SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WEST DISTRICT

CHARLIE SHEEN, an individual; and 9th STEP PRODUCTIONS, a California corporation, Plaintiffs, vs. **CHUCK LORRE, an individual, CHUCK LORRE PRODUCTIONS, INC., a California corporation; WB STUDIO ENTERPRISES, INC, a Delaware corporation; and DOES 1 through 20, inclusive,** Defendants.	CASE NO. **SC111794** **RULING ON SUBMITTED MATTERS AND ORDERS**

This litigation commenced with the filing of a complaint by Charlie Sheen and 9TH Step Productions (collectively referred to as "Sheen" or as "plaintiffs"), which, after amendment on March 22, 2011, alleges ten causes of action against one of more of the following defendants: Chuck Lorre, Chuck Lorre Productions, Inc. (collectively referred

to as "Lorre") and WB Studio Enterprises, Inc. (referred to as "WB").

The parties have filed the following motions: (1) Sheen's Motion to Stay Arbitration; (2) WB's Petition to Compel Submission of Arbitrability of Disputes to Arbitration and, in the alternative, Petition to Compel Arbitration of the Merits, together with its Motion to Stay Proceedings; and (3) Lorre's Motion to Compel Arbitration, in which Lorre also seeks submission of the issue of arbitrability to the arbitrator and a stay of trial court proceedings pending the outcome of the arbitration. Lorre also filed a joinder in WB's motions.

All motions were argued and originally submitted on April 19, 2011. Thereafter, on April 27, counsel for WB filed a supplemental brief in which it argued that the decision of the United States Supreme Court in *AT&T v. Concepcion* (May 27, 2011) 563 U.S. ___, 131 S.Ct. 1740 (*Concepcion*), decided earlier that day, was relevant to determination of the matters pending in this Court. The next day counsel for Sheen filed a brief addressing that contention and an additional issue. Because of the additional arguments of two of the three parties, and to permit each party a full opportunity to address the issues raised *sua sponte* by WB and Sheen after submission of the matter, on May 10 this Court issued an order vacating the earlier submission, permitting further briefing by all three parties and reminding them that the time for submission of evidence was at or before the trial of the matter on April 19. Also on May 10 the Court issued its rulings on the evidence objections by the parties made at or before the April 19 hearing,[1] thus establishing the evidence admitted for purposes of the trial of the matters heard on April 19. Thereafter, the parties filed their respective supplemental memoranda.

Having considered the evidence admitted, the several memoranda on the law, and the arguments of the parties made at the trial of this matter and in their

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[1] The reference to Exhibit II in that Minute Order should have been to Exhibit JJ. That order is amended nunc pro tunc to make this correction.

memoranda, the Court now rules and enters the following orders.

1. *Concepcion case*

What is clear from the Supreme Court's opinions[2] in *Concepcion* distinguishes it from the issue presented here; i.e., no party to this matter contends that there is a rule singling out and denying arbitrability to all agreements of a particular type. Instead, the threshold issue on the merits presented here is whether the particular clause of the agreement between Sheen[3] and WB mandates that arbitrability of the issues here in dispute be determined by the arbitrator rather than by the Court. Nothing about this inquiry suggests a general rule "hostile" to arbitration, as was a principal concern addressed in *Concepcion*.

2. *The petition and motions, and the nature of this proceeding*

Sheen's Motion seeks to stay all proceedings before the arbitrator pending trial of the allegations of the First Amended Complaint. Sheen's Motion i:28-1:2 He has also filed oppositions to WB's Petition and to Lorre's Motion.

WB's Petition and Lorre's separate Motion each request determination of a threshold issue: Should the question of arbitrability of the claims made in the First Amended Complaint be submitted to binding arbitration under the Sheen - WB contract (WB's Petition 1:5-7; Lorre's Motion 1:7-11)? If so, the arbitrator rather than this Court would determine arbitrability and any defenses thereto. Sheen opposes these motions,

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[2] The parties' discussion of the "4 and 1" majority decision in *Concepcion* (as characterized by counsel for Sheen) is appreciated. Whether that court will expand the scope of its ruling to bar unconscionability determinations by state trial courts under section 2 of the FAA is unlikely for many reasons, including those cogently set forth in the supplemental memorandum filed by counsel for Sheen. This comment should not be construed as a statement that this Court agrees with all of the views expressed in the supplemental memorandum filed by plaintiffs' counsel.

