SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Thank you.

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DATE: NOVEMBER 29, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV385047	Santiago v. Ready 2 Go Logistics, LLC (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	22CV404762	Neihart v. Zumiez Inc., et al. (PAGA)	See Line 2 for tentative ruling.
LINE 3	20CV373147	Cuevas v. Little Caesars Enterprises, Inc. (PAGA)	See Line 3 for tentative ruling.
LINE 4	20CV373998	Garcia v. Din Tai Fung Restaurant, Inc., et al. (PAGA)	See Line 4 for tentative ruling.
LINE 5	21CV387068	Adriano v. Visby Medical, Inc.	See Line 5 for tentative ruling.
LINE 6	22CV394491	Bridges v. Premier Nissan of San Jose, LLC, et al. (PAGA)	See Line 6 for tentative ruling.
LINE 7	22CV394491	Bridges v. Premier Nissan of San Jose, LLC, et al. (PAGA)	See Line 6 for tentative ruling.

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LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Santiago v. Ready 2 Go Logistics, LLC (Class Action/PAGA)
Case No.: 21CV385047

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

Plaintiff Nestor Fernando Neri Santiago ("Plaintiff") initiated this case as a putative wage and hour class action. Thereafter, Plaintiff filed a First Amended Complaint that includes a Private Attorney General Act (PAGA) cause of action on behalf of Plaintiff and similarly aggrieved employees. Defendant Ready 2 Go Logistics ("Defendant") is a company that hires drivers to deliver packages for Amazon Logistics, Inc. ("Amazon"). Plaintiff asserts that his former employer, Defendant, failed to properly record his hours worked, failed to properly compensate him, denied him meal periods and rest breaks, and did not provide the required premium pay compensation.

The currently operative complaint, the Second Amended Complaint alleges causes of action for: (1) failure to pay for all hours worked, (2) failure to pay overtime, (3) meal period violations, (4) rest period violations, (5) wage statement violations, (6) waiting time penalties, (7) PAGA enforcement, and (8) unfair competition.

Currently before the Court is Defendant's motion to compel arbitration. Plaintiff has opposed the motion and Defendant has filed a reply.

II. DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

In connection with the initial motion, Defendant requested judicial notice of (1) an opinion from the Oklahoma Court of Civil Appeals, Mathis v. Kerr, No. 120,246 (Okla. Civ. App. Dec. 16, 2022) and (2) a tentative ruling of the Superior Court for the County of San Bernardino in Ovando v. Paolino Logistics, CIVSB2216425, which Defendant contends was adopted in full by the Superior Court at a hearing on August 17, 2023.

With its reply, Defendant also requested judicial notice of an excerpt of the petition for writ of certiorari filed October 19, 2023 in Domino's Pizza, LLC v. Carmona, et al, United States

Supreme Court docket number 23-427. The Court notes that the petition for certiorari was filed after Defendant filed the initial motion to compel arbitration.

The Court grants Defendant's unopposed requests for judicial notice. (Evid. Code, § 452, subd. (d); Becerra v. McClatchy Co. (2021) 69 Cal.App.5th 913, 929 [taking judicial notice of trial court order under parallel circumstances].) However, the Court recognizes that the opinion has "no binding or precedential effect" and has "at most, some persuasive value." (Id. at p. 929.) The Court "remain[s] mindful of the limited relevance of this material." (Ibid.)

III. DISCUSSION

A. Legal Standard

The parties dispute whether the Federal Arbitration Act ("FAA") or California statutory law applies to the instant motion. Accordingly, the Court will discuss both.

In ruling on a motion to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See Howsan v. Dean Witter Reynolds (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (Fleming v. Oliphant Financial, LLC (2023) 88 Cal.App.5th 13, 19 (Fleming), internal quotation marks omitted.)

Under California law, "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2, subds. (a), (b).) "This initial issue also reflects the very plain principle that you cannot compel individuals or entities to arbitrate a dispute when they did not agree to do so." (Fleming, supra, 88 Cal.App.5th at p. 19.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement--either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc., § 1281.2, subds. (a), (b))--that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.]" (Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 413.) If the proponent of arbitration has shown the existence of an arbitration provision governing the claims at issue by a preponderance of the evidence, the burden then shifts to the resisting party to prove a ground for denial. (Ibid.)

"Federal law is wholly congruent with these principles. As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," [citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' (EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 582.)" (Fleming, supra, 88 Cal.App.5th at pp. 19-20.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236 (Pinnacle).) "If no agreement to arbitrate was formed, then there is no basis upon which to compel arbitration." (Ahlstrom v. DHI Mortgage Co., L.P. (9th Cir. 2021) 21 F.4th 631, 635.)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration", (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (Pinnacle, supra, 55 Cal.4th at p. 236.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (Pinnacle, supra, 55 Cal.4th at p. 236.)

B. Analysis

i. Existence of an Agreement

Defendant asserts that Plaintiff signed an arbitration agreement as part of his onboarding when he was hired. Defendant provides the declaration of its owner, Timothy Guess, which explains the method by which Plaintiff signed the agreement. Plaintiff has provided his own declaration indicating that he does not remember signing the agreement provided by Defendant. However, Defendant's owner has provided evidence that a prospective employee must create a unique account with individual login information and he has provided Exhibit 2, which purports to show that Plaintiff signed the arbitration agreement on August 3, 2020. (Declaration of Timothy Guess in Support of Defendant's Motion to Compel Individual Arbitration, Dismiss Class Claims, and Stay Proceedings ("Guess Decl.") ¶ 7, 8, 19, Ex. 2.) Guess declares that Plaintiff's name, which is displayed on Exhibit 2, indicating that he signed the arbitration agreement, could only have been placed there by someone using Plaintiff's unique login information. (Id., ¶ 19.) Although Plaintiff contends he does not remember signing the agreement, nothing in his declaration counters Defendant's evidence that Defendant electronically signed the agreement.

Plaintiff also contends that Defendant has failed to show the existence of an enforceable agreement because the agreement identifies the parties as "Employee" and "Company" but the term "Company" is not defined. This argument does have some appeal. The arbitration agreement itself never mentions Defendant and, confusingly, many of the onboarding documents bear Amazon's name and logo, in addition to mentioning Defendant. (Guess Decl. ¶¶ 6, 7, 8, 9, 10.) However, Mr. Guess's declaration explains that Defendant hires delivery drivers for Amazon and that Defendant signed the agreement as part of the onboarding process with Defendant. (Guess Decl., ¶¶ 2, 5.) Although the agreement could be clearer as to the identity of the parties, the circumstances surrounding the signing of the agreement during the onboarding process make it clear that Defendant is the "Employer" referenced in the agreement. Further, this case is distinguishable from Flores v. Nature's Best Distribution, LLC

(2016) 7 Cal.App.5th 1, 9, on which Plaintiff relies, because in that case there were several issues with the agreement in addition to the identity of the parties to the contract. The Court finds that an arbitration agreement between Plaintiff and Defendant was formed when Plaintiff signed the agreement during the course of his onboarding with Defendant.

ii. Governing Law

Defendant asserts that the FAA applies to the arbitration agreement. Plaintiff counters that he is an employee engaged in interstate commerce and, therefore, the FAA does not apply. (See 9 U.S.C. 1.) This issue has been the subject of some debate in the courts recently. Notably, the arbitration agreement indicates that the FAA applies.

Plaintiff relies primarily on Rittmann v. Amazon.com, Inc. (9th. Cir. 2020) 971 F.3d 904, 909-910 (Rittmann), in which the Ninth Circuit Court of Appeals held that the exemption for employees engaged in interstate commerce applied to Amazon's so called "last mile" delivery drivers, who did not actually drive beyond state lines because they were the "last leg" of interstate transport.

Defendant contends that Rittman was wrongly decided and is no longer viable in light of the United States Supreme Court's opinion in Southwest Airlines Co. v. Saxon (2022) 142 S.Ct. 1783 (Saxon). In that case, the court held that held that the exemption applied to a ramp supervisor employed by Southwest Airlines who frequently loaded and unloaded cargo on and off airplanes that travelled in interstate commerce belonged to a class of workers engaged in foreign or interstate commerce. (Id. at p. 1793.) The court explained that the determinative issue is not whether the employer's industry involves interstate commerce, but whether the class of workers to which the plaintiff belongs is engaged in interstate commerce. (Id. at p. 1788.)

Plaintiff correctly points out that the Ninth Circuit Court of Appeals has since held that the holding in Rittmann survived Saxon. (Carmona v. Domino's Pizza, LLC (9th Cir. 2023) 73 F.4th 1135, 1136 (Carmona), see also Miller v. Amazon.com, Inc. (9th Cir. Sep. 1, 2023, No. 21-36048) 2023 U.S. App. LEXIS 23309, at *2.).) In Carmona, the court reasoned that the Saxon court expressly declined to decide whether "last leg" delivery drivers fell into the exception for employees engaged in interstate commerce. (Carmona, supra, 73 F.4th at p. 1137, quoting Saxon, supra, 142 S.Ct. at p. 1789, fn.2 [" 'We recognize that the answer will not

always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders. Compare, e.g., Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (C.A.9 2020) (holding that a class of 'last leg' delivery drivers falls within § 1's exemption), with, e.g., Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 803 (C.A.7 2020) (holding that food delivery drivers do not). In any event, we need not address those questions to resolve this case.' "].)

Defendant contends that the defendant in Carmona filed a petition for review with the United States Supreme Court. (Supplemental Request for Judicial Notice in Support of Defendant's Motion to Compel Arbitration, Dismiss Class Claims, and Stay Proceedings, Ex. 1.) It asks that, if the court does not find that the FAA applies, it should stay the proceedings pending the Supreme Court's determination of whether to grant review. The Court declines to stay the proceedings as it finds that Carmona is not dispositive.

The Court need not decide whether Saxon has eviscerated the holding in Rittmann because California Courts of Appeal have held that local delivery drivers who deliver products that are transported in interstate commerce are engaged in interstate commerce for the purposes of 9 U.S.C. § 1's exception. (See Betancourt v. Transportation Brokerage Specialists, Inc. (2021) 62 Cal. App. 5th 552, 554 ["last mile" delivery driver for company that provided drivers for Amazon exempt from FAA coverage as a transportation worker engaged in interstate commerce]; Muller v. Roy Miller Freight Lines, LLC (2019) 34 Cal. App. 5th 1056, 1069 [truck driver fits under exemption because "over 99 percent - of the goods Muller transported originated across state lines," so "even though Muller was not personally transporting goods from state to state, he played an integral role in transporting those goods through interstate commerce" and because he was subject to federal regulations]; Nieto v. Fresno Beverage Co., Inc. (2019) 33 Cal.App.5th 274, 284 [beverage delivery driver who only made intrastate deliveries still fell within the exemption because beverages were manufacturer out of state and driver was engaged in the "last phase of a continuous journey of the interstate commerce"].)

Given that Saxon did not decide the question of whether "last mile" or "last leg" delivery drivers are engaged in interstate commerce and these cases are not wholly inconsistent with Saxon, the Court finds that they remain good law. Accordingly, the Court is bound by the

decisions of the Court of Appeal. (See Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [a lower court is without authority to rule in a way that is contrary to a higher court's ruling].)

Defendant also asserts that, to qualify for the transportation worker engaged in interstate commerce exception to apply, the plaintiff need not only be a transportation worker engaged in interstate commerce but he or she must do so pursuant to an employment contract. It relies on Magana v. DoorDash, Inc. (N.D.Cal. 2018) 343 F. Supp. 3d 891, 899, in which the court explained that "[t]o qualify for this exemption from the FAA in the Ninth Circuit, an individual must (1) be a 'transportation worker' who is 'engaged in interstate commerce,' and (2) work for a business pursuant to an 'employment contract.' Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140-41 (9th Cir. 2001) [(Harden)] (citing Circuit City, 532 U.S. at 118)."

In Harden, the Court of Appeal stated,

Section 1 of the FAA says: 'nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1. The Supreme Court recently affirmed that § 1 exempts transportation workers from the FAA. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302, 1311 (2001). As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA.

