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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CONNIE SCHWENDEMAN,

Plaintiff,

v.

HEALTH CAROUSEL, LLC and HEALTH
CAROUSEL TRAVEL NETWORK, LLC,

Defendants.

Case No. 18-cv-07641-BLF

**ORDER GRANTING DEFENDANTS’
MOTION TO COMPEL
ARBITRATION; AND STAYING
ACTION**

[Re: ECF 19]

Plaintiff Connie Schwendeman asserts a single claim under California’s Private Attorneys General Act (“PAGA”) against her former employers, Defendants Health Carousel, LLC and Health Carousel Travel Network, LLC (collectively, “Health Carousel”). Health Carousel has filed a motion to compel arbitration and dismiss the action.

Having considered the parties’ briefs and supplemental briefs, the relevant legal authorities, and the oral argument of counsel, the Court GRANTS the motion to compel arbitration. However, the Court STAYS the action pending completion of arbitration rather than dismissing it as requested by Health Carousel.

I. INTRODUCTION

Health Carousel provides healthcare staffing for temporary assignments at medical facilities across the United States. Dalton Decl. ¶ 1-2, ECF 19-1. Schwendeman, a registered nurse, began working for Health Carousel in 2017, when she was placed at Lucile Packard Children’s Hospital Stanford in Palo Alto, California. *Id.* ¶ 3. Schwendeman was employed by Health Carousel “in Palo Alto, California from August 2017 to February 2018.” FAC ¶ 4, ECF

1 17. Prior to starting employment, Schwendeman was provided with Health Carousel’s standard
2 new-hire paperwork via an online portal. *Id.* ¶ 4. The new-hire paperwork included a “Mutual
3 Agreement to Arbitrate Claims” (“Agreement”), a five-page stand-alone document that requires
4 binding arbitration of certain disputes and waives the right to bring class or collective claims. *Id.* ¶
5 4 & Exh. 1 (Agreement). Execution of the Agreement is optional for Health Carousel employees
6 pursuant to a section titled “An Employee’s Right to Opt Out Of Arbitration,” which states
7 “Arbitration is not a mandatory condition of employment at the Company, and therefore you may
8 submit a statement notifying the Company that you wish to opt out and not be subject to this
9 Agreement.” Agreement at 4. The same section of the Agreement states that “[a]n employee’s
10 decision to be bound or not bound by this Agreement is completely voluntary.” *Id.*
11 Schwendeman electronically signed the Agreement on July 6, 2017 and she never opted out of the
12 Agreement. *Id.* ¶ 4 & Exh 1 (Agreement).

13 Schwendeman filed the complaint in this action on December 19, 2018, asserting putative
14 class and collective claims under California law and the Fair Labor Standards Act. *See* Compl.,
15 ECF 1. On January 8, 2019, Health Carousel’s counsel advised Schwendeman’s counsel that the
16 parties had signed the Agreement. *See* Joint Stipulation at 2, ECF 15. The parties thereafter
17 stipulated to dismissal of all class and collective claims without prejudice, and to amendment of
18 the complaint to add a PAGA claim. *See id.* Schwendeman filed the operative first amended
19 complaint (“FAC”) on March 11, 2019, asserting a single claim under PAGA. *See* FAC, ECF 17.

20 Schwendeman alleges that Health Carousel engages in numerous practices that violate the
21 California Labor Code. For example, she alleges that Health Carousel provides its traveling
22 employees with stipends for housing, meals, and incidentals, but does not include the value of
23 those stipends in the regular rate of pay when calculating overtime and double time. *See* FAC ¶¶
24 11-17. She also alleges that Health Carousel does not include certain non-discretionary bonus
25 remuneration in the regular rate of pay when calculating overtime and double time, and that wage
26 statements inaccurately show overtime and double time as paid at the base hourly rate. *See* FAC
27 ¶¶ 19-20. Schwendeman seeks recovery of civil penalties for these Labor Code violations on
28 behalf of herself and other aggrieved employees under PAGA. *See* FAC ¶ 39.