[3] Due to the redactions made in the Sheen - WB contract in evidence, the Court cannot determine if 9th Step Productions (Sheen's "loan out company") is also a party to, or otherwise bound by, that contract. As the parties' arguments assume that to be the case, the Court's analysis is based on that assumption.

contending that arbitrability must be decided by this Court.

Code of Civil Procedure section 1290.2 (see also section 1281.2) addresses the nature of the hearing held on a petition to commence, or to stay, an arbitration. The trial court sits as trier of fact, weighing all of the declarations and other evidence and legal arguments, to reach a determination on the matters presented. *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218, citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414. As indicated, *ante*, that evidence consists of the declarations and documents submitted by the parties after the rulings on the several evidence objections resolved in the Minute Order filed May 10.[4]

3. *Analysis*

The parties agree that the matters presented are subject to the Federal Arbitration Act, 9 U.S.C. sections 1-14 (the FAA).

A court presented with a request to refer to arbitration the question of arbitrability of issues allegedly arising under a contract containing an arbitration clause must make threshold inquiries to determine (1) the existence of a contract between the parties and (2) whether the contract's arbitration clause expressly requires that the arbitrator determine arbitrability. This is required, *inter alia*, because the widely recognized "general rule" — that arbitrability of a dispute to which the FAA applies is for determination by the court (e.g., *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 US 79, 84; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 US 938, 943 [the expectation is that the parties to an agreement containing an arbitration clause *would likely expect a court* to decide the dispute] — is subject to a well-recognized exception: Arbitrability is to be determined by the arbitrator when the parties have "clearly and

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[4] WB submitted three documents "conditionally under seal". The number was effective reduced to two as one of those documents was also submitted separately without a request for sealing. Based on the rulings now made, the Court did not consider the two conditionally sealed documents. The Motion to Seal is now denied as moot. Counsel for WB should make arrangements with the Clerk to retrieve the envelope containing the conditionally sealed matter.

unmistakably" agreed that the arbitrator decide such issues. *Howsam v. Dean Witter Reynolds, Inc., supra,* 537 U.S. at 84; *Rent A–Center, West, Inc. v. Jackson* (2010) 561 U.S. ___, ___, 130 S.Ct. 2772, 2777–2778 & fn. 1; *cf., Granite Rock Co. v. International Brotherhood of Teamsters* (2010) ___ U.S. ___, ___, 130 S.Ct. 2847, 2856; *Nagrampa v. MailCoups, Inc.* (9th Circ. 2006) 469 Fed.3d 1257, 1264 [en banc].

Once the threshold determination is made that arbitrability is for the arbitrator, the matter is required to be referred for that determination.

Thus, this Court must determine if the arbitration clause in the contract at issue is "broadly worded" such that it is clear and unmistakable that the parties agreed to submit the issue of arbitrability to the arbitrator rather than have a court make that determination. *Green Tree Financial Corp. v. Bazzle* (2003) 539 US 444 is of particular interest because the contract between the parties in *Green Tree* provided that "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" were to be subject to determination by the arbitrator. *Id.*, at 451-452. If the arbitration clause at issue in this case is determined to be functionally similar to that in *Green Tree*, then the matter must be referred to the arbitrator for determination of arbitrability, and she or he will hear and decide any defenses to enforcement of that clause, including but not limited to unconscionability.

The parties agree that the provision of the employment agreements between Sheen and WB, and between Lorre and WB, relevant for this analysis are the virtually identical provisions set out in subparagraph D[5] of the Sheen - WB contract and Rider A of the Lorre - WB contract, each of which is an exhibit to the March 28, 2011 Declaration of Jody Zucker, Senior Vice President and General Counsel of WB's parent entity. Reference will be to Subparagraph D, although it could equally be to Rider A.

Subparagraph D consists of an introductory section and three numbered subsections. The introductory section defines the term "Dispute" broadly, to encompass

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[5] Each of the agreements has otherwise been redacted.