(Harden v. Roadway Packaging Sys. (9th Cir. 2001) 249 F.3d 1137, 1140.) At least one California court has adopted this construction. (Performance Team Freight Systems, Inc. v. Aleman (2015) 241 Cal.App.4th 1233, 1240 [exception under 9 U.S.C. § 1 did not apply because plaintiff was an independent contractor].)

Here, neither party has provided any written employment contract between Plaintiff and Defendant. "The party opposing arbitration bears the burden of demonstrating that the exemption applies." (Performance Team Freight Systems, Inc. v. Aleman, supra, 241 Cal.App.4th at p. 1241.) But, Defendant's owner's declaration repeatedly characterizes

Plaintiff as an employee. (Guess Decl., ¶¶ 1 ["I also reviewed the onboarding documents that apply to all R2GO employees, including Plaintiff Nestor Fernando Neri Santiago ("Plaintiff")."], 3 ["Like the rest of R2GO's delivery employees, Plaintiff only picked up and delivered packages within the State of California . . ."].) Further, its argument regarding how the arbitration agreement applies to Plaintiff requires Plaintiff to be an employee. (Guess Decl., ¶¶ 5 [describing onboarding process for employees, 6 [same], 7 [same], 14 [providing "screenshot" of arbitration agreement between "Company" and "Employee"]; compare Performance Team Freight Systems, Inc. v. Aleman, supra, 241 Cal.App.4th at p. 1241 ["The only evidence relevant to the issue of whether the individual respondents entered into contracts of employment was presented by Performance Team, which submitted the subject agreements and the declaration of its driver manager. Each agreement was labeled 'Independent Contractor Agreement' and specifically described each individual respondent as an 'independent contractor.' Each agreement further stated: 'For all purposes, [individual respondent] shall be an independent contractor and not an employee of [Performance Team].' "].) Accordingly, the Court finds that Plaintiff worked for Defendant pursuant to an employment agreement, otherwise, Defendant's argument that an arbitration agreement exists would fail.

The Court finds that the FAA does not apply and the arbitration agreement is covered by California law.

iii. Unconscionability

"A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. [Citation.]" (OTO, L.L.C. v. Kho (2019) 8 Cal.5th 111, 125 (OTO).) Unconscionability has both procedural and substantive elements. (Armendariz v. Foundation Health Psychare Services, Inc. (2000) 24 Cal.4th 83, 114 (Armendariz); Jones v. Wells Fargo Bank (2003) 112 Cal.App.4th 1527, 1539 (Jones).) Both must appear for a court to invalidate a contract or one of its individual terms, (Armendariz, supra, 24 Cal.4th at p. 114; Mercuro v. Superior Court (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (Armendariz, supra, 24 Cal.4th at p. 114.)

1. Procedural Unconscionability

Procedural unconscionability focuses on the elements of oppression and surprise. (Armendariz, supra, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (Davis v. TWC Dealer Group, Inc. (2019) 41 Cal.App.5th 662, 671 (Davis), internal citation and quotation marks omitted.) Here, the agreement is one of adhesion. (Armendariz, supra, 24 Cal.4th at p. 115 ["in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement"].)

An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis. [Citations.] Arbitration contracts imposed as a condition of employment are typically adhesive [citations], and the agreement here is no exception. The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. [Citations.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citations.]

(OTO, supra, 8 Cal.5th at p. 126, internal quotation marks omitted.)

Here, the arbitration agreement is part of Plaintiff's new hire paperwork and Defendant appears to concede that signing the agreement was a condition of employment. The arbitration agreement states that it is mandatory and contains no provision allowing the employee to opt out. A contract of adhesion in the employment context adds a modest amount of procedural unconscionability and, the amount of procedurally unconscionability is increased when the fact of an adhesion contract is combined with other issues. (See Nguyen v. Applied Medical Resources Corp. (2016) 4 Cal.App.5th 232, 248.)

Plaintiff also contends that the arbitration agreement is procedurally unconscionable because it was presented to him in English but he is only fluent in Spanish. With its reply, Defendant has filed a declaration of Elizabeth Ruiz, a Driver Resources Coordinator, who indicates that Defendant never asked for a copy of the agreement in Spanish and that she communicated with Plaintiff in English without difficulty. (Declaration of Elizabeth Ruiz in Support of Defendant's Motion to Compel Individual Arbitration, Dismiss Class Claims, and Stay Proceedings ("Ruiz Decl."), ¶¶ 4, 5.) Even setting aside the issue with presenting evidence for the first time in reply, (see Jay v. Mahaffey (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers.'], the fact that Plaintiff may have been able to speak conversational English does not mean that the legal language in the arbitration agreement would be comprehensible to Plaintiff. Further, Plaintiff declared that he was asked to just click, "I Accept and Agree," to speed through the onboarding process and he may not have felt that he could ask for a Spanish translation. (Declaration of Nestor Fernando Neri Santiago in Support of Plaintiff's Opposition to Defendant's Motion to Compel Arbitration ("Santiago Decl."), ¶ 4.) Ruiz declares that Plaintiff took a "significant" amount of time, over an hour, to review each document. (Ruiz Decl., ¶ 4.) But, taking time to review the documents is not inconsistent with trying to make sense of them in a language with which Plaintiff may not have been fully familiar. And, Plaintiff also declares that the two telephone interviews he participated in prior to coming to the Defendant's facility to complete the onboarding documents were conducted entirely in Spanish. (Santiago Decl., ¶ 3.)

As in Subcontracting Concepts (CT), LLC v. De Melo (2019) 34 Cal.App.5th 201, 211 (De Melo), Plaintiff states that he is only fully fluent in Spanish, that no one explained the agreement to him, and that he did not understand the meaning of the word "arbitration." In De Melo, the Court of Appeal held that "at least" a moderate amount of procedural unconscionability was present where the contract was one of adhesion, the plaintiff did not fully understand the legal documents written in English, and "the arbitration clause referred to the American Arbitration Association, but did not clearly state what rules would govern arbitration, nor was respondent provided with a copy of the governing rules." (Id. at p. 212.)

Plaintiff also argues that he was not allowed to consult with an attorney prior to signing the arbitration agreement. But, Plaintiff does not declare that he would have consulted an attorney if given the opportunity. Thus, the lack of opportunity to consult an attorney adds at most a minimal amount of procedural unconscionability.

Finally, Plaintiff contends that the confusion regarding the parties to the agreement also adds to the procedural unconscionability, resulting in a high level of surprise. The Court agrees that the confusion regarding the identity of the parties adds a small amount of procedural unconscionability.

The Court finds that a moderate degree of procedural unconscionability is present.

iv. Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results", (Armendariz, supra, 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner, (Jones, supra, 112 Cal.App.4th at p. 1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (Pinela v. Neiman Marcus Group, Inc. (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (Armendariz, supra, 24 Cal.4th at p. 117.) "Substantive unconscionability examines the fairness of a contract's terms. This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party." (OTO, supra, 8 Cal.5th at pp. 129-130, internal citation and quotations omitted.)

With respect to substantive unconscionability, Plaintiff argues that the agreement is substantively unconscionable because it requires him to give up his right to pursue a representative PAGA action and it contains a class action waiver, which Plaintiff asserts is contrary to California public policy and Labor Code section 229.

Plaintiff's argument that a class action waiver is categorically substantively unconscionable must be rejected. (See Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 364, 366 (Iskanian) [rule in Gentry v. Superior Court (2007) 42 Cal.4th 443 (Gentry) "whereby a class waiver would be invalid if it meant a de facto waiver of rights and if the arbitration agreement failed to provide suitable alternative means for vindicating employee rights" preempted by FAA]; Evenskaas v. California Transit, Inc. (2022) 81 Cal.App.5th 285, 298 [Gentry rule preempted by FAA].) The Court will discuss enforceability of the agreement under Gentry separately below.

As for the PAGA waiver, Plaintiff relies on Iskanian to assert that a PAGA waiver renders the arbitration agreement unconscionable. The United States Supreme Court recently partially overruled Iskanian in Viking River Cruises, Inc. v. Moriana (2022) 596 U.S. ___ [213 L. Ed. 2d 179, 142 S.Ct. 1906] (Viking River). As explained in Adolph v. Uber Technologies, Inc. (2023) 14 Cal.5th 1104, 1117 (Adolph),

In Iskanian, we held that a predispute categorical waiver of the right to bring a PAGA action is unenforceable (Iskanian, supra, 59 Cal.4th at pp. 382-383) — a rule that Viking River left undisturbed (see Viking River, supra, 596 U.S. at p. ___ [142 S.Ct. at pp. 1922–1923, 1924–1925] [the FAA does not preempt this rule]).

Thus, the prohibition against categorical predispute PAGA waivers remains good law. The Viking River court stated: "The agreement between Viking and Moriana purported to waive 'representative' PAGA claims. Under Iskanian, this provision was invalid if construed as a wholesale waiver of PAGA claims. And under our holding, that aspect of Iskanian is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner." (Viking River, supra, 596 U.S. at p. ___ [142 S.Ct. at pp. 1924-1925].)
The representative portion of the PAGA claim (representative in the sense of addressing violations suffered by other employees) may not be waived under Iskanian as left intact by Viking River. (See Adolph, supra, 14 Cal.5th at p. 1118.) Thus, the agreement, which prevents either party from asserting "representative action claims against the other in arbitration or

otherwise" is substantively unconscionable to the extent it would prevent Plaintiff from bringing a PAGA representative action.

v. Severability

As discussed above, the Court has found the PAGA waiver unconscionable to the extent it seeks to prevent Plaintiff from bringing a representative PAGA action. Defendant contends that any provisions the Court might find unconscionable can be severed pursuant to the arbitration agreement's severability provision, which states that "[i]f any provision of this Agreement to arbitrate is adjudged to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and such adjudication shall not affect the validity of the remainder of this Agreement to arbitrate." (Guess Decl., Ex. 1.) The Court finds that the representative PAGA waiver is severable.

"[W]hether to sever is within the trial court's discretion." (Navas v. Fresh Venture Foods, LLC (2022) 85 Cal.App.5th 626, 636-637.)

" 'In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever unless the agreement is "permeated" by unconscionability.' [Citation.] [¶] An agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision. [Citation.] 'Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage.' [Citation.] An arbitration agreement is also deemed 'permeated' by unconscionability if 'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' [Citation.] If 'the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms,' the court must void the entire agreement." (Magno v. The College Network, Inc. (2016) 1 Cal.App.5th 277, 292.)

(De Leon v. Pinnacle Property Management Services, LLC (2021) 72 Cal.App.5th 476, 492-493.)

The Court finds that the agreement is not permeated with unconscionability to sever the single substantively unconscionable provision. With the representative PAGA claim waiver severed, the Court finds that the agreement is not substantively unconscionable and, therefore, Plaintiff's unconscionability argument must fail.

vi. Enforceability Under Gentry

Plaintiff also argues that the agreement is unenforceable under Gentry. As mentioned above, Iskanian held that the holding in Gentry was abrogated.

The employee had entered into an arbitration agreement that waived the right to class proceedings. The question is whether a state's refusal to enforce such a waiver on grounds of public policy or unconscionability is preempted by the FAA. We conclude that it is and that our holding to the contrary in Gentry v. Superior Court (2007) 42 Cal.4th 443 (Gentry) has been abrogated by recent United States Supreme Court precedent.

(Iskanian, supra, 59 Cal.4th at pp. 359-360, italics added.) But, Defendant does not argue that Gentry is no longer good law and California courts have continued to rely on Gentry's analysis even after Iskanian. (See, e.g., Garrido v. Air Liquide Industrial U.S. LP (2015) 241 Cal.App.4th 833, 845 (Garrido) ["We believe that the Gentry rule likewise may be asserted in matters governed by the [California Arbitration Act ("CAA")] and not the FAA. In Iskanian, our Supreme Court had the opportunity to find Gentry comprehensively invalidated. It did not do so. While Iskanian made clear that the Gentry rule is preempted by the FAA, it did not go beyond that finding. Therefore, the Gentry rule remains valid under the CAA."].) Accordingly, the Court will go on to discuss the enforceability of the arbitration agreement under Gentry.

