum, the agreement requires arbitration of Christman's status as an aggrieved employee. In *Williams v. Superior Court* (2015) 237 Cal.App.4th 642, 647-649 (*Williams*), this court rejected such a contention in circumstances closely resembling those before us. There, the plaintiff executed an arbitration agreement with his employer barring him from arbitrating any "'class, collective or representative action'" and from bringing a representative action in a court of law. (*Id.* at p. 646, fn. 2.) Later, when the plaintiff initiated an action in which he asserted only a PAGA claim, the employer sought to enforce the waiver of the PAGA claim, or alternatively, compel arbitration pursuant to the FAA as to whether the plaintiff was an aggrieved employee, for purposes of a PAGA claim. (*Williams, supra,* at p. 645.) The trial court determined that the waiver was unenforceable under *Iskanian*, but ordered arbitration on the issue of the plaintiff's status as an aggrieved employee. (*Id.* at p. 646.) In granting the plaintiff's petition for writ relief, we concluded that the plaintiff's status as an aggrieved employee was not subject to arbitration because a "representative" PAGA claim -- that is, one seeking relief on behalf of employees other than the plaintiff -- cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. (*Williams, supra,* at p. 649.)

We abide by *Williams*. Our Supreme Court has stated that even a PAGA claim "'seeking penalties . . . as to only one aggrieved employee -- the plaintiff bringing the action -- . . . is a representative action on behalf of the state.'" (*Iskanian*, *supra*, 59 Cal.4th at p. 387.) As explained above (see pt. B.2. of the Discussion, *ante*), when Christman executed the agreement, she was not authorized to consign a PAGA claim to arbitration, as she was not then the state's agent. For that reason, she also lacked the authority to require arbitration of a key element of that claim, whether she was an aggrieved employee for purposes of recovering penalties under PAGA. (See also *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 [PAGA plaintiff's status as aggrieved employee is not a separately arbitrable issue because it is aspect of representative action on behalf of state, rather than dispute between plaintiff and employer]; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 420-422 [concluding that under *Iskanian*, arbitration agreement requiring plaintiff to arbitrate whether he was """aggrieved employee""" for purposes of PAGA claim, but permitting remaining portion of PAGA claim to be resolved in court, was unenforceable].)

In an effort to distinguish *Williams*, appellants suggest that Christman's agreement is materially different from the arbitration agreements at issue in *Iskanian* and *Williams*. We disagree. In *Iskanian*, the court concluded that the pertinent waiver contravened public policy because it encompassed "class" and "representative" actions, and thus

barred the plaintiff from asserting a PAGA claim on behalf of other employees. (*Iskanian*, *supra*, 59 Cal.4th at pp. 360-361, 383-384.) Although the court recognized that the waiver potentially permitted the plaintiff to assert an "individualize[d]" PAGA claim, the court declined to decide whether such a claim was cognizable, stating that "a prohibition of representative claims" -- that is, claims on behalf of other employees -- "frustrates the PAGA's objectives." (*Iskanian*, *supra*, at pp. 383-384, italics omitted.) That rationale also applied to the arbitration agreement in *Williams*, which barred the plaitiff from asserting such a representative claim in any forum.

Christman's agreement is substantively equivalent to the agreements at issue in *Iskanian* and *William*s. The agreement purports to prohibit the assertion of representative claims -- that is, claims on behalf of employees other than Christman -- in any forum, as it requires arbitration of "all legal claims or disputes" of statutory violations and mandates that any such arbitration must be "on an *individual basis* and not as a class or collective action." (Italics added.) Indeed, before the trial court, appellants maintained that the agreement was "unequivocal" in limiting Christman to the assertion of claims as an individual, arguing that "[w]hile [Christman] herself can arbitrate her wage and hour claims and seek civil penalties on her own behalf, she cannot seek civil penalties on behalf of any other . . . current or former employees, because the [a]greement and [dispute resolution] [p]rogram

[b]ooklet bar the arbitrator from hearing claims involving multiple employees." The circumstances before us are thus indistinguishable from those presented in *Williams*. Accordingly, the trial court did not err in denying appellants' petition to compel.[6]

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[6] Contending the appeal is frivolous and taken solely for the purpose of delay, respondent requests sanctions in her brief on appeal, including dismissal of the appeal and an award of monetary sanctions. Generally, sanctions for a frivolous appeal are granted only when the appeal was prosecuted for an improper motive or is indisputably meritless. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We deny respondent's request for sanctions, as the appeal does not meet the demanding standards set forth in *Flaherty* for the imposition of sanctions, and respondent has failed to assert her request in a separate motion (Cal. Rules of Court, rule 8.276(e); *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 ["Sanctions cannot be sought in the respondent's brief"]).

DISPOSITION

The order denying appellants' petition to compel arbitration is affirmed. Respondent is awarded her costs on appeal.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.