"[a]ny and all controversies, claims or disputes arising out of or related to [the] Agreement or the interpretation, performance or breach thereof, including but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of [the] agreement to arbitrate...." All such Disputes are to be resolved as set out in the subsection of subparagraph D headed "Arbitration".[6]

What is clearest from the cases cited by the parties regarding this question is that the matters of who decides arbitrability and what constitutes a contractual provision that requires reference to the arbitrator are not free from controversy or conflicting determinations. Analysis of cases discussing this issue reveals that the "general rule" (see, *ante*, at 4 - 5) that clauses which appear to vest authority to make key determinations in the arbitrator are often found to be not as clear as a first reading would suggest: "... [S]imilar language used to describe the scope of an arbitration clause has been interpreted quite differently by the courts." *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 554, fn. 1 (Dream Theater). Contract clauses textually similar, if not functionally identical, to the clause at issue here have been held by lower courts to require reference of the issue of arbitrability to the arbitrator — or to require that the particular court make that same determination.

This lack of clarity in construing such clauses, indeed, in the apparent preference on the part of lower courts to deny motions to refer the issue of arbitrability to the arbitrator, results from a preference, particularly in state courts, for open court

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[6] The referenced subparagraph sets out the procedure for initiating first mediation and then arbitration, incorporates by reference the Rules and Procedures of the Judicial Arbitration and Mediation Service (JAMS), specifies that "[t]he arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute", contains a choice of law clause, and includes a waiver of punitive damages. Incorporation by reference of the rules promulgated by JAMS is a common practice (*see, Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557 [incorporation into parties' contract of AAA rules], citing *Shaw Group Inc. v. Triplefine Intern. Corp.* (2d Cir. 2003) 322 F.3d 115, 118 [approving incorporation of International Chamber of Commerce rules]. Sheen's argument that such incorporation is exceptional is lacking in support.

proceedings, enforcing the state's Constitutional right to trial by jury, and for the clear and well-understood and public procedures of trial and appeal — as contrasted with the non-public nature of proceedings before arbitrators, who may not be routinely required to follow any rules of evidence[7] and whose decisions are subject only to closely circumscribed and truncated public, court review once the arbitrator's award is final.

There is no clearer — or less complicated — example of contract language that invokes the parties' intent to have the arbitrator determine arbitrability than that before the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395 (*Prima Paint*). There, the relevant contractual language provided:

> "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association ...." *Id.*, at 398.[8]

Subparagraph D of the contract at issue here has additional provisions, which give it a meaning even clearer than the clause under scrutiny in *Prima Paint*. The introductory clause of Subparagraph D provides:

> "Any and all controversies, claims or disputes arising out of or related to this Agreement or the interpretation, performance, or breach thereof, including but not limited to alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ... shall be resolved [by Arbitration]."

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[7] In this case the arbitration clauses require that the arbitrator apply the Federal Rules of Evidence.

[8] *Prima Paint* arose in a federal forum. In *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 447-448 [challenge to the validity of a contract as a whole is for determination by the arbitrator], the supreme court applied the *Prima Paint* rule to cases arising in state courts. The holding is the latter case is relevant here because of the text of the arbitration clause at issue in this case, viz., the same rules must apply in FAA cases whether arising from federal or state courts.

The additional words in Subsection D, and the identical words in Rider A, clarify and cement the meaning of the clause and further illuminate the relevant intent: The parties to the Sheen - WB contract and to the identically worded Lorre - WB contract intended to submit to the Arbitrator for determination the matters defined as Disputes by this carefully worded text, including the matter of arbitrability and all defenses related thereto.

The otherwise well-reasoned and well-articulated arguments in this regard by Sheen's counsel cannot prevail on this precedent and text.[9] Even were the clause at issue not as clear, the United States Supreme Court and the California Supreme Court have each repeatedly expressed strong preference for enforcement of agreements to arbitrate,[10] notwithstanding the uncertainty and lack of predictability that is the frequent comment of intermediate appellate court opinions. *Compare, e.g.*, the discussion in *Dream Theater* with that in *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884.

This conflict in construction of similarly-worded arbitration clauses and (state) courts' reluctance to refer to arbitration the determination of arbitrability of disputes arising from contracts containing arbitration clauses which appear by their terms to require such reference has been the subject of scores of law review articles, among them those set out in the accompanying footnote.[11] The first two articles cited in the

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[9] There is no doubt but that this analysis applies with equal force in California courts. In discussing the application of the principles articulated in *Prima Paint* to state court proceedings, our Supreme Court made clear that "California follows the same rule" in the construction of the relevant contract clauses. *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415, fn. 8.