1 The FAC’s prayer indicates that the civil penalties sought under PAGA include “the
2 underpaid wages recoverable through Labor Code section 558 and the penalties imposed by Labor
3 Code section 203 recoverable through Labor Code section 1197.1, as well as the amounts
4 recoverable pursuant to Labor Code section 2699(f).” FAC at 7 (Prayer). On September 12,
5 2019, the California Supreme Court held that “unpaid wages are not recoverable as civil penalties
6 under the PAGA.” *ZB, N.A. v. Superior Court of San Diego Cty.*, 8 Cal. 5th 175, 193 (2019). The
7 parties thereafter stipulated that “Plaintiff’s prayer for ‘unpaid wages recoverable through Labor
8 Code section 558 and the penalties imposed by Labor Code section 203 recoverable through Labor
9 Code section 1197.1’ is stricken from the First Amended Complaint.” Joint Stipulation and Order
10 at 3, ECF 29. As a result, the FAC’s prayer for civil penalties is limited to those available under
11 California Labor Code § 2699(f).

12 Health Carousel contends that the PAGA claim is subject to binding arbitration under the
13 Agreement, and it moves to compel arbitration and dismiss this action. In the course of briefing
14 and arguing the motion to compel, a dispute arose as to which aspects of the motion to compel
15 properly are presented to the Court and which are reserved for the arbitrator. The Agreement
16 delegates to the arbitrator “exclusive authority to resolve any dispute relating to the interpretation,
17 applicability, enforceability or formation of this Agreement.” Dalton Decl. Exh. 1 (Agreement) at
18 1. While the parties agree that certain arguments presented in the briefing fall within this
19 delegation clause, Schwendeman asserts that Health Carousel has waived the right to have the
20 arbitrator resolve those arguments. Health Carousel denies that it has waived its right to enforce
21 the delegation clause. At the Court’s requested, the parties submitted supplemental briefing on the
22 waiver issue.

23 **II. LEGAL STANDARD**

24 The Federal Arbitration Act (“FAA”) applies to arbitration agreements affecting interstate
25 commerce. 9 U.S.C. §§ 1 *et seq.* When it applies, the FAA preempts state law rules that conflict
26 with its provisions, as well as “state-law rules that stand as an obstacle to the accomplishment of
27 the FAA’s objectives.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-43 (2011). Under
28 the FAA, contractual arbitration agreements “must be enforced ‘save upon such grounds as exist at

1 law or in equity for the revocation of any contract.” *Newton v. Am. Debt Servs., Inc.*, 549 Fed.
2 App’x. 692, 693 (9th Cir. 2013) (quoting 9 U.S.C. § 2).

3 “Generally, in deciding whether to compel arbitration, a court must determine two
4 ‘gateway’ issues: (1) whether there is an agreement to arbitrate between the parties; and (2)
5 whether the agreement covers the dispute.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir.
6 2015). “If the response is affirmative on both counts, then the Act requires the court to enforce the
7 arbitration agreement in accordance with its terms.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
8 207 F.3d 1126, 1130 (9th Cir. 2000).

9 Although these gateway issues generally are for the court to decide, they “can be expressly
10 delegated to the arbitrator where the parties *clearly and unmistakably* provide otherwise.”
11 *Brennan*, 796 F.3d at 1130. For example, the Supreme Court has “recognized that parties can
12 agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to
13 arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Ctr., W., Inc. v.*
14 *Jackson*, 561 U.S. 63, 68-69 (2010). “When the parties’ contract delegates the arbitrability
15 question to an arbitrator, a court may not override the contract.” *Henry Schein, Inc. v. Archer &*
16 *White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). “In those circumstances, a court possesses no power
17 to decide the arbitrability issue.” *Id.* “That is true even if the court thinks that the argument that
18 the arbitration agreement applies to a particular dispute is wholly groundless.” *Id.*

19 However, “[t]he right to arbitration, like other contractual rights, can be waived.” *Martin*
20 *v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016). “A determination of whether the right to compel
21 arbitration has been waived must be conducted in light of the strong federal policy favoring
22 enforcement of arbitration agreements.” *Id.* (internal quotation marks and citation omitted).
23 “Because waiver of the right to arbitration is disfavored, any party arguing waiver of arbitration
24 bears a heavy burden of proof.” *Id.* (internal quotation marks and citation omitted). “As such, a
25 party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an
26 existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice
27 to the party opposing arbitration resulting from such inconsistent acts.” *Id.* (internal quotation
28 marks, citation, and alteration omitted).

1 **III. DISCUSSION**

2 **A. Agreement**

3 The Agreement provides for arbitration of “all claims or controversies, past, present or
4 future, including without limitation, claims arising out of or related to my application for
5 employment, assignment/employment, and/or the termination of my assignment/employment that
6 the Company may have against me or that I may have against the Company. . . .” Agreement at 1.
7 The Agreement specifies that it encompasses “claims for wages or other compensation due . . . and
8 claims for violation of any federal, state or other governmental law, statute, regulation, or
9 ordinance, except claims excluded in the subsection of this Agreement entitled ‘Claims Not
10 Covered By The Agreement.’” *Id.* The subsection “Claims Not Covered By The Agreement”
11 excludes certain types of claims, including claims for workers’ compensation benefits, state
12 disability insurance benefits, and unemployment compensation, as well as claims brought in small
13 claims court. *Id.* The Agreement also waives the right to assert a class or collective action. *Id.* at
14 2. The Agreement does *not* waive the right to assert a representative PAGA claim. *See generally*
15 Agreement.

16 The Agreement contains a delegation clause stating in relevant part that: “The Arbitrator,
17 and not any federal, state, or local court or agency, shall have exclusive authority to resolve any
18 dispute relating to the *interpretation, applicability, enforceability or formation of this Agreement*
19 including, but not limited to any claim that all or any part of this Agreement is void or voidable.”
20 Dalton Decl. Exh. 1 (Agreement) at 1 (italics added).

21 In *Rent-A-Ctr.*, the Supreme Court held that identical language in a freestanding arbitration
22 agreement was sufficient to delegate to the arbitrator all questions of arbitrability, including the
23 plaintiff’s contention that the arbitration agreement was unenforceable as unconscionable. *See*
24 *Rent-A-Ctr.*, 561 U.S. at 66, 72-74. The Supreme Court held that had the plaintiff specifically
25 challenged the validity of the delegation clause, as opposed to the validity of the arbitration
26 agreement as a whole, the district court would have been required to consider the challenge before
27 enforcing the delegation clause. *See id.* at 71. However, because the plaintiff did not challenge
28 the delegation clause specifically, it was treated as valid and enforceable, “leaving any challenge

1 to the validity of the Agreement as a whole for the arbitrator.” *See id.* at 72.

2 Applying *Rent-A-Ctr.*, this Court concludes that the delegation clause in the parties’
3 Agreement delegates to the arbitrator all questions of arbitrability, including whether the parties
4 have agreed to arbitrate and whether the Agreement covers a particular controversy.

5 **B. Waiver**

6 At the hearing, Schwendeman’s counsel “agree[d] that the arbitration agreement would
7 satisfy the Supreme Court’s standards for delegating the arbitrability determination.” Hrg. Tr.
8 7:15-17. However, counsel asserted that Health Carousel waived its right to enforce the
9 delegation clause through its litigation conduct, specifically, through its failure to invoke the
10 delegation clause in its opening brief. *Id.* 7:19-25. Health Carousel’s counsel disputed the
11 assertion of waiver, stating that Health Carousel submitted the Agreement with its opening brief,
12 and that when Schwendeman raised contract interpretation issues in her opposition, Health
13 Carousel appropriately raised the delegation clause in its reply. *Id.* 12:12-13:1. The Court
14 requested and received supplemental briefing on the waiver issue. *See* Suppl. Briefs, ECF 32, 35.

15 As discussed above, “a party seeking to prove waiver of a right to arbitration must
16 demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with
17 that existing right; and (3) prejudice to the party opposing arbitration resulting from such
18 inconsistent acts.” *Martin*, 829 F.3d at 1124 (internal quotation marks, citation, and alteration
19 omitted). Because there is a strong federal policy favoring enforcement of arbitration agreements,
20 the party asserted waiver “bears a heavy burden of proof.” *Id.* (internal quotation marks and
21 citation omitted).

22 Waiver is to be decided by the court, absent an express delegation of authority to the
23 arbitrator to decide the issue of waiver. *See Martin*, 829 F.3d at 1118; *Armstrong v. Michaels*
24 *Stores, Inc.*, No. 17-CV-06540-LHK, 2018 WL 6505997, at *9 (N.D. