

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARTINA HERNANDEZ, *et al.*,

No. C-14-1531 EMC

Plaintiffs,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO COMPEL ARBITRATION**

DMSI STAFFING, LLC., *et al.*,

(Docket No. 39)

Defendants.

On February 27, 2014, Plaintiff Martina Hernandez filed a class action complaint alleging various violations of California’s labor code and California’s Unfair Competition Law (“UCL”), and bringing a representative claim under the Private Attorneys General Act (“PAGA”). Docket No. 1-1 (“Compl.”). Ms. Hernandez brought this action against DMSI Staffing, LLC (“DMSI”) and Ross Stores, Inc. (“Ross”) (collectively “Defendants”). Pending before the Court is Defendants’ motion to compel arbitration.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ms. Hernandez has filed a class action complaint against DMSI and Ross. Docket No. 1-1. Ms. Hernandez initially brought suit in Alameda County Superior Court, but Defendants removed the case in April of 2014. Docket No. 1. Ms. Hernandez’s motion to remand was denied. Docket No. 38.

In her Complaint, Ms. Hernandez alleges she was jointly employed by DMSI and Ross to work in Ross’s warehouse as a non-exempt employee who was paid by the hour. Compl. ¶ 1, 5. DMSI is a temporary staffing company that provides temporary staffing to Ross, a retail apparel

1 store. According to DMSI's Administrative Director of Staffing Operations, Christine Harrison, Ms.
2 Hernandez was hired by DMSI after DMSI replaced a staffing agency named MJO as Ross's
3 staffing partner. Ms. Hernandez had previously been staffed in a Ross warehouse through MJO.
4 Docket No. 39-2, Harrison Decl. ¶¶ 5-6. When she began work with DMSI on March 26, 2012, Ms.
5 Hernandez signed a Dispute Resolution Agreement ("DRA"). Docket No. 39-2. DMSI's Dispute
6 Resolution Agreement provides:

7 This Agreement sets forth the procedures to resolve any and
8 all disputes arising out of or related to your employment with
9 DMSI and/or termination thereof. . . . All such disputes will
10 be resolved by an arbitrator through final and binding
11 arbitration. . . . This Agreement is governed by the Federal
12 Arbitration Act, 9 USC. Sec.1 *et seq.* . . . The arbitration
13 shall be conducted with both parties having the right to
14 conduct discovery and bring motions as provided for by the
15 Federal Rules of Civil Procedure. However, there will be no
16 right for any dispute to be brought, heard, or arbitrated as a
17 Class or Collective Action of any sort of nature.

18 Harrison Decl., Ex. 1. Ms. Hernandez also signed a copy of the DRA in Spanish. *Id.*, Ex. 2.

19 According to Ross's Human Resources Administrator for its Southwest Distribution Center,
20 Tina Lobato, in September of 2012, Ms. Hernandez applied to and was hired directly by Ross.
21 Docket No. 39-3 ("Lobato Decl.") at ¶¶ 2-4; Ex. 1. Ms. Lobato attests that she participated in the
22 orientations that were given to new employees like Ms. Hernandez. She states that the new hires
23 were given a packet of Ross new hire documents, which were explained in both English and
24 Spanish, depending on the mix of employees. Lobato Decl. ¶4. The new hires received a copy of
25 Ross's employee handbook, called "Distribution & Transportation Associate Handbook." Lobato
26 Decl. ¶ 6. The employee handbook contained an Arbitration Policy. Lobato Decl., Ex. 3. Ms.
27 Hernandez signed an acknowledgment and agreement, recognizing that she "read, under[stood] and
28 agree[d] to comply with the . . . Ross Arbitration Policy." Lobato Decl., Ex. 2. The Ross
Arbitration Policy laid out at page 44 of the employee handbook provides:

 This Arbitration Policy ("Policy") applies to any disputes, arising out
of or relating to the employment relationship, between an associate
and Ross or between an associate and any of Ross' agents or
employees, whether initiated by an associate or by Ross. This policy
requires all such disputes to be resolved only by an Arbitrator through
final and binding arbitration This Policy is governed by the
Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* . . . The parties will have

1 the right to conduct civil discovery and bring motions, as provided by
2 the Federal Rules of Civil Procedure and enforced by the Arbitrator.
3 However, there will be no right or authority for any dispute to be
brought, heard or arbitrated as a class action, private attorney general,
or in a representative capacity on behalf of any person.

4 Lobato Decl., Ex. 3.

5 Ms. Hernandez alleges DMSI and Ross violated various provisions of California's labor code
6 as well as the Industrial Wage Commission's ("IWC") order, including failure to pay minimum
7 wage (Cal. Lab. C. §§ 1194, 1194.2, 1197); failure to pay wages for all hours worked (Cal. Lab. C. §
8 204); failure to pay overtime (Cal. Lab. C. §§ 510, 1194); failure to pay timely wages owed upon
9 termination or quitting (Cal. Lab. C. §§ 201-203); and failure to provide accurate and compliant
10 wage statements (Cal. Lab. C. § 226). Ms. Hernandez alleges that, as a result of the labor code
11 violations, the Defendants' business practices violated the UCL. Ms. Hernandez also seeks
12 remedies under PAGA (Cal. Labor Code §§ 2698 and 2699).