[10] Cases articulating this preference for arbitration are many and include *Moses H. Cone Memorial Hospital v. Mercury Construction Co.* (1983) 460 U.S. 1, and *Broughton v. Cigna Health Plans of California* (1999) 21 Cal.4th 1066, 1073-1074.

[11] Broome, *An Unconscionable Application of the Unconscionability Doctrine: How California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39

footnote were also cited in *Concepcion, supra,* 563 U.S. at ___, 131 S. Ct. at 1747.

The circumstances of the contract negotiations between the parties, to the extent presently known and relevant, support this conclusion.[12]

Having carefully considered the text of Subparagraph D, as well as the cases and the reasoning of the highest courts of our nation and state, this Court determines that Subparagraph D of the Sheen - WB contract, and the identical subparagraph in the Lorre- WB contract expressly and clearly require that arbitrability of the matters within the definition of the contractually-defined term Dispute be determined by the arbitrator appointed pursuant to JAMS Rules. The clause obligates each party to submit to arbitration, *inter alia*, "... all controversies... including but not limited to [] alleged violations of state ... statutory or common law rights ...." Sheen seeks to have determined whether his contract with WB is unconscionable under Civil Code section 1670.5(a). Sheen's request is clearly and unmistakably required to be referred to an arbitrator for determination. This conclusion does not foreclose Sheen from presenting his claims, including his claims of unconscionability and violation of public policy, to the

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(2006); Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185 (2004); Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 Washington Univ. J. Law and Policy 129 (2004); Buhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N Y U L Rev. 1420 (2008).

[12] While the record of the contract negotiations at this stage is sparse, it is clear that Sheen was represented by competent counsel in those negotiations. That record is relevant only to the limited extent necessary to the making of the threshold determinations discussed in the text. No inference is to be drawn regarding the need for a more complete factual record as may be relevant to the determination of arbitrability and of any defenses as may be asserted. The arbitrator has the power under the rules agreed upon by the parties to permit sufficient and appropriate discovery for the presentation of defenses which Sheen sought to have determined by this Court, including the power to order more than a single deposition. *E.g.*, JAMS Rules 16 and 17, addressing, *inter alia*, exchange of information and discovery procedures.

arbitrator.[13]

Lorre, as a third-party beneficiary of the Sheen - WB contract (as Sheen has agreed), and joining in WB's Petition, is a beneficiary of this ruling and will be a party to the determination of arbitrability, and the consideration of Sheen's defenses thereto, to be made by the arbitrator.

Lorre's separate Motion to Compel Arbitration, etc. requires additional analysis. In that motion Lorre seeks an order to determine arbitrability of "the applicable arbitration agreement between the parties," apparently referring to both the Sheen - WB contract and the Lorre - WB contract. Motion 1:7 In support, Lorre argues that, even though Sheen is not a party to the Lorre - WB contract, Sheen is equitably estopped from contesting the arbitration of his claims against Lorre (Motion, at Memorandum 1:19-20).[14]

Sheen points out that Lorre's written request to JAMS to commence arbitration was made only with respect to the Sheen - WB contract, and there is no evidence in the record that Lorre ever sought to commence arbitration under the Lorre - WB contract.[15] Sheen also acknowledges that the Fifth Cause of Action of his First Amended Complaint alleges that Sheen is a third party beneficiary of the Lorre - WB contract.

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[13] Sheen's reliance on state court cases that narrowly construe the obligation to refer the determination of arbitrability to an arbitrator is not without precedent. Numerous intermediate appellate court cases cited by Sheen support -- and refute -- his contentions. This dichotomy is analyzed in the law review articles cited in footnote 11, *ante*. Nevertheless, those state court cases which Sheen cites in support of his claim that this Court must make the arbitrability determination and adjudicate his defenses cannot be viewed as persuasive in view of the clear commands of our federal and state supreme courts for the reasons discussed in the text.

[14] WB did not file a response to Lorre's Motion.

[15] The claims made by WB and Lorre before JAMS are not in the record, e.g., there is no evidence with respect to compliance with JAMS Rules 5 and 9. That omission does not affect the conclusions reached in the text.

Lorre's equitable estoppel argument has merit notwithstanding the uneven record. Unlike the circumstances of *Smith v. Microskills San Diego, L.P.* (2007) 153 Cal.App.4th 892, in which there was no relationship between the third party (school), on the one hand, and the student and his lender, on the other, to support the school's demand for arbitration under the loan agreement between the student and his lender,[16] the facts of the present case are analogous to those presented in *Zakarian v. Bekov* (2002) 98 Cal.App.4th 316, in which the court determined that equitable estoppel is appropriately found when there is a preexisting relationship between a party and the nonsignatory to an arbitration clause that makes it equitable to bind the nonsignatory, or when the circumstances otherwise establish that the nonsignatory is a third party beneficiary to the contract. *Id.*, at 322-323.

Sheen's allegation that he is a third party beneficiary of the Lorre - WB contract brings him within this rubric, as do the circumstances of his relationship with Lorre and WB. Based on that allegation and the facts previously determined, Sheen is estopped to deny application of the Lorre - WB arbitration clause to his claims, or to WB's or Lorre's claims.[17]

There are inherent limitations on these determinations, however, viz., they do not apply to disputes (the lack of a capital "D" is intentional) which involve non-contracting parties *without their express consent*, or to proceedings of particular types. These issues are discussed in the next section.

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[16] *Smith* holds that determination of equitable estoppel is a question of law for the court, rather than a matter to be referred to the arbitrator. *Id.*, at 900.

[17] The circumstance that Lorre has apparently not yet formally asked JAMS to commence arbitration proceedings under the Lorre - WB contract is likely to be remedied promptly once these motions are determined. In the event it is not, all remain engaged pursuant to WB's demand for arbitration to which all parties are participants.

4. *Limitations and exception*

The seventh cause of action of Sheen's First Amended Complaint seeks enforcement of Labor Code sections 2698, et seq., known as The Labor Code Private Attorneys General Act of 2004 (hereinafter referred to as the PAGA), and involves persons who did not sign the Sheen - WB contract and who cannot be bound thereby. Labor Code section 2699(g)(1).

Determining whether the PAGA claims are arbitrable is complex. WB implicitly recognized that complexity by devoting a significant portion of its final brief to this matter.

On this record there is no basis to refer to the arbitrator the determination of arbitrability of the PAGA claims; indeed, they may not be arbitrated. There are at least three reasons for this differentiation and conclusion: (1) no reading of the arbitration clause in evidence supports or suggests a construction that its terms apply to a claim for collection of a penalty existing by reason of, or arising under, the PAGA; (2) this particular cause of action seeks a remedy belonging not to any individual but to the state Labor and Workforce Agency (LWA), enforcement of which the PAGA expanded to individuals because of state budgetary constrains (Statutes 2003, ch. 906, sec. 1); and (3) this claim for relief applies to persons who did not execute the arbitration clause at issue.[18]

Review of the text of the arbitration clause at issue confirms these conclusions. There is absolutely no reference to claims of third parties in general, or to statutory

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[18] The remedy available pursuant to the PAGA is adjudication of the appropriate amount of civil penalties, three-quarters of which are paid to the state for enforcement of state labor laws and related public purposes (Labor Code sections 2699(i) and (j)). This circumstance presents an additional issue: Whether it is appropriate for the determination of the proper amount of such penalties to be made by an arbitrator rather than by a court. Determination of civil penalties is more appropriate in a public forum, certainly so when there does not exist any express contractual term seeking to privatize litigation of an essential aspect of a public enforcement proceeding. *Cf. Cruz v. PacifiCare Health Systems, Inc.* (2009) 30 Cal.4th 303, affirming *Broughton v. Cigna Heathplans* (1999) 21 Cal.4th 1066.

enforcement actions in particular. Nothing in the arbitration clause at issue states or suggests that claims brought on behalf of the LWA to enforce the PAGA are subject to arbitration. The term Dispute is a specifically defined term under the agreements, one which cannot fairly be read to include the claim and remedy asserted in the seventh cause of action. One reason for this is the very nature of a PAGA claim — it does not arise under contract. The PAGA claims are distinct from claims for unpaid wages, such as the claims at issue in *Perry v. Thomas* (1987) 482 U.S. 483, 490, which held a very different Labor Code section (section 229, relating to collection of wages rather than to enforcement penalties) to be preempted by section 2 of the FAA. Rather than addressing claims for wages due to private parties, PAGA suits seek penalties for violation of state laws. That a PAGA claim may be enforced in an action brought by an individual standing in for the under-staffed LWA (state enforcement agency) does not convert it into a private claim; nor can the circumstance that one-quarter of the penalty finally determined is paid to the private individual have this effect.

Preemption under the FAA is not found when the claim at issue is based on public policy applicable to contracts irrespective of the presence, or absence, of an arbitration agreement or clause. Nor is it found when the arbitration clause being construed does not address in any manner the very gravamen of the particular (seventh) cause of action. *Cf.*, *Sonic-Calabasas A. v. Moreno* (2011) 51 Cal.4th 659, 688-689, citing *Perry v. Thomas* (1987) 482 U.S. 483, 492-493, fn. 9. As the court in *Sonic-Calabasas* explains, enforcement actions are exempt from the preemptive provision of the FAA that might otherwise proscribe such suits (*id.*, at 690-691, discussing the distinction made by the United States Supreme Court in *Preston v. Ferrer* (2008) 552 U.S. 346, which in turn discusses the same court's holding in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 [see discussion of *EEOC*, *post*]). *See also*, *Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, holding that provisions in employment agreements that bar employees from acting under the PAGA as private attorneys general are invalid. *Id.*, at 1300.

The reasoning of *EEOC v. Waffle House, Inc., supra*, 534 U.S. 279, supports the conclusion that there is no conflict between the PAGA and the FAA. There, the federal Equal Employment Opportunity Commission had initiated an enforcement action which was challenged as contrary to the FAA. In rejecting that preemption claim, the United States Supreme Court held that:

> "[all that the FAA requires is that courts] place arbitration agreements on equal footing with other contracts, ... 'not require parties to arbitrate when they have not agreed to do so.' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).[FN9] See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so").... *No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty.* Accordingly, the proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *Id.*, at 293-294. (Emphasis added)[19]

The text and legislative history of the PAGA make clear that it was not enacted, nor does its application stand as an obstacle, to the enforcement of the FAA.

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[19] Footnote 9 of the Court's Opinion reads as follows:

"In *Volt*, the parties to a construction contract agreed to arbitrate all disputes relating to the contract and specified that California law would apply. When one party sought to compel arbitration, the other invoked a California statute that authorizes a court to stay arbitration pending resolution of related litigation with third parties not bound by the agreement when inconsistent rulings are possible. We concluded that the FAA did not pre-empt the California statute because 'the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*' 489 U.S., at 474–475, 109 S.Ct. 1248 (quoting 9 U.S.C. § 4). Similarly, the FAA enables respondent to compel Baker to arbitrate his claim, but *it does not expand the range of claims subject to arbitration beyond what is provided for in the agreement.*" (Emphasis added.)

And, *cf. Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 544-545, which illustrates the analysis required when federal statutes do contain (limited) preemption clauses and state statutes predicated on that sovereign's police power are implicated:

> "As [the Supreme] Court noted in Kelly v. Washington, 302 U.S. 1, 10, 58 S.Ct. 87, 92, 82 L.Ed. 3 (1937): 'The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' See also Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156, 62 S.Ct. 491, 496, 86 L.Ed. 754 (1942); Askew v. American Waterways Operators, Inc., 411 U.S. 325, 337, 341, 93 S.Ct. 1590, 1600, 36 L.Ed.2d 280 (1973). When we deal, as we do here, with congressional action 'in a field which the States have traditionally occupied,' the basic assumption from which pre-emption must be viewed is 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); cf. De Canas v. Bica, 424 U.S. 351, 356, 96 S.Ct. 933, 936-937, 47 L.Ed.2d 43 (1976)." *Id.*, at 544-545, Rehnquist, J., concurring in part and dissenting in part.

Further, when a PAGA enforcement action is initiated, it is not brought under the contract, or by a signer of the contract *qua* signer. The cause of action is that of the LWA, an agency of the State of California; the suit is brought to vindicate a public right as an agent of the LWA. Bringing a suit as an agent of the state differentiates Sheen's claim in his seventh cause of action from the other claims -- and requires a different result.

Thus, there can be no "direct and positive" conflict between the PAGA and the FAA, no suggestion that either contract at issue here even suggests inclusion of PAGA claims within the term Dispute, and, thus, no basis upon which it can be found that the

PAGA is preempted, or that that determination is appropriately transferred to an arbitrator.

The unpublished federal district court cases cited by WB are not entitled either to any weight or to any deference for several reasons, beginning with the circumstance that they do not contain more than superficial and conclusory statements. Were they decisions of California state courts, these unpublished federal trial court rulings would not be properly citable. Rule 8.1115, California Rules of Court. While the fact that they are federal court decisions means they are not within the terms of the cited rule, that does not make them worthy of deference. On their merits, they are not good authority for the propositions for which they are cited by WB and Lorre. Analysis of these cases reveals that they contain no cogent or compelling reasoning or any logical force. Had they been well-reasoned, they might have supported the arguments WB advances. *Cf.*, *Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel* (2011) 192 Cal.App.4th 1183, 1219-1220 As a California trial court, this court is bound to follow binding precedent of *appellate* courts, whether state or federal (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450), not unpublished, cursory and conclusory rulings of other trial courts.

Analogous case authority supports the conclusion set out here. The California Supreme Court, in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, carefully distinguished claims designed to benefit the public and to vindicate public rights, on the one hand, from those seeking enforcement of private claims, on the other. In doing so, our Supreme Court rejected PacifiCare's contention that the court's earlier decision in *Broughton v. Cigna Health Plans* (1999) 21 Cal.4th 1066 (holding that injunctive relief claims under the Consumer Legal Remedies Act (CRLA) are inarbitrable) should be overruled in light of *Green Tree Financial Corp.-Alabama v. Randolph, supra,* 531 U.S. 79 and *Circuit City v. McAdams* (2001) 532 U.S. 105.

> "In *Broughton*, we recognized that the United States Supreme Court has emphasized Congress's and its own policy in favor of arbitration and, at least

since 1984, has rejected numerous efforts and arguments by state courts, federal courts and litigants to declare certain classes of cases not subject to arbitration. (*Broughton*, *supra*, 21 Cal.4th at pp. 1074-1075.).

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"We nonetheless held that requests for injunctive relief designed to benefit the public presented a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements. We reasoned that the Supreme Court has acknowledged that Congress may " 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration' " (*Broughton*, *supra*, 21 Cal.4th at p. 1074, quoting *Southland Corp. v. Keating*, *supra*, 465 U.S. at p. 10 [104 S.Ct. at p. 858]), and that "[t]he unsuitability of a statutory claim for arbitration turns on congressional intent, which can be discovered in the text of the statute in question, its legislative history or in an 'inherent conflict" between arbitration and the [statute's] underlying purposes.' (*Broughton*, *supra*, 21 Cal.4th at p. 1075, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26 [111 S.Ct. 1647, 1652, 114 L.Ed.2d 26] (*Gilmer*).)" *Id.* at 311-312.

Suits to collect penalties payable to the state are state enforcement actions to the same extent as suits for injunctive relief brought on behalf of the state.

Nor in this case is there any basis upon which to conclude there exists any legislative intent to single out arbitration clauses for disparate treatment under the PAGA, or that there is any inherent conflict between the PAGA and the FAA. And the legislative history of the PAGA supports the conclusion that the non-arbitrability of the PAGA claims is not contrary to the FAA. No part of the legislative history of the PAGA suggests that it was intended as an obstacle to arbitration. See *Dunlop v. Superior Court* (2009) 142 Cal.App.4th 330 [analyzing the legislative history of the PAGA]. Indeed, in *Arias v. Superior Court* (2009) 46 Cal.4th 969, a case cited by WB, our Supreme Court held that a PAGA plaintiff represents the interests of the LWA in

recovering civil penalties and "does so as the proxy or agent of the state labor law enforcement officials"; see also *Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, holding to be void provisions in employment agreements that bar employees from enforcing the PAGA.

Thus, the PAGA claims in the First Amended Complaint are not arbitrable and cannot be ordered to arbitration, whether under WB's Petition or Lorre's Motion to compel arbitration.[20]

Contrast with this Sheen's FEHA claims, which arise directly from his employment under the Sheen - WB contract and therefore are within the scope of its arbitration clause. This result is consistent with the substantial authority that FEHA claims can be made arbitrable by contract. *E.g., Armendariz v. Foundation Health Psychcare Services, al.* (2000) 24 Cal.4th 83; *Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal.App.4th 452, 463; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1210.

6. *Stay of matters not referred to arbitrator*

WB, joined by Lorre, and Lorre separately, seek stays of trial court proceedings (1) pending the arbitration of Sheen's objections to the arbitrability of his disputes with WB and Lorre and (2) pending conclusion of all proceedings before the arbitrator, viz., before issuance of final award (Code of Civil Procedure, section 1285).

In the event the PAGA claim is severed, WB and Lorre[21] each request that this

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[20] WB's claim that Sheen's PAGA claims are procedurally flawed (WB's Petition to Compel Arbitration, filed March 28, 2011, at 9, fn. 4), although potentially viable at the time it was made, expired almost simultaneously with the hearing of this matter, as the 33 day stay provided for by statute had expired. In its May 18 Memorandum, WB concedes this point (May 18 Memorandum at 11, fn. 2). For this reason, this claim is not otherwise considered.

[21] As noted in the text, *ante*, Lorre has joined in WB's Petition, including WB's request for a stay. In addition to the discussion in the text, the following authorities confirm that a non-signer to an agreement, who is a party to litigation that includes a request that some or all of the issues of that litigation be referred to an arbitrator may make a motion

Court stay further proceedings on the PAGA claims. In advancing this contention WB argues that a stay is appropriate where an arbitration could moot the need to litigate non-arbitrable claims, or where there is a risk of inconsistent determinations between the trial court and the arbitrator. Specifically, WB argues, arbitration of the parties' contract dispute could moot this PAGA claim, which is related to Sheen's allegation that he has a right to additional payments under his contract with WB. If the arbitrator concludes that Sheen does not have a right to additional payments under his contract, the PAGA claim as to Sheen himself fails.[22] WB's May 18 Memorandum at 4:9-5:3 and 11:20-12:5.

WB's and Lorre's arguments have merit. *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, holds that a stay of overlapping claims in a civil action shall be ordered so long as there is at least one claim that overlaps with issues that may be ordered to arbitration, relying on Code of Civil Procedure section 1281.4.[23]

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to stay the litigation. Code of Civil Procedure sections 1281.4 and 1281.2 (as to "third parties) and *cf.* 9 U.S.C. section 3 and *Arthur Anderson LLP v. Carlisle* (2009) ___ U.S. ___, 129 S.Ct. 1896, 1903 [litigant not a party to arbitration agreement may invoke FAA provision when state equitable estoppel doctrine permits non-signer to enforce the agreement – as is the case in California].

[22] Because of the nature of the PAGA, however, neither an order for a stay of proceedings on the seventh cause of action, nor any eventual adverse ruling as to that claim as to Sheen himself, can stay independent timely actions by either the LWA or by persons within the class encompassed in that claim. *Cf.*, *Arias v. Superior Court* (2009) 46 Cal.4th 969, 987.

[23] California law rather than federal controls this determination. E.g., *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376. WB's citation to a different and inapplicable code section (Code of Civil Procedure section 1281.2) is not determinative.

Code of Civil Procedure section 1281.4 provides, in pertinent part, that "If a court of competent jurisdiction ... *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

The request for such a stay may be made by any party to the litigation, regardless of whether that party signed or is a third party beneficiary of the arbitration agreement. Thus, Lorre's separate motion for stay, as well as WB's (and Lorre's joinder in WB's Petition), must be, and are, granted. *See Coast Plaza Doctors Hospital v. Blue Cross of Calif.* (2000) 83 Cal.App.4th 677, 693 [staying all non-arbitral claims *other than* for injunction]; *Federal Insurance Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374 [stay required where continuation of proceedings in the trial court "disrupts" arbitration proceedings and "can" render those proceedings ineffective].[24]

The Court has determined, as discussed above, that arbitrability of the matters indicated, together with any defenses, is properly determined by the arbitrator. Thus, a stay of other proceedings until that determination is made is appropriate.

Accordingly, and good cause appearing,

IT IS ORDERED that:

1. WB's Petition (together with Lorre's Joinder therein) and Lorre's Motion to refer the determination of arbitrability, and any subsequent proceedings, to the arbitrator are granted with respect to all matters except the PAGA claims set out in seventh cause of action of the First Amended Complaint.

2. WB and Lorre's requests to stay trial court proceedings pending final determination of matters referred to the arbitrator are granted.

3. Sheen's Motion to stay arbitration is denied.

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accordance with the order to arbitrate or until such earlier time as the court specifies." (Italics added)

The stay cannot apply to non-parties for reasons discussed in the text, *ante*. Thus, this ruling cannot preclude either another employee within the class described in the seventh cause of action, or the LWA, from bringing an action under The PAGA.

[24] There is no exact standard for making these determinations.