The Gentry court identified four factors to be considered in determining the enforceability of an arbitration agreement. These are " '[1] the modest size of the potential individual recovery, [2] the potential for retaliation against members of the class, [3] the fact that absent members of the class may be ill informed about their rights, and [4] other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration.' (Gentry, supra, 42 Cal.4th at p. 463.)" (Garrido, supra, 241 Cal.App.4th at p. 845.)

Gentry held that a class action waiver must be invalidated if the trial court concludes, based on these factors, that class arbitration is 'likely to be a significantly more effective practical means of vindicating the rights of affected employees than individual litigation or arbitration,' and that there would be a 'less comprehensive enforcement' of the applicable laws if the class action device is disallowed. (Gentry, supra, 42 Cal.4th at p. 463.)
(Truly Nolen of America v. Superior Court (2012) 208 Cal.App.4th 487, 507-508.)

Plaintiff contends that his potential individual recovery, which he argues is $11,525, is modest. But, Plaintiff has provided no evidence on this point. (See Kinecta Alternative Financial Solutions, Inc. v. Superior Court (2012) 205 Cal.App.4th 506, 510, disapproved on other grounds in Sandquist v. Lebo Automotive, Inc. (2016) 1 Cal.5th 233, 260, fn. 9.) Further, as Defendant argues, the calculations provided by Plaintiff do not include a valuation for all of Plaintiff's claims. Accordingly, the Court finds that Plaintiff has not shown that the first Gentry factor applies in this case.

With respect to the second Gentry factor, the potential for retaliation against class members, Plaintiff declares that he was afraid he would be retaliated against if he reported the wage and hour violations he suffered. (Santiago Decl., ¶ 10.) He also declares that his hours were reduced after he inquired about overtime pay. (Id., ¶¶ 10, 11.) Defendant has provided a declaration indicating that Defendant did not reduce Plaintiff's work hours as a result of him inquiring about overtime pay. (Ruiz Decl., ¶ 8.) Plaintiff's declaration is insufficient to establish that there is a significant potential for retaliation against class members. Even if Plaintiff's hours were reduced it is not clear that this was not due to some other reason than his asking about overtime pay. Further, he has not provided any evidence that other employees may be afraid to attempt to enforce their rights due to fear of retaliation by Defendant.

With respect to the third Gentry factor, Plaintiff declares that Defendant did not inform himself or others similarly situated of their rights under the wage and hour laws. (Santiago Decl., ¶ 12.) He also indicates that he did not see any posters identifying these rights in Defendant's facilities. (Ibid.) Although Plaintiff states that others similarly situated to him were not informed of their rights, it is not clear how he would be aware of what others were told. Defendant's owner declares that Defendant [T]akes many steps to inform its employees of their rights under the law, including the California Labor Code. For example, the Company

provides employee handbooks and written policies, verbally communicates employees' rights to meal and rest breaks (among other things), and keeps the poster required by California's Department of Industrial Relations containing information related to wages, hours, and working conditions in an area frequented by applicants and employees where it may be easily read. Like the [Arbitration] Agreement, [Defendant] provides the Employee Handbook to all employees as part of the onboarding process.
(Guess Decl., ¶ 20.) Plaintiff acknowledges that he received the Employee Handbook, which contains some information regarding an employee's rights under the Labor Code. (Santiago Decl., ¶ 12; Guess Decl., Ex. 3.)

Accordingly, although Plaintiff states that he was not informed about his rights, it is not clear that other employees would not have been informed, particularly because Defendant has provided evident that it has a policy of providing its Employee Handbook to new employees and Plaintiff admits that he received the handbook but states that could not understand it.

With respect to the fourth Gentry factor, Plaintiff argues that a class action would be more cost effective than individual lawsuits and that it would make a bigger impact on the enforcement of wage and hour rights on behalf of the public. However, in light of the fact that the Court has rejected Plaintiff's arguments with respect to the first three Gentry factors, the Court finds that, even if a class action is superior to individual lawsuits, this is insufficient to invalidate the arbitration agreement under Gentry.

The Court finds that the arbitration agreement is enforceable under California law.

vii. Labor Code 229

Plaintiff argues that she may not be required to arbitrate some of her claims under Labor Code section 229, which provides, in part, "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate."

[Labor Code s]ection 229 is found in article 1 of division 2, part 1, chapter 1 of the Labor Code, encompassing sections 200 through 244. Thus, if a cause of action seeks to collect due and unpaid wages pursuant to sections 200 through 244, that action can be maintained in court, despite an agreement to arbitrate.

(Lane v. Francis Capital Management LLC (2014) 224 Cal.App.4th 676, 684 (Lane).)
The United States Supreme Court and at least one California Court of Appeal have concluded that Labor Code section 229 is preempted by the FAA. (See Perry v. Thomas (1987) 482 U.S. 483, 491; Nixon v. AmeriHome Mortgage Co., LLC (2021) 67 Cal.App.5th 934, 947.) But, where the FAA does not apply, the Court of Appeal has held that Labor Code section 229 is not preempted. (Lane, supra, 224 Cal.App.4th at p. 687.) Here, the Court has determined that the FAA does not apply. Accordingly, Labor Code section 229 applies in this case.

The operative complaint alleges claims for: (1) failure to pay minimum wage (Lab. Code, §§ 204, 500, and 1194); (2) failure to pay overtime (Lab. Code, §§ 500, 510, and 1194); (3) failure to pay meal period premiums (Lab. Code, § 226.7); (4) failure to pay rest period premiums (Lab. Code, § 226.7); (5) failure to provide accurate, itemized wage statements (Lab. Code, § 226); (6) waiting time penalties (Lab. Code, §§ 201, 202, and 203); (7) civil penalties under PAGA (Lab. Code, § 2698, et seq.); and (8) unfair competition (Bus. & Prof. Code, § 17200, et seq.).

The Lane court held that, " 'Failure To Pay Unpaid Meal and Rest Period Wages' under [Labor Code] section 226.7, it is not, in fact, an action for the 'collection of due and unpaid wages,' but one for a failure to provide mandated meal or rest breaks. [Citation.]" (Lane, supra, 224 Cal.App.4th at p. 684.) Similarly, the Lane court held that failure to provide itemized wage statements is not an action for the collection of due and unpaid wages. (Ibid.)

Relying on Naranjo v. Spectrum Security Services, Inc. (2022) 26 Cal.5th 93 (Naranjo), Plaintiff argues that premium pay for meal and rest break violations constitute wages. The Naranjo court held that the "extra pay for missed breaks constitutes 'wages' that must be reported on statutorily required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job (id., § 203)[.]" (Id. at p. 102.) Naranjo did not mention Labor Code section 229, nor did it discuss Lane. However, the Court finds that the holding in Naranjo is irreconcilable with a conclusion that Labor Code section 229 does not apply to claims for meal and rest periods under Labor Code section 226.7.
The Naranjo court explained

Although the extra pay is designed to compensate for the unlawful deprivation of a guaranteed break, it also compensates for the work the employee performed during the break period. [Citation.] The extra pay thus constitutes wages subject to the same timing and reporting rules as other forms of compensation for work.

(Naranjo, supra, 13 Cal.5th at p. 102, italics added.) As in Naranjo, here, Plaintiff states a claim for premium pay for meal and rest break violations under Labor Code section 226.7.

The Naranjo court reasoned

The Court of Appeal was correct that premium pay is a statutory remedy for a legal violation. But the court's further conclusion that premium pay cannot constitute wages rests on a false dichotomy: that a payment must be either a legal remedy or wages. For these purposes, section 226.7 is both. That is because under the relevant statute and wage order, an employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was required to work when she should have been relieved of duty: required to work too long into a shift without a meal break; required in whole or part to work through a break; or, as was the case here, required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks. [Citations.]

(Naranjo, supra, 13 Cal.5th at pp. 106-107.) The Naranjo court also reasoned that "the Legislature requires employers to pay missed-break premium pay on an ongoing, running basis [citation], just like other forms of wages (see Lab. Code, § 204)" (Id. at pp. 110.) The Court finds that Plaintiff's third and fourth causes of action, the only claims to which Plaintiff explicitly argues Labor Code 229 applies, are exempt from arbitration under Labor Code section 229.

viii. Dismissal of the Class Claims

Plaintiff does not appear to dispute that the class claims should be dismissed if the motion is granted. Multiple appellate courts have held that arbitration provisions with language analogous to the operative language here do not permit class arbitration, and a trial court should dismiss such claims and compel individual arbitration upon motion by the defendant. (See Kinecta Alternative Financial Solutions, Inc. v. Superior Court (2012) 205

Cal.App.4th 506, disapproved of on another ground by Sandquist v. Lebo Automotive, Inc. (2016) 1 Cal.5th 233; Nelsen v. Legacy Partners Residential, Inc. (2012) 207 Cal.App.4th 1115.) Accordingly, the Court will dismiss the class claims.

IV. CONCLUSION

The motion to compel arbitration is GRANTED IN PART AND DENIED IN PART. The Court finds that the third and fourth causes of action are exempt from arbitration under Labor Code section 229. However, the arbitration agreement, with the representative PAGA action waiver severed is enforceable under California law. Accordingly, the remaining claims are ordered to arbitration and the class claims are ordered dismissed. The individual portion of the PAGA claim is ordered to arbitration and the representative portion of the PAGA claim is stayed pursuant to Adolph v. Uber Technologies, Inc., supra, 14 Cal.5th 1104.
Defendant as the substantially prevailing party, shall prepare the order.

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Calendar Line 2

Case Name: Neihart v. Zumiez Inc., et al. (PAGA)
Case No.: 22CV404762

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is an action under the Private Attorneys General Act of 2004 (Labor Code, § 2098 et seq., "PAGA") alleging various violations against defendants Zumiez Inc., Zumiez Distribution, LLC, and Zumiez Services Inc. (collectively, "Defendants"). On October 14, 2022, plaintiff Seana Neihart ("Neihart") filed a Complaint—PAGA Enforcement Action, setting forth a single cause of action for PAGA violations. On January 26, 2023, the parties filed a Joint Stipulation to File First Amended Complaint, permitting the addition of Jessica King ("King") as a plaintiff.

On February 8, 2023, plaintiffs Neihart and King (collectively, "Plaintiffs") filed the operative First Amended Complaint—PAGA Enforcement Action, setting forth a single cause of action for PAGA violations based on allegations that Defendants failed to pay wages during employment, provide legally compliant meal and rest periods, furnish accurate wage statements, maintain accurate records, pay wages due upon separation of employment, provide rest days, provide suitable seating, and reimburse necessary business expenses.

Now before the court is Defendants' motion to compel Plaintiffs to arbitrate their individual PAGA claims and stay the representative PAGA claims. Plaintiffs oppose the motion.

II. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies. However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid.*)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b)

Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 (*Cruise*) [under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; see also *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for a denial. (*Rosenthal, supra*, 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

III. DISCUSSION

As an initial matter, the Plaintiffs state they filed their opposition papers one day later than specified in the relevant Stipulation and Order and request the court to consider the papers, nonetheless. Plaintiffs contend there is no prejudice to Defendants, who filed a ten-page reply without addressing the issue. Under the circumstances, the court finds that any prejudice to the Defendants arising from the tardiness of the opposition papers is minimal. Thus, the court has considered the Plaintiffs' opposition papers. Plaintiffs are admonished to file any future papers in accordance with pertinent statutes, Rules of Court, and local rules, as failure to do so may result in the court refusing to consider such non-compliant filings.

Defendants move to compel Plaintiffs to pursue their individual PAGA claims in arbitration and ask the court to stay Plaintiffs' representative PAGA claims. For purposes of PAGA, claims are divided into two types, sometimes labeled "A" and "O." (*Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, 648-649 (*Galarsa*); see also *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1120-1123 (*Adolph*) [referencing "individual" and "nonindividual" claims].)

"Type A" is used for a claim seeking to recover a civil penalty imposed because of a Labor Code violation suffered by the plaintiff, which civil penalty, if recovered, will be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the plaintiff as the employee aggrieved by the violation pursuant to PAGA. (*Galarsa, supra*, 88 Cal.App.5th 648-649.) "Type O" is used for a claim seeking to recover a

civil penalty imposed because of a Labor Code violation suffered by an employee other than the plaintiff. (*Ibid.*) Under PAGA, that civil penalty, if recovered, will be split 75-25 between the LWDA and the employee aggrieved by the violation. (*Ibid.*) "Type O" claims, unlike "Type A" claims, are not subject to arbitration under an arbitration agreement. (*Ibid.*)

Against this background, Defendants present evidence that both Plaintiffs electronically signed an arbitration agreement on their respective dates of hire. Specifically, Defendants show that plaintiff Neihart signed an arbitration agreement on October 9, 2019, and that plaintiff King signed an identical arbitration agreement on November 24, 2020. Defendants contend it is beyond dispute that an arbitration agreement exists between the parties. Defendants further argue, among other things, that Plaintiffs' PAGA claims are indisputably within the scope of the arbitration agreement because the agreement explicitly covers claims under federal, state, or local law, including wage and hour claims. In opposition, Plaintiffs argue, among other things, that the court should deny Defendants' motion because the arbitration agreement expressly excludes all PAGA claims from the scope of covered claims.

Plaintiffs' argument that PAGA claims are not encompassed by the arbitration agreement is dispositive of the instant motion. As set forth previously, "the moving party bears the burden of producing 'prima facie evidence of a written agreement to arbitrate the controversy.'" (*Gamboa v. Northeast Community* Clinic (2021) 72 Cal.App.5th 158, 165 [quoting and citing *Rosenthal, supra*, 14 Cal.4th at p. 413].) "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626; *Cruise, supra*, 233 Cal.App.4th at p. 396.) "Similarly, under California law, arbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so." (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683 [internal quotation marks and citations omitted].)

"Because arbitration is a favored method of dispute resolution, arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question. [Citation.]" (*Weeks v. Crow* (1980) 113 Cal.App.3d 350, 353.) "However, 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate ….'" (*Ibid.* [quoting and citing *Freeman v. State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 481].) "Thus, as a general rule, the parties may freely delineate in their contract which disputes will be arbitrated and which will not. [Citation.]" (*Duran v. EmployBridge Holding Co.* (2023) 92 Cal.App.5th 59, 65

(*Duran*).) "Whether the parties agreed to arbitrate all or a portion of 'the present controversy turns on the language of the arbitration clause.' [Citation.]" (*Ibid.*)

Here, the pertinent language of the arbitration agreement is as follows:

> MUTUAL AGREEMENT TO ARBITRATE
>
> The Company and [employee] agree pursuant to this Mutal Arbitration Agreement ("Agreement") to arbitrate Covered Claims (as described below), in lieu of litigating in court. [¶]
>
> A. The Mutal Agreement to Arbitrate
>
> Except for the Excluded Claims set forth in the paragraph below, the Company and [employee] are required to arbitrate any and all disputes, claims, or controversies ("Covered Claims") against the other that could be brought in court including, but not limited to, all claims arising out of [employee's] recruitment, employment, the cessation of employment, and any claim that could be brought before any court by [employee] or the Company…. [¶]
>
> Excluded Claims: Claims not covered by this Agreement are: … (vi) claims pursuant to the Labor Code Private Attorneys General Act of 2004, California Labor Code section 2968 *et seq.* ("PAGA") …. [¶]
>
> B. Class/Collective/Group Action Waiver and Jury Waiver
>
> The parties agree all Covered Claims must be pursued in arbitration on an individual basis only. … [¶]
>
> This waiver does not apply to representative actions pursuant to the California Labor Code Private Attorneys General act of 2004, California Labor Code section 2968 *et seq.* ("PAGA").

(Declaration of Max Davis in support of Defendants' motion, Ex. A, pp. 2-3.)

According to Plaintiffs, the plain language of the arbitration agreement unambiguously excludes all PAGA claims. They contend the arbitration agreement "carves out" both types of PAGA claims from its scope, comparing this case to *Duran*, *supra*, 92 Cal.App.5th 59. In *Duran*, the plaintiff signed an arbitration agreement that "specifically encompasses wage-hour disputes." (*Id.* at p. 62.) "The agreement also contains a class and representative action waiver…." (*Ibid.*) "The carve-out provision that was the basis for the trial court's decision to deny arbitration states: 'Claims for unemployment compensation, claims under the National Labor Relations Act, *claims under PAGA*, claims for worker's compensation benefits, and any

claim that is non-arbitrable under applicable state or federal law *are not arbitrable under this Agreement*." (*Id.* at p. 63 [italics added by appellate court].)

The plaintiff in *Duran* brought an action seeking only to recover PAGA civil penalties for herself and all current and former aggrieved employees. (*Duran*, *supra*, 92 Cal.App.5th at p. 63.) The appellate court in *Duran* set forth principles for interpreting an arbitration agreement. (*Id.* at p. 65.) "Arbitration is strictly a matter of consent. A party cannot be required to arbitrate a dispute that he or she has not agreed to submit to arbitration. [Citation.]" (*Ibid.*) "Under California law, the first step in analyzing the meaning of a contract is to determine whether the language is ambiguous—that is, reasonably susceptible to more than one meaning. [Citation.]" (*Id.* at p. 66.) The *Duran* concluded that the language in the agreement was unambiguous and affirmed the order denying the motion to compel arbitration. (*Id.* at pp. 66, 69.)

In reply, Defendants argue that, unlike in *Duran*, the arbitration agreement here is ambiguous because it states that the collective action waiver does not apply to PAGA representative actions. According to Defendants, reading this in conjunction with the excluded claims provision shows that the parties intended to divide their individual and representative PAGA claims. Thus, the Defendants' construction would add the word "representative" to the relevant language in the excluded claims provision, so that it would read: "(vi) [representative] claims pursuant to the Labor Code Private Attorneys General Act of 2004, California Labor Code section 2968 *et seq.* ('PAGA')." But this argument ignores Code of Civil Procedure section 1858, which states: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in term or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858; see also *Duran*, *supra*, 92 Cal.App.5th at p. 67; *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 764 [relying, in a contract action, upon Code Civ. Proc., § 1858 for "the fundamental principle that in interpreting contracts … courts are not to insert what has been omitted"].)

It is logical that the provision of the arbitration agreement expressly excluding representative PAGA actions from the general representative action waiver was added to ensure enforceability following *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-383 (*Iskanian*). In *Iskanian*, our high court concluded that "where … an employment agreement compels the waiver of representative claims under the PAGA, it is

contrary to public policy and unenforceable as a matter of state law." (*Adolph*, *supra*, 14 Cal.5th at p. 1118 [quoting and citing *Iskanian*, *supra*, 59 Cal.4th at pp. 384].) However, the court need not ascertain the reasons the relevant provisions were included in this case because the language is clear. (Civ. Code, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve absurdity"].)

Here, much as in *Duran*, the arbitration agreement unambiguously excludes PAGA actions, leaving no basis for the motion to compel. The authorities cited by Defendants do not convince the court otherwise. Defendants contend the court in *Barrera v. Apple American Group LLC*, (2023) 95 Cal.App.5th 63 (*Barrera*), analyzed language similar language to that at issue here. However, per the excerpts provided in the *Barrera* decision and the corresponding analysis, the arbitration agreements at issue in *Barrera* do not expressly exclude PAGA claims (as is the case here) because the *Barrera* agreements make no reference to PAGA at all. (*Barrera*, *supra*, 95 Cal.App.5th at pp. 72-73, 82-83.)

Similarly, Defendants' reliance on *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281 (*Piplack*) is unavailing. The holding in *Piplack* does not arise from ambiguity in the agreement, as Defendants suggest, but rather from its clarity: "the agreement makes clear, 'The … Private Attorney General Waiver … shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.'" (*Piplack*, *supra*, 88 Cal.App.5th at p. 1289.) The agreement in this case contains no analogous language expressing the parties' clear agreement to submit individual PAGA claims to arbitration.

Here, because the court concludes that the arbitration agreement excludes all PAGA claims from arbitration, it declines to address the remaining issues raised by the parties, including the post-*Adolph* impact of *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___[142 S. Ct. 1906, 2022 U.S. LEXIS 2940] upon motions to compel arbitration where the agreement encompasses PAGA claims.

Accordingly, Defendants' motion to compel arbitration is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 3

Case Name: Cuevas v. Little Caesars Enterprises, Inc. (PAGA)
Case No.: 20CV373147

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a law enforcement action under the Labor Code Private Attorney General Act of 2004, California Labor Code section 2698, et seq. ("PAGA") to recover civil penalties on behalf of Plaintiff Jose Cuevas ("Plaintiff"), the State of California, and other current and former employees of Defendant Little Caesar Enterprises, Inc. ("Defendant") for violations of the Labor Code.

The First Amended Complaint ("FAC"), filed on July 24, 2023, sets forth the following cause of action: (1) for Civil Penalties pursuant to California Labor Code sections 2698, et seq. for numerous violations of the Labor Code.

Currently before the Court is Defendant's motion to strike Plaintiff's FAC. Plaintiff has opposed the motion to strike and Defendant has filed a reply.

II. DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

In support of its motion to strike, Defendant requests judicial notice of the following:

1) Judicial Council of the State of California's Emergency Rule 9. The requested is GRANTED. (See Evid. Code § 452, subd. (e).);

2) Governor's Executive Order No. N-38-20. The request is GRANTED. (See Evid. Code § 452, subd. (c).);

3) Santa Clara County Superior Court's March 18, 2020 General Order Re: Implementation of Emergency Relief Authorized Pursuant to Government Code section 68115 by Chair of Judicial Council. The requested is GRANTED. (See Evid. Code § 452, subd. (e).);

4) Santa Clara County Superior Court's April 30, 2022 Notice Re: Information Regarding Civil Division Operations During COVID-19 Public Health Emergency. The Request is GRANTED. (See Evid. Code § 452, subd. (e).); and

5) State of California Department of Industrial Relations ("DIR") searchable database of Labor and Workforce Development Agency ("LWDA") notices filed with the DIR.

The request is DENIED. Although a court may notice a variety of matters, only relevant material may be noticed. (Mangini v. R. J. Reynolds Tobacco (1994) 7 Cal.4th 1057, 1063 [overruled on other grounds].) Here, Plaintiff does not dispute that he submitted notice to the LWDA. (See FAC, ¶ 36.) Further, whether the DIR searchable database shows that other non-parties submitted notices to the LWDA during a similar time period is not relevant to this matter, and thus, is not a proper subject of judicial notice. (See Gbur v. Cohen (1979) 93 Cal.App.3d 296, 301 ["judicial notice . . . is always confined to those matters which are relevant to the issues at hand. . . . The only matter ordinarily relevant to the sufficiency of the pleading under review is the relevant allegations of that pleading"].)

III. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE

In support of his opposition, Plaintiff requests judicial notice of the following: Alameda County Superior Court Trial Court Order in LaCour v. Marshalls of CA, LLC, Case No. RG21084368. The request is DENIED. While a trial court is permitted to "'take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments— [] the court cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.'" (People v. Woodell (1998) 17 Cal.4th 448, 455.) Here, Plaintiff relies on the trial court order's conclusion, as well as the facts of the case (Opposition, p. 7:14-17, fn. 7); however, the facts are explained in detail in the Court of Appeal's decision cited below. Therefore, in addition to being improper, the request is not necessary or helpful. (Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

IV. LEGAL STANDARD

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and

assumes the truth of all well-pleaded allegations. (Clauson v. Superior Ct. (1998) 67 Cal.App.4th 1253, 1255.)

V. DISCUSSION

Defendant moves to strike the following allegations from the FAC:

This means that the one-year PAGA statute of limitations for this case was tolled from April 6, 2020, until Plaintiff commenced this PAGA action on November 5, 2020. Accordingly, the one-year reach back for this action is April 6, 2019.

(FAC, ¶ 2:19-22.)