13 Ms. Hernandez alleges six causes of action individually and on behalf of similarly-situated
14 class members. Compl. at 1. The seventh cause of action under PAGA is brought as a
15 representative action. *Id.* at 13. The Class is defined as "[a]ll current and former non-exempt,
16 hourly paid California employees who worked through DMSO and who were assigned to any of
17 Ross's warehouse facilities in California for any period of time within four years prior to the
18 initiation of this action through certification . . . and whose work time was tracked by one or more
19 time management systems." *Id.* ¶ 9. Defendants have answered. Docket No. 6.

20 Plaintiff does not oppose arbitration of her labor code claims or her claim under the UCL.
21 Solely at issue is Plaintiff's seventh cause of action, the representative claim under PAGA. Plaintiff
22 contends that she has not waived and is not bound to arbitrate her PAGA claim. At the hearing on
23 Defendants' motion to compel, Plaintiff made an oral motion to amend her Complaint to dismiss
24 without prejudice her PAGA claim. The Court gave leave for the parties to file supplemental
25 briefing on whether Plaintiff should be permitted to amend her Complaint under Rule 15. For the
26 reasons discussed below, the Court **DENIES** Plaintiff's motion to amend her Complaint, **GRANTS**
27 Defendants' motion to compel arbitration as to Plaintiff's first six causes of action, and **DENIES in**
28

1 **part and DEFERS in part** Defendants' motion to compel arbitration of Plaintiff's representative
 2 PAGA claim.

3 **II. DISCUSSION**

4 A. Rule 15

5 At the hearing on the motion to compel, Plaintiff's counsel made an oral motion to amend,
 6 which Defendants opposed. The Court gave the parties leave for supplemental briefing on whether
 7 to permit amendment.¹ When a party seeks to dismiss some, but not all, of its claims, Rule 15
 8 governs. *See Gen. Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1513 (9th Cir.
 9 1995) (“[W]e have held that Rule 15, not Rule 41, governs the situation when a party dismisses
 10 some, but not all, of its claims.”). Under Rule 15, a court “should freely give leave when justice so
 11 requires.” Fed. R. Civ. P. 15(a)(2). That said, a court may deny leave to amend where there are
 12 grounds such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated
 13 failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing
 14 party by virtue of allowance of the amendment, futility of amendment, etc.” *Foman v. Davis*, 371
 15 U.S. 178, 182 (1962).

16 In this case, Plaintiff seeks to amend by dismissing her PAGA causes of action, in part
 17 because she concedes her PAGA claim against DMSI is time-barred.² Docket No. 46 at 5-6.
 18 Defendants respond that the arbitrator should decide whether to permit amendment, that Plaintiff has
 19 acted in bad faith by knowingly prosecuting her time-barred claims, and that Plaintiff has brought
 20 her oral motion in an effort to engage in forum-shopping and other chicanery.

21 The Court agrees that there is evidence that Plaintiff has sought to amend in bad faith, and
 22 that prejudice would naturally follow from granting Plaintiff's motion. First, the facts suggest that
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24 ¹ The Court notes that the Plaintiff's oral motion and supplemental briefing do not comply
 25 with this Court's local rules regarding moving to amend the pleadings. This Court's local rules
 26 require that a party moving to amend a pleading reproduce the entire proposed amended pleading.
See Civ. L.R. 10-1

27 ² Although Plaintiff asserts her PAGA claim against Ross as the joint employer of DMSI is
 28 likewise time barred, she does not appear to assert her claims arising out of her direct employment
 by Ross between September 2012 and September 2013 are time barred. The PAGA claim does not
 appear to be limited to those who were jointly employed by DMSI and Ross.

1 Plaintiff has engaged in forum-shopping. For example, Ms. Hernandez appears to have filed a state
2 court action in Riverside duplicating her PAGA cause of action against Ross just one month after
3 Defendants removed. *Compare* Docket No. 1, with Docket No. 46, Ex. B. Plaintiff offers no reason
4 for filing the duplicate action, and it appears at least plausible that Plaintiff filed the state court
5 action to hedge her bet on Plaintiff's (ultimately unsuccessful) motion to remand and ultimately
6 allow her to manipulate the risk of compelled arbitration, which risk she may believe to depend on
7 the forum. As discussed below, the California Supreme Court has enunciated a rule against waiver
8 of PAGA claims, and it has concluded its rule is not preempted by the Federal Arbitration Act.
9 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 379 (2014) *cert. denied*, No. 14-341,
10 2015 WL 231976 (U.S. Jan. 20, 2015). That decision, however, is not binding on federal courts on
11 the question of FAA preemption. The Court concludes that Plaintiff's motion to amend appears to
12 have been brought to avoid the possibility of an adverse ruling on the pending motion to compel
13 arbitration.

14 The Court is also skeptical of the timing of Plaintiff's motion to amend. Ms. Hernandez
15 appears to contend that she discovered that her claim was time-barred when she learned of her
16 termination date in DMSI's declaration in support of its motion to compel arbitration. *See* Docket
17 No. 46 at 5. The Court finds this implausible. Ms. Hernandez presumably knew that she ceased
18 working for DMSI in 2012. Correspondingly, she likely knew her claim was time-barred at multiple
19 junctures of this litigation, including the inception of this action, the inception of the Riverside
20 action in May of 2014 when she alleged only the timely PAGA claim against Ross (and not the
21 untimely claim against DMSI), and during the pending dispute wherein she reviewed the
22 Defendants' motion to compel arbitration months before she requested leave to amend.

23 It appears that Plaintiff timed her motion to amend so that she could have the benefit of
24 previewing Defendants' motion to compel arbitration before deciding whether to abandon the
25 federal case in favor of the parallel state case. Such a tactic is not countenanced by Rule 15,
26 particularly where there is prejudice to Defendants resulting from potentially denying Defendants'
27 right to fully adjudicate their motion to compel arbitration while subjecting Defendants to incurring
28 the expense of unnecessary motion practice so that Plaintiff can have a trial run. Plaintiff's motion

1 to amend is therefore denied. *See Acri*, 781 F.2d at 1398-99 (affirming denial of leave to amend
 2 where plaintiffs' motion was brought to "avoid the possibility of an adverse summary judgment
 3 ruling" and where allowing amendment would lead to prejudice due to the need for additional
 4 discovery); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir. 1987) (holding "bad faith
 5 motive is a proper ground for denying leave to amend" and affirming denial of leave to amend
 6 where plaintiff's motive was to destroy diversity and destroy the court's jurisdiction). The Court
 7 will therefore proceed to address the merits of Defendants' motion to compel arbitration. In that
 8 motion, Defendants seek to enforce the putative waiver of Plaintiff's representative PAGA claims.

9 B. Federal Arbitration Act (FAA)

10 Section 2 of the FAA provides:

11 A written provision in any maritime transaction or a contract
 12 evidencing a transaction involving commerce to settle by arbitration a
 13 controversy thereafter arising out of such contract or transaction, or
 14 the refusal to perform the whole or any part thereof, or an agreement
 15 in writing to submit to arbitration an existing controversy arising out
 of such a contract, transaction, or refusal, shall be valid, irrevocable,
 and enforceable, save upon such grounds as exist at law or in equity
 for the revocation of any contract.

16 9 U.S.C. § 2. One purpose of the FAA "was to reverse the longstanding judicial hostility to
 17 arbitration agreements that had existed at English common law and had been adopted by American
 18 courts, and to place arbitration agreements upon the same footing as other contracts." *E.E.O.C. v.*
 19 *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500
 20 U.S. 20, 24 (1991)). The FAA reflects a "liberal federal policy favoring arbitration agreements."
 21 *Waffle House*, 534 U.S. at 289.

22 The savings clause of Section 2 permits arbitration agreements to be declared unenforceable
 23 by generally applicable contract defenses but not by "defenses that apply only to arbitration or that
 24 derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v.*
 25 *Concepcion*, 131 S. Ct. 1740, 1748 (2011). To put it more generally, Section 2's savings clause
 26 does not preserve state-law rules that "stand as an obstacle to the accomplishment of the FAA's
 27 objectives." *Id.* at 1748; 1753 (applying obstacle preemption doctrine, quoting *Hines v. Davidowitz*,
 28 312 U.S. 52, 67 (1941)). In *Concepcion*, the Court held that California's *Discover Bank* rule

1 prohibiting waiver of classwide procedures in consumer contracts as unconscionable was preempted
2 by the FAA. “Requiring the availability of classwide arbitration interferes with fundamental
3 attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748. The
4 Court found that requiring classwide arbitration undermined arbitration’s “fundamental attribute” of
5 being an efficient, streamlined procedure designed to achieve expeditious results. *Id.* at 1749. The
6 shift from bilateral to class-action arbitrations would result in “fundamental” changes to the
7 arbitration process. *Id.* at 1750.

8 The issue before this Court is whether the FAA preempts California law prohibiting waiver
9 of PAGA representative claims.

10 C. PAGA Waiver Under California State Law

11 The specific question in this case is whether the putative waivers of class, collective, private
12 attorney general, and representative actions in the DRA and the Ross Arbitration Policy bar Ms.
13 Hernandez from pursuing her representative PAGA claim. The Ross Arbitration Policy clearly
14 contains a waiver of Ms. Hernandez’s right to bring or arbitrate any dispute “as a class action, [as a]
15 private attorney general, or in a representative capacity on behalf of any person.” Lobato Decl., Ex.
16 3. As such, there is no question that the Ross arbitration clause purports to limit Ms. Hernandez’s
17 right to bring a representative PAGA claim. Whether the clause in the DRA purports to address a
18 representative PAGA claim is less clear. The DRA provides that “there will be no right for any
19 dispute to be brought, heard, or arbitrated as a Class or Collective Action of any sort of nature.”
20 Representative actions are not called out by this clause. Nonetheless, in this case, Ms. Hernandez
21 does not argue that the DRA does not encompass a representative PAGA claim. Indeed, Ms.
22 Hernandez appears to concede that the DRA and Ross Arbitration Policy both expressly forbid the
23 PAGA claim herein. Docket No. 40, Opp. at 8.

24 Assuming that both clauses apply to preclude a PAGA representative claim, neither waiver is
25 enforceable as a matter of California law. In *Iskanian*, the California Supreme Court ruled such a
26 waiver is unenforceable as a matter of public policy. *Id.* at 382.

27 The Court found PAGA suits were enforcement actions in which the Labor and Workforce
28 Development Agency (“LWDA”) is the real party in interest. *Iskanian* concluded that a PAGA

1 representative claim was in essence a *qui tam* action. *Id.* at 382. As a result, “the government entity
2 on whose behalf the plaintiff files suit is always the real party in interest.” *Id.* at 382. Thus, PAGA
3 is “fundamentally a law enforcement action designed to protect the public and penalize the employer
4 for past illegal conduct.” *Franco*, 171 Cal. App. 4th at 1300. Under PAGA, “an ‘aggrieved
5 employee’ may bring a civil action personally and on behalf of other current or former employees to
6 recover civil penalties for Labor Code violations.” *Arias*, 46 Cal. 4th at 980. Any recovery of
7 penalties largely returns to the state; “[o]f the civil penalties recovered, 75 percent goes to the Labor
8 and Workforce Development Agency, leaving the remaining 25 percent for the ‘aggrieved
9 employees.’” *Id.* at 980-81. An aggrieved employee may proceed with a PAGA claim only after
10 providing written notice to the Labor and Workforce Development Agency (“LWDA”) and
11 providing the agency the opportunity to take over prosecuting the alleged violation. Cal. Lab. C. §
12 2699.3. In this manner, among others, California labor law enforcement agencies “retain primacy
13 over private enforcement efforts.” *Arias*, 46 Cal. 4th at 980. The state is bound by any resolution
14 reached by its deputized plaintiff. *Iskanian*, 59 Cal. 4th at 387 (observing “judgment in a PAGA
15 action is binding on the government”).

16 Thus, PAGA representative suits differ from class actions and other suits in which a private
17 plaintiff seeks relief on behalf of the public. A PAGA claim “functions as a substitute for an action
18 brought by the government itself,” and therefore any judgment binds the state labor law enforcement
19 agencies. *Arias*, 46 Cal. 4th at 986. In a PAGA action “to recover civil penalties is fundamentally a
20 law enforcement action designed to protect the public and not to benefit private parties.” *Id.*
21 (quotation omitted). These differences, among others, have led California courts to recognize, for
22 example, that “the PAGA representative action is fundamentally different than the injunctive relief
23 action” under California’s unfair competition law, false advertising law, or Consumer Legal
24 Remedies Act. *McGill v. Citibank, N.A.*, 181 Cal. Rptr. 3d 494, 510 (Ct. App. 2014), *reh’g denied*
25 (Jan. 7, 2015). *See Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) *cert.*
26 *denied*, No. 14-260, 2014 WL 4373643 (U.S. Dec. 15, 2014) (discussing the distinct *qui tam* nature
27 of PAGA representative suits and concluding that “a PAGA suit is fundamentally different than a
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1 class action”) (quoting *McKenzie v. Fed. Express Corp.*, 765 F. Supp. 2d 1222, 1233 (C.D. Cal.
2 2011)).

3 *Iskanian* concluded that imposing on employees a waiver of representative claims “frustrates
4 the PAGA’s objectives” – the punishment and deterrence of labor code violations. *Iskanian*, 59 Cal.
5 4th at 384. A representative claim, unlike an individual claim, fully effectuates “the penalties
6 contemplated under the PAGA to punish and deter employer practices that violate the rights of
7 numerous employees under the Labor Code.” *Id.* (quoting *Arias*, 46 Cal.4th at 985-987). Waivers
8 of representative claims are therefore contrary to public policy and not enforceable under California
9 law. *Id.* at 382.

10 D. California Law Prohibiting PAGA Waiver Is Not Preempted by The FAA

11 The interpretation of PAGA and *Iskanian*’s decision that waivers of PAGA claims are not
12 enforceable are questions of California state law. *See U.S. Fid. & Guar. Co. v. Lee Investments*
13 *LLC*, 641 F.3d 1126, 1133 (9th Cir. 2011). Whether the *Iskanian* anti-waiver rule is preempted
14 under the FAA is a matter of federal law. *See* U.S. Const., art. VI, cl. 2 (“the Laws of the United
15 States ... shall be the supreme Law of the Land”); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)
16 (“We thus read the underlying issue of arbitrability to be a question of substantive federal law:
17 ‘Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.’”
18 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)); *Ferguson v.*
19 *Corinthian Colleges, Inc.*, 733 F.3d 928, 936 (9th Cir. 2013) (“When a state rule allegedly conflicts
20 with the FAA, we apply standard preemption principles, asking whether the state law frustrates the
21 FAA’s purposes and objectives.” (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304,
22 2320 (2013) (Kagan J., dissenting))); *Langston v. 20/20 Companies, Inc.*, No. EDCV 14-1360 JGB
23 SPX, 2014 WL 5335734, at *7 (C.D. Cal. Oct. 17, 2014); *Fardig v. Hobby Lobby Stores Inc.*, No.
24 SACV 14-00561 JVS, 2014 WL 4782618, at *4 (C.D. Cal. Aug. 11, 2014). While *Iskanian*’s
25 holding on this question is not binding on this Court, for the reasons stated below, this Court finds
26 *Iskanian* persuasive and agrees with its conclusion that the FAA does not preempt the *Iskanian* rule.

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1 Defendants contend that the *Iskanian* rule against waiver of PAGA representative claims is
2 not materially different from the *Discover Bank* rule prohibiting waivers of class actions found
3 preempted in *Concepcion*. The Court disagrees.

4 The reasoning of *Concepcion* does not extend to a PAGA representative action. The
5 Supreme Court in *Concepcion* identified aspects of class procedures that it found to be inconsistent
6 with the FAA, which do not apply to PAGA representative actions. For example, *Concepcion*
7 focused on the complexity of class certification procedures – including the need to determine
8 whether the class may be certified, whether the named parties are sufficiently representative and
9 typical, and how class discovery should be conducted. *Concepcion*, 131 S. Ct. at 1751. By contrast,
10 as discussed in *Baumann*, “unlike Rule 23(a), PAGA contains no requirements of numerosity,
11 commonality, or typicality.” *Baumann*, 747 F.3d at 1123. There is no certification procedure.
12 *Concepcion* noted it would typically take 583 or 630 days to complete class arbitrations. *Id.*
13 Nothing in the record before this Court suggests PAGA representative claims would take nearly so
14 long. *Concepcion* stressed the formality needed for class certification to bind class members,
15 including the need for notice, an opportunity to be heard, and opt-out rights. *Concepcion*, 131 S. Ct.
16 at 1751. PAGA, on the other hand, has “no notice requirements for unnamed aggrieved employees,
17 nor may such employees opt out of a PAGA action.” *Baumann*, 747 F.3d at 1122. Nor does a
18 PAGA action require inquiry into the “named plaintiff’s and class counsel’s ability to fairly and
19 adequately represent unnamed employees.” *Id.* While the need for sufficient procedures to bind
20 class members in class arbitration was cause for concern in *Concepcion*, PAGA’s preclusive effect
21 differs from that of class action judgments. “PAGA expressly provides that employees retain all
22 rights ‘to pursue or recover other remedies available under state or federal law, either separately or
23 concurrently with an action taken under this part.’” *Baumann*, 747 F.3d at 1123 (quoting Cal. Lab.
24 Code § 2699(g)(1)). Although, as discussed *supra*, the governmental agency and those represented
25 by it may be bound in terms of their rights under PAGA, *Arias*, 46 Cal. 4th at 986, a PAGA recovery
26 does not prevent employees from litigating their underlying wage and hour claims. *Id.* at 987. The
27 due-process-related procedural requirements of formal class actions do not obtain in PAGA
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1 representative actions. Thus, the *Iskanian* rule against waiver of PAGA claims does not threaten to
2 undermine the fundamental attributes of arbitration.

3 Defendants' reliance on *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013)
4 which held that the FAA preempts the *Broughton-Cruz* rule to the contrary is misplaced.³ Under the
5 *Broughton-Cruz* rule, a plaintiff seeking broad injunctive relief under California's Consumer Legal
6 Remedies Act, Unfair Competition Law, and False Advertising Law could not be compelled into
7 arbitration. See *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1079-80 (1999);
8 *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 307 (2003). The Ninth Circuit found that the
9 FAA preempted the *Broughton-Cruz* rule. See *Ferguson*, 733 F.3d at 934. *Ferguson* concluded that
10 the *Broughton-Cruz* rule would forbid not just waiver of certain claims, but would prohibit outright
11 the arbitration of those claims. *Id.* Such preclusion, *Ferguson* reasoned, ran afoul of the Supreme
12 Court's command in *Concepcion* that state laws that prohibit arbitration of a particular type of claim
13 are displaced by the FAA. *Id.* In light of the broad effect given to arbitration agreements, *Ferguson*
14 concluded that "even where a specific remedy has implications for the public at large, it must be
15 arbitrated under the FAA if the parties have agreed to arbitrate it." *Id.* at 935. *Ferguson* also
16 criticized the justification for the *Broughton-Cruz* rule, which was premised on effective vindication
17 of California's statutes and avoidance of the inherent conflict between the FAA and the purpose of
18 those statutes. *Id.* at 935-36. *Ferguson* concluded that the effective vindication and inherent conflict
19 exceptions do not extend to state statutes; they only apply to federal statutes. *Id.* Finally, *Ferguson*
20 concluded that arguments relating to the institutional advantages of the judicial forum did not
21 survive *Concepcion*. *Id.* at 936.

22 For the reasons stated in *Iskanian*, however, the rationale for preemption of the
23 *Broughton-Cruz* rule does not apply to PAGA claims. As noted above, a PAGA claim is a type of
24 *qui tam* action. *Iskanian*, 59 Cal. 4th at 382. The proper focus is on the real party in interest, not on
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27 ³ Defendants cite to *Kilgore v. KeyBank, N.A.*, 673 F.3d 947 (9th Cir. 2012), which was
28 reheard *en banc*. The *en banc* panel determined that the *Broughton-Cruz* rule that was deemed
preempted by the initial *Kilgore* panel did not apply in light of the facts of that case. *Kilgore v.*
KeyBank, Nat. Ass'n, 718 F.3d 1052, 1061 (9th Cir. 2013). *Ferguson*, however, squarely addressed
the preemption question.

1 the public nature of the remedy sought. *Id.*; *cf. Mississippi ex rel. Hood v. AU Optronics Corp.*, 134
 2 S. Ct. 736, 739 (2014) (holding that where the state is the plaintiff in a *parens patriae* suit, even
 3 where the claim for restitution is based on injuries suffered by many citizens of the state, the suit
 4 does not constitute a “mass action” under CAFA); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 672
 5 (9th Cir. 2012) (holding that, despite the possibility of restitution for thousands, the State of Nevada
 6 was the real party in interest in *parens patriae* suit, and therefore action was not a “mass action” for
 7 purposes of CAFA removal). Unlike the private plaintiffs in *Broughton-Cruz*, who sought relief that
 8 happens to have a public dimension, as *Iskanian* holds, the real party in interest in a representative
 9 PAGA is the government, which the plaintiff is deputized to represent.⁴ The government exercises
 10 initial control over the action (having the right to bring the suit after notice), receives the lion share
 11 of the statutory recovery, and is bound by any judgment obtained. *Iskanian*, 59 Cal. 4th at 380-82;
 12 *see also McGill*, 181 Cal. Rptr. 3d at 509 (holding *Iskanian* inapplicable to *Broughton-Cruz*
 13 analysis; “PAGA is unique in comparison to the UCL, FAL, and CLRA because the state retains
 14 primacy over private enforcement efforts.” (citation omitted)). A PAGA claim “is [therefore] not a
 15 dispute between an employer and an employee arising out of their contractual relationship[;] [i]t is a
 16 dispute between an employer and the *state*.” *Id.* at 386 (emphasis in original). In this way, a PAGA
 17 claim is not merely derivative of an aggrieved employee’s claims – the LWDA does not act as a
 18 proxy for that employee. *Id.* at 387-88; *cf., Waffle House*, 534 U.S. at 288 (observing “the EEOC is
 19 not merely a proxy for the victims of discrimination and that [its] enforcement suits should not be
 20 considered representative actions subject to Rule 23” (quoting *Gen. Tel. Co. of the Nw. v. Equal*
 21 *Employment Opportunity Comm’n*, 446 U.S. at 318(1980)). *Ferguson* is inapposite to the *Iskanian*
 22 rule prohibiting waiver of PAGA claims because of the public nature of law enforcement that
 23 inheres in PAGA.

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 28 ⁴ The California Legislature elected to deputize an aggrieved employee to bring a claim on behalf of the state instead of a stranger to the employment relationship to avoid “private plaintiff abuse.” *Id.* at 387.

1 To be sure, there are lower court cases extending case law relating to the preemption of the
2 *Broughton-Cruz* rule to waivers of PAGA claims. See, e.g., *Morvant v. P.F. Chang's China Bistro,*
3 *Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (citing *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d
4 947, 951 (9th Cir. 2012), *on reh'g en banc*, 718 F.3d 1052 (9th Cir. 2013)); see also *Chico v. Hilton*
5 *Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 WL 5088240, at *12 (C.D. Cal. Oct. 7, 2014);
6 *Ortiz*, 2014 WL 4961126, at *11 (following "the majority of federal district courts" in finding that
7 PAGA action waivers are enforceable); *Fardig*, 2014 WL 4782618, at *3 (citing *Kilgore* and
8 declining on motion for reconsideration to depart from prior holding following the majority of
9 district court opinions); see also *Lucero v. Sears Holdings Mgmt. Corp.*, No. 14-CV-1620 AJB
10 WVG, 2014 WL 6984220, at *6 (S.D. Cal. Dec. 2, 2014) (following *Fardig* and its progeny); *Mill v.*
11 *Kmart Corp.*, No. 14-CV-02749-KAW, 2014 WL 6706017, at *6-7 (N.D. Cal. Nov. 26, 2014)
12 (same); *Langston*, 2014 WL 5335734, at *8 (same). These cases are not persuasive, because they
13 fail to recognize the critical difference between PAGA claims on behalf of the government and
14 private suits for injunctive relief. These cases also fail to examine whether arbitration of PAGA
15 representative claims, like class action claims, would in fact undermine the "fundamental attributes"
16 of arbitration, a condition necessary to warrant the application of obstacle preemption which
17 underpins the holding in *Concepcion*.

18 Moreover, as noted in *Iskanian*, the public nature of PAGA is significant because the FAA
19 was not originally intended to govern disputes between the government (acting in its law
20 enforcement capacity) and private employers. See *Waffle House*, 534 U.S. at 294. Instead, the
21 FAA's focus is on arbitration of disputes between parties involving their own rights, not the rights of
22 a public enforcement agency. In that vein, the FAA was not intended to preempt policies that
23 vindicate the enforcement of *qui tam* suits brought on behalf of the state. See *Martinez v. Leslie's*
24 *Poolmart, Inc.*, No. 8:14-CV-01481-CAS, 2014 WL 5604974, at *5 (C.D. Cal. Nov. 3, 2014)
25 (compelling arbitration of representative claim and concluding the FAA does not preempt rule
26 precluding waiver of representative PAGA claims); *United States v. Cancer Treatment Centers of*
27 *Am.*, No. 99 C 8287, 2002 WL 31497338, at *2 (N.D. Ill. Nov. 7, 2002) (holding *qui tam* action
28 under False Claims Act is not subject to arbitration agreement).

1 Finally, the Court notes that federalism concerns further support the conclusion that the FAA
2 does not preempt California's rule against PAGA waivers. The principle of federalism counsels
3 against disabling the authority of a state law enforcement agency acting within its police powers.
4 "[S]tate laws dealing with matters traditionally within a state's police powers are not to be
5 preempted unless Congress's intent to do so is clear and manifest." *Californians For Safe &*
6 *Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1186 (9th Cir. 1998). As the
7 Supreme Court has observed:

8 [D]espite the variety of . . . opportunities for federal preeminence, we
9 have never assumed lightly that Congress has derogated state
10 regulation, but instead have addressed claims of pre-emption with the
11 starting presumption that Congress does not intend to supplant state
12 law. Indeed, in cases like this one, where federal law is said to bar
state action in fields of traditional state regulation, we have worked on
the assumption that the historic police powers of the States were not to
be superseded by the Federal Act unless that was the clear and
manifest purpose of Congress.

13 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645,
14 654-55 (1995) (citations omitted); *United States v. Locke*, 529 U.S. 89, 108 (2000) (finding that
15 where Congress legislates "in a field which the States have traditionally occupied" starting
16 assumption is "that the historic police powers of the States were not to be superseded by the Federal
17 Act unless that was the clear and manifest purpose of Congress" (citation omitted)); *Medtronic, Inc.*
18 *v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal
19 system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of
20 action."); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (holding "a high
21 threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal
22 Act"). Labor law enforcement falls squarely within a state's police powers. *Metro. Life Ins. Co. v.*
23 *Massachusetts*, 471 U.S. 724, 756 (1985) ("States possess broad authority under their police powers
24 to regulate the employment relationship to protect workers within the State." (citation omitted)). A
25 state's authority over its law enforcement activities is central to state sovereignty. *Printz v. United*
26 *States*, 521 U.S. 898, 928 (1997) ("It is an essential attribute of the States' retained sovereignty that
27 they remain independent and autonomous within their proper sphere of authority.").

28

1 *Iskanian* highlights the ways that California’s police powers would be adversely affected by
 2 FAA preemption. PAGA’s objectives – enhancing law enforcement and efficiently deploying
 3 resources to address a problem that costs California billions of dollars each year – squarely address
 4 issues of public concern. *Iskanian*, 59 Cal. 4th 348 at 379; 384. FAA preemption of the rule against
 5 waiver of PAGA claims would do more than hinder the state’s ability to enforce its laws through *qui*
 6 *tam* actions; preemption would “disable one of the primary mechanisms for enforcing the Labor
 7 Code.” *Id.* at 383.

8 The district court cases that have rejected *Iskanian* demonstrate that the risk to state
 9 sovereignty is not hypothetical. For example, *Ortiz v. Hobby Lobby Stores, Inc.*, No.
 10 2:13-CV-01619, 2014 WL 4961126 (E.D. Cal. Oct. 1, 2014), compelled arbitration of the PAGA
 11 claim, but found that (1) Plaintiff could not pursue a representative PAGA claim, and (2) Plaintiff
 12 could not bring an individual PAGA claim. *Id.* at *13. In other words, *Ortiz* barred the PAGA claim
 13 in a judicial forum and next concluded that “Plaintiff is barred from pursuing her PAGA action in
 14 arbitration.” *Id.* *Waffle House* cautioned that using the FAA to preclude the EEOC from seeking
 15 victim-specific relief would turn “what is effectively a forum selection clause into a waiver of a
 16 nonparty’s statutory remedies.” *Waffle House*, 534 U.S. at 295. *Ortiz* illustrates that compelling
 17 arbitration of a PAGA claim does not merely enforce a forum selection clause, but instead can have
 18 the practical effect of entirely waiving a state agency’s statutory remedy.

19 Absent Congress’s clear and manifest intent to disable the enforcement of one of California’s
 20 police powers traditionally held by the state, this Court is particularly reluctant to find FAA
 21 preemption of *Iskanian*’s rule against PAGA waiver.⁵

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 26 ⁵ This Court also does not find the FAA sufficiently pervasive, dominant, or obstructed to
 27 conclude that the FAA is impliedly the “sole federal authority” as to adjudication of labor law
 28 enforcement actions belonging to the state. *Cf. Lockheed Air Terminal, Inc. v. City of Burbank*, 457
 F.2d 667, 671 (9th Cir. 1972) *aff’d*, 411 U.S. 624 (1973) (holding “pervasiveness of federal
 regulation in the field of air commerce, the intensity of the national interest in this regulation, and
 the nature of air commerce itself require the conclusion that State and local regulation in that area
 has been preempted” by the Aviation Act).

1 **III. CONCLUSION**

2 The Court concludes that barring the waiver of representative PAGA claims and requiring
3 such claims to be arbitrated would not interfere with the fundamental attributes of arbitration. *Cf.*
4 *Concepcion*, 131 S. Ct. at 1748. Defendants have not shown that arbitration of these claims would
5 be particularly complex, cumbersome, time-consuming, or expensive. Nor should FAA preemption
6 be lightly considered in view of the historical purpose of the FAA and the federalism concerns
7 which counsel deference to the state's exercise of traditional police power which is embodied in
8 PAGA. In short, *Iskanian*'s anti-waiver rule does not "stand as an obstacle to the accomplishment
9 and execution of the full purposes and objectives of Congress." *Id.* at 1735 (quoting *Hines v.*
10 *Davidowitz*, 312 U.S. at 67). Accordingly, the Court denies Defendants' motion to enforce the
11 waiver of Plaintiff's representative PAGA claims.

12 The fact that the waiver provisions of the arbitration clauses at issue cannot be enforced to
13 bar PAGA representative claims does not necessarily dictate which forum is proper for their
14 adjudication. The arbitration clauses here are ambiguous, because while both provisions broadly
15 extend arbitration to all disputes arising out of or related to Plaintiff's employment, the waivers
16 suggest that the parties did not anticipate that PAGA representative claims would be arbitrated. *See*
17 *Iskanian*, 59 Cal. 4th at 391 ("The arbitration agreement gives us no basis to assume that the parties
18 would prefer to resolve a representative PAGA claim through arbitration.").

19 The Court directs the parties to meet and confer regarding their views on how to proceed in
20 light of the holdings of this order. The Court will address whether to bifurcate and stay the PAGA
21 matter pursuant to 9 U.S.C. § 3 at the next case management conference on March 26, 2015.⁶ To the
22 extent the parties disagree on next steps, the parties shall agree on a briefing schedule on their
23 respective interpretations of the DRA and Ross Arbitration Policy language. Such briefing shall be
24 completed no later than March 12, 2015. If the parties are able to agree on next steps through
25 meeting and conferring, the parties shall file a stipulation and proposed order.


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28 ⁶ The Court finds that 9 U.S.C. § 3 and not Cal. Civ. Proc. C. § 1281.2 applies to this case. *See, e.g., Cronus Investments, Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 391 (2005) (noting that procedural rules of the FAA clearly applied to federal courts sitting in diversity).

1 For the foregoing reasons, the Court **DENIES** Plaintiff's motion to amend the complaint,
2 **DENIES** Defendants' motion to enforce waiver of Plaintiff's PAGA representative claims,
3 **DEFERS** decision on bifurcation and stay; and **GRANTS** Defendants' uncontested motion to
4 compel arbitration as to Ms. Hernandez's first six causes of action.

5 This order disposes of Docket No. 39.

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7 IT IS SO ORDERED.

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9 Dated: February 3, 2015

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12 EDWARD M. CHEN
13 United States District Judge
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United States District Court
For the Northern District of California