A. Statutes of Limitations and Emergency Rule 9 Generally

An employee "who seeks PAGA penalties must notify the LWDA and the employer of the specific Labor Code provisions that the employer allegedly violated, as well as the facts and those theories supporting the claim. ([Labor Code,] § 2699.3, subd. (a)(1)(A).) Then, 'if the Agency does not investigate, does not issue a citation, or fails to respond to the notice within 65 days, the employee may sue. (§ 2699.3, subd. (a)(2).)'" (Hutcheson v. Superior Ct. (2022) 74 Cal.App.5th 932, 939.) "[A] PAGA action is subject to a one-year statute of limitations. The 65-day period following notice to the LWDA and employer is 'not counted as part of the time limited for the commencement of the civil action to recover penalties' under PAGA. (§ 2699.3, subd. (d).)" (Ibid.)

In 2020, Governor Gavin Newsom declared a state of emergency due to COVID-19 and on March 27, 2020, he issued an executive order suspending "'any limitations in Government Code section 68115 or any other provision of law that limited the Judicial Council's ability to issue emergency orders or rules, and suspended statutes that may be inconsistent with rules the Judicial Council may adopt.'" (Committee for Sound Water & Land Development v. City of Seaside (2022) 79 Cal.App.5th 389, 401.) In response, the Judicial Council adopted a set of emergency rules, including Emergency Rule 9 ("Rule 9"). (Ibid.) Rule 9 effectively tolled the statute of limitations and repose for civil causes of action that exceed 180 days from April 6, 2020 until October 1, 2020. (Cal. Rules of Court, Appx., Emergency Rule 9, subd. (a).) The rule was "intended to apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil cause of action." (Advisory Comm. Cmt., Cal. Rules of Court, Emergency Rule 9.) In August 2023, the First District Court of Appeal determined that Rule 9

was constitutional and tolled the statute of limitations in PAGA actions during the specified time period. (LaCour v. Marshalls of California, LLC (2023) 94 Cal.App.5th 1172 (LaCour).)

B. Rule 9's Application to Plaintiff's PAGA Action

Defendant argues that the Rule 9 allegations should be stricken because Plaintiff's rationale for extending the PAGA liability period is a misunderstanding of the rule and that the rule simply allows civil claimants additional time to file their claims in court. (Motion to Strike, pp. 3:19-21; 5:26-27.) It asserts that 1) Plaintiff's interpretation of Rule 9 violates the California Constitution; and 2) had the LWDA investigated Plaintiff's claims, it would have been limited to only the violations occurring within one year of Plaintiff's notice.

In opposition, Plaintiff relies entirely on LaCour to support his argument that Rule 9 extends Defendant's liability period back to April 6, 2019. (Opposition, p. 5:12-14 ["Because the PAGA claims were submitted during the 178-day tolling period of Emergency Rule 9, the one-year look-back period for this Action is extended back an additional six months to April 6, 2019"].)

In LaCour, a former Marshalls employee filed a PAGA action on January 4, 2021. (LaCour, supra, 94 Cal.App.5th at p. 1181.) Marshalls demurred, arguing that because LaCour's employment ended in May 2019, he had only a year and 65 days to bring a PAGA claim, and having missed that deadline, the PAGA action was untimely. (Ibid.) The trial court held that Rule 9 pushed the deadline to file the complaint in the action until the latter part of January 2021. (Id. at p. 1185.) Marshalls appealed, challenging the trial court's tolling analysis on the ground Rule 9 is unconstitutional and prohibited by statute. (Ibid.) The Court of Appeal rejected the challenge, holding the rule to be constitutional. (Ibid.) The LaCour Court affirmed the trial court's explanation that, pursuant to Emergency Rule 9, "the PAGA statute of limitations was tolled from April 6, 2020, through October 30, 2020, which had the effect of extending [the] deadline to file with the LWDA [a] notice of a PAGA claim until November 24, 2020." (Ibid.) The Court of Appeal did not address the trial court's specific application of Rule 9 or when the liability period began.

The facts of the current case differ in some respects from those of LaCour. First, in this case, Defendant does not assert that the application of Rule 9, in general, is unconstitutional (see Motion to Strike, p. 3:22-24), but that Plaintiff's interpretation of the Rule is a violation of the California Constitution (see Motion to Strike, p. 7:24-27).

Second, in LaCour, the plaintiff filed an untimely LWDA notice and PAGA action. Here, however, both the LWDA notice and the PAGA action were timely filed. As alleged in the FAC, Plaintiff was employed by Defendant from approximately June 15, 2006 to approximately November 5, 2019. (FAC, ¶ 7.) Thus, Plaintiff had one year from November 5, 2019 to file a PAGA action, plus the 65 days that the statute of limitations was tolled to provide LWDA with a chance to respond. Therefore, without applying any additional tolling, Plaintiff had to file with the LWDA by November 5, 2020 and his PAGA action by January 11, 2021. On or around September 1, 2020, Plaintiff timely filed with the LWDA. (FAC, ¶ 36; Ex. 1.) The LWDA did not respond within 65 days. (Id. at ¶ 37.) Thereafter, on November 5, 2020, Plaintiff timely filed a PAGA action against Defendant.

Plaintiff now alleges that, because the PAGA claims were submitted during the Rule 9 tolling period, Rule 9 should extend the period of liability for an additional six months, as if the cause of action began to accrue on April 6, 2019, such that Plaintiff receives penalties for the one-year statute of limitations in addition to all days the period was tolled. (FAC, ¶ 2; Opposition, p. 5:12-14, 19-20.)

> This is an inaccurate interpretation of Rule 9. The rule's purpose is to toll the "'statutes of limitations and repose for civil causes of action.' Statutes of limitations and statutes of repose are specific statutes that serve to bar the initiation of legal proceedings after the expiration of a defined timeline." (People v. Philadelphia Reinsurance Corp. (2021) 70 Cal.App.5th Supp. 10, 16.) Tolling is "'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations – timely notice to the defendant of the plaintiff's claims – has been satisfied.' Where applicable, [tolling] will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.'" (McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal.4th 88, 99.) As Plaintiff timely filed his PAGA action, Emergency Rule 9 need not be implicated. Further, no unfairness has resulted to either party, as Plaintiff may adjudicate his case on the merits and Defendant received timely notice of Plaintiff's claims.

That said, even if Rule 9 was applicable, the additional days that the statute of limitations was tolled would be added to the end of the tolling period, extending the time for Plaintiff to file the LWDA notice and PAGA action due to COVID-19 delays. It would not

have extended the period of liability backwards to April 6, 2019, as Plaintiff suggests. (See Opposition, p. 6:21-25 [indicating the tolled period is "added counting backwards"].) The effect of a tolling period "is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (See Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 370-371 [emphasis original]; see also Mitchell v. State Dept. of Public Health (2016) 1 Cal.App.5th 1000, 1011 ["The term 'tolled' in the context of the statute of limitations is commonly understood to mean 'suspended' or 'stopped.' As our Supreme Court has explained . . . 'the tolled interval, no matter when it took place, is tacked onto the end of the limitations period'"].) Further, as Defendant correctly states in Reply, LaCour did not address, or even acknowledge the "look-back" analysis that Plaintiff asserts the case supports. (See Reply, p. 4:1-7.) Thus, LaCour does not support Plaintiff's argument and Plaintiff cites no further authority to support this look-back analysis.

As the motion to strike may be granted on the basis that Rule 9 is inapplicable, the Court declines to address the remaining arguments raised by Defendant. Based on the foregoing, the motion to strike is GRANTED without leave to amend. (See City of Stockton v. Superior Ct. (2007) 42 Cal.4th 730, 747 [leave to amend is liberally allowed unless the pleading shows on its face it is incapable of amendment].)

VI. CONCLUSION

The motion to strike is GRANTED without leave to amend.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 4

Case Name: Garcia v. Din Tai Fung Restaurant, Inc., et al. (PAGA)
Case No.: 20CV373998

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29. 2023 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is an action under the Private Attorneys General Act (PAGA), alleging various wage and hour violations by defendants Din Tai Fung Restaurant, Inc., Din Tai Fung (SF) Restaurant, LLC, Selena Soto, and Antonio Valdez (collectively, Defendants). Plaintiff Juana Garcia (Plaintiff) filed the operative complaint on December 7, 2020, alleging a single cause of action under PAGA. On December 15, 2022, Defendants filed a motion to compel arbitration of the action, which the court granted in part as to the individual component of Plaintiff's PAGA claim, but denied to the extent it sought dismissal of Plaintiff's representative PAGA claim. Exercising its inherent authority, the court stayed Plaintiff's representative PAGA claim pending a decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*).

On July 17, the California Supreme Court issued its *Adolph* decision, disagreeing with the United States Supreme Court's interpretation of PAGA standing in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906 (*Viking River*), and holding that "where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court." (*Adolph*, *supra*, 14 Cal.5th at p. 1123.) In light of *Adolph*, Plaintiff filed a motion to lift stay of proceedings and for leave to amend complaint (Motion). The Motion is opposed.

II. REQUESTS FOR JUDICIAL NOTICE

A. Defendants' Request

Defendants request judicial notice of five exhibits in support of their Opposition to Plaintiff's Motion [] (Opp.): (1) Declaration of Ashley Yang in Support of Defendants' Motion to Compel Arbitration, previously filed in the United States District Court for the

Northern District of California, San Jose Division in the case of *Garcia, Juana v. Din Tai Fung Restaurant, Inc. et. al.* (Case No. 5:20-cv- 02919-NC); (2) Order Re: Defendant's Motion to Compel Arbitration and Dismiss or Stay Action filed May 9, 2023 in this case; (3) Plaintiff's Class Action Complaint, filed April 28, 2020, filed in the United States District Court for the Northern District of California San Jose Division in the case of *Garcia, Juana v. Din Tai Fung Restaurant, Inc. et. al.* (Case No. 5:20-cv-02919-NC); (4) Order Granting Motion to Compel Arbitration and Motion to Dismiss All State Claims, filed in the United States District Court for the Northern District of California San Jose Division in the case of *Garcia, Juana v. Din Tai Fung Restaurant, Inc. et. al.* (Case No. 5:20-cv-02919-NC); and (5) Plaintiff's complaint filed on December 7, 2020 in this case.

Defendants' request for judicial notice is DENIED. (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 51, fn. 6 [denying request where judicial notice is not necessary, helpful, or relevant].) Exhibits 2 and 5 are already part of the record in this case and taking judicial notice of these documents is unnecessary. Exhibit 1, 3, and 4 are not relevant to material issues raised by the Motion.

B. Plaintiff's Request

Plaintiff filed a request for judicial notice in support of her Reply. Plaintiff's request for judicial notice is DENIED. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers."]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252 [stating that evidence submitted for the first time in reply papers is generally not allowed]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

III. DISCUSSION

A. Stay of Proceedings

The court previously stayed Plaintiff's representative PAGA claim "under its inherent authority to manage this case." (See *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141 [noting that a court has the inherent power to stay proceedings].) Plaintiff now asserts that she does not intend to pursue her individual PAGA claim in arbitration and asks the court to lift the stay as to her representative PAGA claim, arguing that nothing requires her to continue pursuing her

individual PAGA claim. The court agrees that lifting the stay is warranted here and finds Defendants' arguments to the contrary unpersuasive.

First, Defendants argue that the court "has also already ordered Plaintiff to arbitrate her individual claims against her employer" and therefore "Plaintiff must litigate those claims in arbitration[.]" (Opp. at p. 4.) But this only means that Plaintiff must arbitrate *if* she wishes to pursue her individual PAGA claims. While a motion to decide whether claims should be adjudicated in court or an arbitral forum may be referred to as a motion to compel arbitration, such a motion, if granted, and the resulting order do not as a general matter actually require a plaintiff to pursue and arbitrate their claims. The court notes that its order granting in part Defendants' motion to compel arbitration as to the individual component of Plaintiff's PAGA claim did so on the basis that "Defendants are thus entitled to compel arbitration of Plaintiff's individual PAGA claim." The impact of this ruling is that if Plaintiff wishes to pursue the individual component of her PAGA claim, arbitration is the proper forum to do so. Here, Plaintiff states that she does not wish to pursue her individual claim in arbitration, and Defendants do not contend or otherwise cite supporting authority that the court can force Plaintiff to pursue a claim she no longer wishes to pursue. (See *Tanis v. Southwest Airlines, Co.* (S.D.Cal. Oct. 17, 2019, No. 18-cv-2333-BAS-BGS) 2019 U.S.Dist.LEXIS 180100, at *4 ["The Court cannot force Plaintiff to initiate arbitration (as Southwest requests) if she instead chooses to drop her claims and pursue non-arbitrable claims."].)

Second, Defendants argue that *Viking River* held that a Plaintiff "*must* adjudicate" her individual PAGA claim in arbitration. (Opp. at p. 4, emphasis original.) But again, this argument is only true if Plaintiff intends to "adjudicate" her own individual PAGA claim in the first place. Defendants do not cite anything in *Viking River* suggesting that Plaintiff must pursue and arbitrate her individual PAGA claim regardless of whether she wishes to do so. Rather, *Viking River* held that a prior rule adopted by California courts preventing arbitration of individual PAGA claims is "preempted" by the Federal Arbitration Act. (142 S.Ct. at p. 1925.)

Third, Defendants contend that Plaintiff must demonstrate she is an "aggrieved employee" to have standing to pursue a PAGA representative lawsuit, and that because she has

agreed to arbitrate her individual PAGA claim, her status as an "aggrieved employee" must be decided in arbitration. (Opp. at p. 5.) According to Defendants, *Adolph* adopted "a two-part approach, where a PAGA plaintiff's status as an aggrieved employee is first determined by the arbitrator. If the plaintiff qualifies, then the individual action proceeds, while the representative action remains stayed, but still viable. However, if the arbitrator determines the plaintiff is *not* an aggrieved employee, then both the individual and representative actions must be dismissed due to lack of standing." (Opp. at p. 5, emphasis original (citing *Adolph, supra*, 14 Cal.5th at pp. 1123-1124 and *Rocha v. U-Haul Co. of Cal.* (2023) 88 Cal.App.5th 65, 77-78 (*Rocha*).) While Defendants argue that Plaintiff is attempting "to avoid the first step of *Adolph*" (Opp. at p. 6), *Adolph* did not hold that this procedure is required in every PAGA case. In fact, it was the *Adolph* plaintiff who proposed that procedure in response to Uber's contention "unless Adolph's non-individual claims are dismissed, his PAGA action will run afoul of *Viking River* because he will be permitted to relitigate whether he is an aggrieved employee in court to establish standing even if he has agreed to resolve that issue in arbitration as part of his individual PAGA claim." (*Adolph, supra*, 14 Cal.5th at p. 1123.) Nothing in *Adolph* indicates that this "two-part approach" is necessary where a plaintiff no longer seeks to pursue their individual PAGA claim.

Fourth, nor does this matter present the same concerns about relitigating the same issue over again. Indeed, in *Rocha*—a case cited by Defendants—the Court of Appeal explained that an arbitrator's finding may have a preclusive effect on whether a plaintiff qualifies as an aggrieved employee. (88 Cal.App.5th at pp. 77-78 ["Once the Labor Code violations based on which a plaintiff seeks to qualify for PAGA standing have been finally adjudicated, the extent to which that adjudication prevents a plaintiff from qualifying for standing will depend on general principles of issue preclusion. Such an approach is necessary in order to avoid inconsistent adjudications as to whether a particular Labor Code violation occurred."].) As with *Adolph*, the concerns raised in *Rocha* are not implicated if there will not be an adjudication in an arbitral forum.

The court's conclusion that Plaintiff is not required to litigate the "aggrieved employee" issue in arbitration to maintain a representative PAGA claim is supported by the California

Supreme Court's decision in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 (*Kim*). In that case, the plaintiff asserted both a PAGA claim and individual claims for damages. (*Id.* at p. 82.) The defendant successfully moved to compel arbitration of the plaintiff's individual claims and the parties later reached a settlement of all the individual claims. (*Id*.) There was no indication that the arbitration actually commenced or the parties litigated the standing issue in arbitration. (*Id*.) After the plaintiff dismissed his individual claims, the defendant moved for summary adjudication, arguing that the settlement and dismissal deprived the plaintiff of PAGA standing as an "aggrieved employee." (*Id.* at pp. 82-83.) The trial court agreed and the Court of Appeal affirmed. (*Id*. at p. 83.) The *Kim* court reversed, holding that the settlement and dismissal of his claims for individual relief did not deprive him of standing to bring a representative PAGA claim. (*Id.* at p. 80.) *Kim* noted that "[i]f the Legislature intended to limit PAGA standing to employees with unresolved compensatory claims when such claims have been alleged, it could have worded the statute accordingly. 'That it did not implies no such . . . requirement was intended.' [Citation.]" (*Id.* at p. 85.) The *Kim* court concluded that "PAGA-only cases cannot be dependent on the maintenance of an individual claim because individual relief has not been sought." (*Id.* at p. 88.)

Finally, Defendants' arguments focusing on judicial economy and avoiding duplicative litigation are unpersuasive. Here, arbitration of the individual claim has not yet commenced (Declaration of Gonzalo Quezada [], ¶ 5) and the arbitrator has yet to rule on the "aggrieved employee" issue. Therefore, lifting the stay to allow Plaintiff to file an amended complaint will neither frustrate the arbitrator's jurisdiction nor waste party or judicial resources. (Opp. at pp. 6-7.)

B. Leave to Amend

Plaintiff seeks leave to amend her complaint to clarify that she is pursuing only the representative or non-individual component of her PAGA claim. Plaintiff proposes to amend her complaint "to clarify that she only seeks to pursue a representative PAGA claim on behalf of aggrieved employees and the State of California." (Motion at p. 4; see *Kim*, *supra*, 9 Cal.5th at pp. 83-86 [a plaintiff's standing to pursue the PAGA claim in a representative capacity as an

aggrieved employee remains even if that plaintiff settles and dismisses their individual claim for damages]; *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1288 ["After *Viking* [*River*], every PAGA action is properly understood as a combination of two claims: an 'individual' claim, arising from the Labor Code violations suffered by the plaintiff or plaintiffs themselves, and a 'representative' claim, arising from violations suffered by other employees."]; *id*. at p. 1292 ["[E]ven with their individual claims forced into a separate forum (or pared away), they satisfy the test for standing described by the California Supreme Court, which binds us."].)

Code of Civil Procedure sections 473, subdivision (a), and 576 provide that the court may, "in the furtherance of justice," allow a party to amend any pleading. "It is well established that 'California courts have "a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others." [Citation.] Indeed, "it is a rare case in which 'a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.' " [Citation.]' [Citation.] Thus, absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. [Citation.]" (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163 (*Board of Trustees*).) "Generally, leave to amend must be liberally granted [citation], provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation. [Citation.]" (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

" 'Leave to amend a complaint is thus entrusted to the sound discretion of the trial court.' " (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) "[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment. [Citation.]" (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) However, the court does not abuse its discretion by denying leave to amend where the facts stated do not constitute a cause of action. (See *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 654.)

Here, Defendants' Opposition offers no argument or challenge against granting leave to amend. There is also no showing of prejudice to Defendants, and it does not appear that the proposed amendment will cause delays or additional costs. Thus, "the rule of great liberality in allowing amendment of pleadings" prevails and Plaintiff shall be granted leave to amend her complaint. (*Board of Trustees, supra,* 149 Cal.App.4th at p. 1163.)

IV. CONCLUSION

For the reasons explained above, Plaintiff's Motion is GRANTED. The stay is lifted and Plaintiff shall be permitted to file a first amended complaint within 10 days of service of this order.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 5

Case Name: Adriano v. Visby Medical, Inc.
Case No.: 21CV387068

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a representative Private Attorneys General Act (PAGA) action alleging various wage and hour violations against Defendant Visby Medical, Inc. (Defendant). The operative complaint (Complaint), filed September 27, 2021, sets forth a single claim for PAGA penalties for the following alleged Labor Code violations: (1) Sections 510 and 1198 (failure to pay overtime); (2) Sections 1182.12, 1194, 1197, and 1198 (failure to pay minimum wages); (3) Sections 226.7, 512(a), 516, and 1198 (failure to provide and record meal periods); (4) Sections 226.7, 516, and 1198 (failure to authorize and permit rest periods); (5) Sections 226(a), 1174(d), and 1198 (failure to provide and maintain compliant wage statements); (6) Section 204 (failure to pay wages during employment); (7) Sections 201 and 202 (failure to pay wages upon termination); (8) Section 206.5 (unlawful requirement for release of claims as a condition to receiving wages); (9) Section 222.5 (failure to pay costs of medical or physical examinations); (10) Section 2802 (failure to reimburse necessary business expenses); and (11) Section 2810.5(a)(1)(A)-(C) (failure to provide written notice of material terms of employment). (Complaint, ¶¶ 49-115.)

The parties have reached a settlement. Plaintiff Romulo Adriano (Plaintiff) now moves for approval of the settlement. Plaintiff's Motion for Court Approval of the Parties' PAGA Settlement (Motion) is unopposed.

II. LEGAL STANDARD FOR APPROVING A PAGA SETTLEMENT

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. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.)

Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

Labor Code section 2699, subdivision (*l*)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. Court review "ensur[es] that any negotiated resolution is fair to those affected. [Citation.]" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) "[C]lass certification is not required" in this context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp.* (N.D. Cal. 2019) 383 F.Supp.3d 959, 971 (*Haralson*); *Arias v. Superior Court* (2009) 46 Cal.4th 969, 975.)

Similar to its review of class action settlements, the court must "determine independently whether a PAGA settlement is fair and reasonable" to protect "the interests of the public and the LWDA in the enforcement of state labor laws[.]" (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. [Citations.]" (*Id.* at p. 77; see also *Haralson*, *supra*, 383 F.Supp.3d at p. 971 ["[W]hen a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public[.]"], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor*, *supra*, 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9.)

III. PLAINTIFFS' INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

After receiving informal discovery from Defendant, Plaintiff's counsel conducted an investigation and evaluation of Plaintiff's PAGA claim. On April 19, 2023, the parties participated in mediation with Louis Marlin, Esq. and were able to eventually negotiate a complete settlement.

Pursuant to the Settlement Agreement,[1] Defendants will pay a gross settlement amount of $725,000. (Settlement Agreement, ¶ 12.) $241,667 in attorney's fees, litigation costs not to exceed $25,000, and $7,000 in estimated administrative costs. (Settlement Agreement, ¶¶ 14, 21.) A proposed total enhancement award of $5,000 to named plaintiff will be deducted. (Settlement Agreement, ¶ 15.) Named plaintiff also agreed to a broader general release of all claims against Defendant and will receive a general release payment of $5,000 to be paid separately and not from the gross settlement amount. (Settlement Agreement, ¶ 16.)

The net settlement of approximately $446,333 will then be distributed 75 percent ($334,749.75) to the Labor and Workforce Development Agency (LWDA) and 25 percent ($111,583.25) to the aggrieved employees. (Settlement Agreement, ¶ 13; Motion at p. 11.) By the court's calculation, the approximately 600 aggrieved employees will receive an average payment of about $185.97. The aggrieved employees are defined as "all persons who were employed by Defendant in the State of California as non-exempt employees at any time from July 23, 2020 through April 19, 2023." (Settlement Agreement, ¶ 2.)

In exchange for the settlement, aggrieved employees will release "all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations, and/or other provisions of law alleged to have been violated in the Action or reasonably could have been alleged in the Action arising out of the alleged facts and/or matters alleged in the Action with respect to Aggrieved Employees during the Settlement Period." (Settlement Agreement, ¶ 10.) This release contained in the Settlement Agreement is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties.

[1] The Settlement Agreement is attached to the Declaration of Raul Perez [] (Perez Decl.) as Exhibit 1.

IV. DISCUSSION

A. Potential Verdict Value

Based on the data produced, Plaintiff estimates that there were between 450 to 29,100 pay periods in the PAGA period (depending on the alleged violation), resulting in maximum potential PAGA penalties of $20,595,000. (Motion at pp. 14-15.)

By the court's calculation, the settlement represents about 3.5 percent of the maximum value of the case. Considering the risks of further litigation, along with the discretionary and uncertain nature of PAGA penalty awards in general and the nature of the violations at issue here, the court agrees that the settlement is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

B. Attorney's Fees

While the PAGA statute does not expressly require judicial review of claimed attorney's fees, the court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney's fees. The court thus finds that it must scrutinize the attorney's fees arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "*qui tam*" suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney's fees arrangement. (See *United States v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney's fees award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

Here, counsel request a fee award of $241,667, or one-third of the gross settlement. This percentage is typical for wage and hour cases. Considering counsel's lodestar of $99,905 based on 133.7 hours of work, resulting in a multiplier of 2.42, the court finds the requested fees to be within the general range of reasonableness. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; see also *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6

& pp. 1052-1054, Appx. [reviewing fees approved in 24 common fund cases and finding that 20 of these cases had multipliers in the 1.5 to 3.0 range].)

C. Other Costs and Expenses

Counsel's requested litigation costs and expenses of $25,000 appears reasonable and is approved. The $7,000 allocated to administrative costs is also approved provided that this represents a hard cap on administrative costs.

Finally, named plaintiff requests an enhancement award of $5,000. The rationale for such awards in class actions is that named plaintiffs "should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class," considering "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, internal citations and quotations omitted.) These considerations apply equally in the PAGA context. To support his request for an enhancement award, named plaintiff provides a declaration describing his efforts on the case. Named plaintiff participated in multiple conferences with counsel about the factual bases for the claims, discussed the facts of the case with counsel, closely reviewed the complaint, maintained regular contact with counsel during the litigation, prepared and was available for mediation, and reviewed and evaluated the proposed settlement with counsel. Named plaintiff was willing to represent the LWDA as a deputized attorney general and estimates he spent approximately 25 to 35 hours assisting counsel in this case. Applying the relevant factors, the court finds that an enhancement award of $5,000 for named plaintiff is appropriate here. (See *Roes v. SFBSC Mgmt., LLC* (9th Cir. 2019) 944 F.3d 1035, 1057 [Reasonable incentive awards are appropriate " 'to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.' [Citations.]"].)

V. ADMINISTRATION PROCESS

The settlement will be funded in two equal payments. The first half of the gross settlement amount will be deposited, within 30 calendar days after the entry of the order and judgment, into a Qualified Settlement Fund to be established by the Settlement Administrator. The remaining half will be funded "on or before January 31, 2024, or within twenty (20) business days after entry of the Order and Judgment if, as of January 31, 2024, no entry of the Order and Judgment has yet been issued." (Settlement Agreement, ¶ 24.) Within 30 calendar days after the entry of the order and judgment, Defendant will provide the settlement administrator with data concerning the aggrieved employees. (Settlement Agreement, ¶ 23.) Within 14 calendar days of the full funding of the settlement, the Settlement Administrator will issue payments to aggrieved employees, the LWDA, named plaintiff, Plaintiff's counsel, and itself. (Settlement Agreement, ¶ 24.)

Prior to mailing payments to aggrieved employees along with an explanatory letter, the Settlement Administrator will perform a search based on the National Change of Address database to update and correct for known or identifiable address changes. (Settlement Agreement, ¶ 25.) Any checks returned as non-deliverable on or before the check cashing deadline will be promptly sent via first class mail to the forwarding address provided, and if no forwarding address is provided, the Settlement Administrator will perform a skip trace or other search and perform a single re-mailing. Checks will remain negotiable for 180 days and funds associated with settlement checks remaining uncashed after that point will be sent to Worksafe as a *cy pres* recipient in accordance with Code of Civil Procedure section 384. (Settlement Agreement, ¶ 25.)

VI. ORDER AND JUDGMENT

The court GRANTS the Motion for Court Approval of the Parties' PAGA Settlement.

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's Motion for Court Approval of the Parties' PAGA Settlement is GRANTED. The aggrieved employees are: "all persons who were employed by Defendant [Visby Medical, Inc.] in the State of California as non-exempt employees at any time from July 23, 2020 through April 19, 2023."

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff shall take from his complaint only the relief set forth in the parties' settlement agreement and this order and judgment. The court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **October 2, 2024 at 2:30 P.M.** in Department 19. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to Worksafe; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 6

Case Name: Bridges v. Premier Nissan of San Jose, LLC, et al. (PAGA)
Case No.: 22CV394491

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

On October 28, 2021, plaintiff Jamie Bridges (Plaintiff) filed a wage and hour action Bridges v. Premier Nissan of San Jose, LLC, et al. (Santa Clara County Superior Court, Case No. 21CV390763) (Bridges I) against defendants Premier Nissan of San Jose, LLC (Premier Nissan SJ) and Troy Duhon (Duhon) (collectively, Defendants). According to the allegations of Plaintiff's individual complaint, Defendants failed to provide Plaintiff all meal periods to which they were entitled, pay meal period premiums, provide employees all rest periods to which they were entitled, pay rest period premiums, pay minimum wages for all hours worked, pay overtime wages for all overtime hours worked, reimburse employees for necessary business expenses, furnish itemized wage statements and maintain accurate pay records. (Complaint, ¶¶ 43-98.) Defendants also retaliated against Plaintiff for complaining about unlawful pay practices, wrongfully terminated Plaintiff in violation of public policy, and willfully failed to pay wages upon his separation of employment. (Id. at ¶¶ 100-104, 108-112, & 115-116.) Based on these allegations, the complaint in Bridges I sets forth causes of action for: (1) Failure to Pay Minimum Wage in violation of Labor Code section 1197; (2) Failure to Pay Overtime Wage in violation of Labor Code section 510; (3) Failure to Provide Meal Periods Labor Code sections 226.7, 512, subdivision (a), and 1198; (4) Failure to Provide Rest Periods Labor Code sections 226.7 and 1198; (5) Failure to Indemnify for Necessary Expenditures in violation of Labor Code section 2802; (6) Failure to Furnish Accurate Wage Statements and Failure to Maintain Accurate Payroll Records in violation of Labor Code sections 226, 1174, subdivision (d), and 1198; (7) Retaliation in violation of Labor Code section 1102.5; (8) Wrongful Termination in violation of Public Policy; (9) Willful Failure to Pay Wages in violation of Labor Code sections 201-203; and (10) Failure to Timely Pay Wages in violation of Labor Code section 204.

On February 8, 2022, the court ordered Bridges I submitted to binding arbitration pursuant to the terms of the parties' arbitration agreement and the parties' stipulation, and stayed Bridges I pending the outcome of the arbitration.

On February 18, 2022, Plaintiff filed this Private Attorneys General Act (PAGA) action Jamie Bridges v. Premier Nissan of San Jose, LLC, et al. (Santa Clara County Superior Court, Case No. 22CV394491) (Bridges II) on behalf of current and former employees of Defendants. According to the allegations of the Complaint, Defendants failed to provide employees all meal periods to which they were entitled, pay meal period premiums, provide employees all rest periods to which they were entitled, pay rest period premiums, pay minimum wages for all hours worked, pay overtime wages for all overtime hours worked, reimburse employees for necessary business expenses, furnish itemized wage statements and maintain accurate pay records. (Complaint, ¶¶ 48-49, 55, 59, 64, 67, & 70-74.) Based on these alleged Labor Code violations, the Complaint sets forth a single cause of action for Civil Penalties in Violation of Labor Code 2698, et seq.

Bridges I was dismissed with prejudice on March 27, 2023.

The Plaintiff and Premier Nissan SJ have reached a settlement agreement. Plaintiff moved for approval of PAGA settlement. No opposition was filed.

On August 10, 2020, proposed intervenor Celia Arreola (Arreola) filed a lawsuit in the Santa Clara County Superior Court, Celia Arreola v. Premier Nissan of San Jose, et a1., 20CV369049. On August 9, 2023, Arreola filed a motion to intervene. The proposed complaint in intervention sets forth a single cause of action for PAGA penalties based on the following predicate violations: (1) Failure to Pay Overtime Wage in violation of Labor Code section 510 and 1198; (2) Failure to Pay Minimum Wage in violation of Labor Code section 1182.12, 1194, 1197, and 1198; (3) Failure to Provide and Record Meal Periods in violation of Labor Code sections 226.7, 512, subdivision (a), 516, and 1198; (4) Failure to Provide Rest Periods Labor Code sections 226.7, 516, and 1198; (5) Failure to Furnish Accurate Wage Statements and Failure to Maintain Accurate Payroll Records in violation of Labor Code sections 226, subdivision (a), 1174, subdivision (d), and 1198; (6) Failure to Timely Pay Wages in violation of Labor Code section 204; (7) Failure to Pay Wages in violation of Labor Code sections 201-203; (8) Unlawful Requirement for Release of Claims as a Condition to Receive Wages in violation of Labor Code section 206.5; (9) Collecting or Receiving Wages Already Paid in

violation of Labor Code sections 221 and 224; (10) Secret Payment of a Lower Wage in violation of Labor Code section 223; (11) Failure to Pay Costs of Mental or Physical Examination in violation of Labor Code section 222.5; (12) Failure to Provide Notice of Paid Sick Leave in violation of Labor Code section 246; and (13) Failure to Reimburse Necessary Business Expenses in violation of Labor Code section 2802. The proposed complaint in intervention also seeks to add as Doe defendants more than 10 additional automotive companies.

On August 19, 2023, the court continued the motion for approval of PAGA settlement to September 27, 2023.

The court explained that it had several concerns regarding the settlement. First, the settlement agreement purported to release claims against Duhon, but did not include Duhon as a party or signatory. Second, the start date of the PAGA Period as defined in the settlement agreement (i.e., June 1, 2019) was earlier than the PAGA Period start date alleged in the Complaint (i.e. October 26, 2020). Third, the court noted Plaintiff entered into a separate settlement agreement for his individual Labor Code claims as alleged in Bridges I, and requested that Plaintiff provide a copy of the individual settlement for its review. Fourth, the court was concerned that the proposed settlement undervalued and unfairly discounted the value of the PAGA claims. The court noted that the informal discovery conducted was meager: only 386 pages of documents were produced for PAGA claims for 201 aggrieved employees and a significant portion of those payroll and time records pertained only to Plaintiff. Additionally, the court explained that Plaintiff appeared to underestimate the value of the PAGA claims given the maximum number of allegedly violations. Finally, the court indicated that the amount of attorney fees and costs requested appeared to be excessive. The percentage of the common fund sought by counsel was higher than the 33.33 percent typically awarded in wage and hour cases. Furthermore, Plaintiff s counsel sought to recover fees and costs for work on Bridges I as well as work on other unrelated cases (e.g., Silva v. Premier Chevrolet of Buena Park, LLC). The court directed Plaintiff's counsel to file a supplemental declaration addressing these issues.

On September 11, 2023, Plaintiff's counsel filed a supplemental declaration and on September 12, 2023, Plaintiff's individual settlement agreement was lodged with the court for in camera review.

On September 26, 2023, the Division of Labor Standards Enforcement, on behalf of the Labor and Workforce Development Agency (LWDA) requested a continuance of the hearing on the motion for approval of PAGA settlement. It asserted that it had only recently received notice of the proposed PAGA settlement and that it was informed that Arreola had moved to intervene. It requested that the court hear the motion to intervene prior to determining the outcome of the motion for approval of PAGA settlement. The court denied the motion.

At the hearing on the motion for approval of PAGA settlement, the court again expressed doubts about the PAGA settlement. First, the court noted that the release purported to release claims during the PAGA period beginning June 1, 2019, when the date Plaintiff gave notice to the LWDA was October 26, 2021, suggesting that the start date should be October 26, 2020. Second, Plaintiff's counsel explained in her supplemental declaration that the maximum potential value of the PAGA claims is $3,738,000. Therefore, the settlement amount of $54,850 reflects a discount of approximately 98.6%. Third, as mentioned above, the discovery provided to Plaintiff was meager and, although Plaintiff's counsel's supplemental declaration indicated that she had since received payroll records from a sampling of 15 employees, Plaintiff's counsel's supplemental declaration did not address what the discovery revealed regarding Plaintiff's allegations regarding rest period violations, failure to pay minimum wages, failure to pay overtime wages, and failure to maintain accurate records. Finally, the Court expressed that the requested attorney fees of $19,197.50 was excessive and counsel continued to request fees and costs for work performed in connection with Bridges I, despite the fact that Plaintiff's counsel already received payment for fees in Bridges I.
The court continued the hearing on the motion for approval of PAGA settlement to November 29, 2023.

Currently before the court is Arreola's motion to intervene in this action. Plaintiff and Defendants have separately opposed the motion and Arreola has filed a reply. Also before the court is Plaintiff's motion for approval of the PAGA settlement between Plaintiff and Premier Nissan SJ.

II. MOTION TO INTERVENE

A. Legal Standard

Code of Civil Procedure section 387 ("Section 387") governs intervention and provides mandatory terms under which the Court "shall" permit intervention where the proposed

intervenor demonstrates in a "timely application" that "[a] provision of law confers an unconditional right to intervene" or "[t]he person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." (§ 387, subd. (d)(1).) Where the would-be intervenor "meets the qualifications for mandatory intervention…, the fact that such intervention would add to the complexity of the action, create delay, or adversely affect the original parties is of no moment." (California Physicians' Service v. Superior Court (Gilmore) (1980) 102 Cal.App.3d 91, 96 (California Physicians' Service).)

Section 387, subdivision (d)(2), pertains to permissive intervention. "[F]or permissive intervention, three factors must be established 'the intervenor must have a direct interest in the lawsuit, the intervenor must not enlarge the issues raised by the original parties, and the intervenor must not tread on the rights of the original parties to conduct their own lawsuit.'" (Lincoln National Life Ins. Co. v. State Bd. Of Equalization (1994) 30 Cal.App.4th 1411, 1422.) "[T]he intervenor's interest in the litigation must be direct and immediate rather than consequential, the issues must not be enlarged by the intervention and the reasons for intervention must outweigh the rights of the original parties to litigate in their own way." (California Physicians' Service, supra, 102 Cal.App.3d at pp. 95-96.) "One cardinal rule which is established by the cases is that an intervenor's interest must be more direct and immediate than that of a simple creditor of one of the parties." (Ibid.) "The purpose of allowing intervention is to protect others potentially affected by a judgment, thus obviating delay and multiplicity of suits." (Catello v. I.T.T. General Controls (1984) 152 Cal.App.3d 1009, 1013.)

B. Analysis

Arreola contends that she is entitled to both permissive and mandatory intervention.

1. Mandatory Intervention

a. Timeliness

Arreola argues that her motion to intervene is timely because she was just informed on May 24, 2023, that Plaintiff and Premier Nissan SJ had reached a settlement. In opposition, Plaintiff and Defendants argue that the motion is untimely because Arreola has known about this action since at least September 6, 2022, when a notice of related cases was filed, but she

did not attempt to intervene until after the motion for approval of the PAGA settlement was filed.

"Timeliness is measured from 'the date the proposed intervenors knew or should have known their interests in the litigation were not being adequately represented." (Lofton v. Wells Fargo Home Mortgage (2018) 27 Cal.App.5th 1001, 1013.)

Here, Arreola contends that she did not know until May 24, 2023 that her interests were not being adequately represented. (See Ziana Homeowners Assn. v. Brookefield Ziani LLC (2015) 243 Cal.App.4th 274, 282 (Ziana) [timeliness is measured not from the time the intervenor becomes aware of the case, but from when he knows or reasonably should know his interests are not adequately represented in the case].)

Plaintiff and Defendants cite to cases, such as Starks v. Vortex Industries, Inc. (2020) 53 Cal.App.5th 1113, in which the court found a motion to intervene made after a settlement was reached was untimely. The court stated that a potential intervenor must move to protect its interest no later than when it gains some actual knowledge that a measurable risk exists. (Id. at ¶ 1127.) But, Arreola contends that the reason why she must intervene is because the proposed settlement is grossly unfair. Thus, she could not have known about the need to intervene until after she had reviewed the proposed settlement. Accordingly, the court finds that Ziana should be followed in this case and the motion is timely.

b. Interest Relating to the Property or Transaction

Arreola asserts that she has a direct interest in the claims made in this case because she is a duly authorized PAGA representative and an aggrieved employee and, therefore, she will be bound by the settlement in this case if it is approved. In opposition, Plaintiff and Defendants argue that Arreola has not shown that she has a direct interest in this case because PAGA claims belong to the State.

Currently, there is a split of authority as to whether a plaintiff in a representative PAGA action has the right to intervene or object to a judgment in a related action that purports to settle the claims brought on behalf of the State.

In Turrieta v. Lyft, Inc. (2021) 69 Cal.App.5th 955 (Turrieta), three individuals filed separate representative actions against the defendant alleging violations of the Labor Code. One of the individuals settled with the defendant. The other two individuals moved to intervene in the matter and object to the settlement. The trial court rejected their requests to intervene and

approved the settlement after finding it to be fair and adequate. It also denied their subsequent motions to vacate the judgment under Code of Civil Procedure section 663. The Court of Appeal affirmed the denial of the appellant's motion to intervene because the appellants could not show they had a direct and immediate interest in the settlement. The Court of Appeal reasoned the fact that the appellants were PAGA plaintiffs in a different PAGA action did not create a direct interest in the case because they were not the real parties in interest, the State was the real party in interest. Although the California Supreme Court has granted review for Turrieta regarding whether a plaintiff in a representative action under PAGA has the right to intervene, object to, or move to vacate a judgment in a related action that purports to settle the claims that plaintiff brought on behalf of the State, Turrieta may be relied on not only for its persuasive value, but also for "the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict." (See Turrieta v. Lyft, Inc.; SEIFU, 502 P3d 3; Cal. Rules of Court, rule 8.1115(e)(3) ["at any time after granting review or after decision on review, the Supreme Court may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2) (emphasis added)].)

In opposition, Arreola relies on Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 73 (Moniz) and Uribe v. Crown Building Maintenance Co. (2021) 70 Cal.App.5th 986, 999-1000 (Uribe). In Moniz, two individuals filed separate PAGA representative actions against the defendant. One of the individuals reached a settlement, which was approved by the trial court. The other individuals appealed on the basis that the settlement process and approval was deficient. The Court of Appeal reversed the judgment because it could not infer that the trial court assessed the fairness of the settlement's allocation of civil penalties between affected aggrieved employees or whether such allocation comports with PAGA. The Court of Appeal stated "where two PAGA actions involve overlapping PAGA claims and a settlement of one is purportedly unfair, it follows that the PAGA representative in the separate action may seek to become a party to the settling action and appeal to the fairness of the settlement as party of [their] role as an effective advocate for the state." (Id. at p. 73.)

In Uribe, the intervenor who opted out of the settlement appealed from the trial court's entry of judgment after the plaintiff reached a settlement with the defendant. The intervenor

was allowed to intervene in the matter to oppose the settlement. The defendant filed a motion to dismiss the intervenor's appeal for lack of standing. The Court of Appeal denied the motion and stated, "with her own PAGA cause of action in this action precluded if [plaintiff's] PAGA settlement stands, [intervenor] has standing to at least challenge the PAGA notice in an attempt to overturn the judgement." (Id. at p. 1002.) However, in Uribe, the Court of Appeal distinguished Turrieta on the basis that unlike in Turrieta, the intervenor's motion for leave to file a complaint in intervention was granted by the trial court.

After Arreola filed her motion but before Plaintiff and Defendants filed their oppositions, the First District Court of Appeal, which decided Moniz, issued its decision in Accurso v. In-N-Out Burgers (2023) 94 Cal.App.5th 1128 (Accurso). The Accurso court disagreed with Turrieta, explaining that it believed that the Turrieta court "went off track" with its "implicit premise that a putative intervenor must have a pecuniary or property interest in potential recovery to warrant intervention." (Id. at p. 1144.) The Accurso court stated

That sort of test will often be met in purely private litigation where the spoils are measured in money damages or where property ownership is at stake, but where litigants have a legitimate claim to representation of the public interest, "the intervener need neither claim a pecuniary interest nor a specific legal or equitable interest in the subject matter of the litigation." (Simpson Redwood Co. v. State of California (1987) 196 Cal.App.3d 1192, 1200 [Save-The-Redwoods League members' claimed right to use public lands]; County of San Bernardino v. Harsh California Corp. (1959) 52 Cal.2d 341, 346 [right of the United States to protect its fiscal policy].) A major objective of the 1977 amendment of section 387, as we read the Legislative history, was to facilitate intervention by third parties claiming stakes imbued with the public interest as a basis for participation in the litigation of others.

(Accurso, supra, 94 Cal.App.5th at p. 1144.) The court finds Accurso to be better reasoned. Accordingly, the court finds that Arreola has an interest in the proceedings that would allow her to intervene in this matter.

c. Whether the Disposition of the Matter will Impair or Impede Proposed Intervenors' Rights

Arreola asserts that her rights, as a PAGA representative and as an aggrieved employee, will be impaired or impeded because she and other aggrieved employees will not be able to opt

out of the settlement between Plaintiff and Defendants, but, she contends, the settlement is unfair. The court finds that a settlement that is unfair may impair or impede Arreola's rights.

d. Adequacy of the Representation

Arreola argues that Plaintiff cannot adequately represent her interests because Plaintiff has agreed to a grossly unfair settlement, which she maintains amounts to only 0.13% of the minimum statutory penalty per pay period.

"[W]here an applicant for intervention and an existing party 'have the same ultimate objective, a presumption of adequacy arises.' " (League of United Latin Am. Citizens v. Wilson (9th Cir. 1997) 131 F.3d 1297, 1305 (League of United Latin Am. Citizens) [original emphasis].) Three factors determine whether a party will adequately represent a nonparty's interest: "(1) whether the interest of a present party is such that it will undoubtedly make all of [nonparty's] arguments; (2) whether the present party is capable and willing to make such arguments, and (3) whether [nonparty] would offer any necessary elements to the proceeding that other parties would neglect." (Friends of Oceano Dunes v. California Costal Com. (2023) 90 Cal.App.5th 836, 842 (Friends of Oceano Dunes), citing Callahan v. Brookdale Senior Living Communities, Inc. (9th Cir. 2022) 42 F.4th 1013, 1020.) Generally, the burden of satisfying the test is "minimal"; it can be satisfied if the nonparty "shows the representation of [their] interest 'may be' inadequate." (Id. at p. 843.) If the nonparty's "interest is 'identical to that of one of the parties.' " however, "a compelling showing is required to demonstrate inadequate representation." (Ibid.)

Here, Plaintiff and Arreola each seek to bring PAGA claims for wage and hour violations on behalf of aggrieved employees. However, the proposed complaint in intervention contains claims not contained in the Complaint and vice versa. Thus, despite the similarities, Plaintiff and Arreola do not share the same ultimate objective and as a result, a presumption of adequacy does not arise.

Arreola provides a detailed analysis explaining why she believes the PAGA claims in this case were improperly discounted. She claims that the actual exposure Premier Nissan SJ faces is over $12 million. Therefore, she argues the proposed settlement amount of $54,850, of which only $19,402.50, will be allocated to PAGA penalties is inadequate. Here, the parties have agreed to the settlement and they argue that it is fair and reasonable. Accordingly, it is not likely that either party will make the arguments advanced by Arreola. Given the limited

discovery conducted in this case, the parties' minimal presentation regarding the valuation of the claims at issue, and the court's own misgivings regarding the fairness of the settlement, it appears that Arreola would provide necessary protection for the interests of the public as a PAGA representative in this case. The court finds that mandatory intervention is appropriate.

In light of the court's conclusion that mandatory intervention is appropriate, it need not discuss permissive intervention.

C. Conclusion

The motion to intervene is GRANTED.

III. MOTION FOR APPROVAL OF PAGA SETTLEMENT

In light of the court's conclusion regarding the motion to intervene, the motion for approval of the PAGA settlement is DENIED WITHOUT PREJUDICE.

IV. CONCLUSION

The motion to intervene is GRANTED. Arreola may file her proposed complaint in intervention.

The motion for approval of PAGA settlement is DENIED WITHOUT PREJUDICE in light of the court's ruling on the motion to intervene.

Arreola as the prevailing party, shall prepare the order.

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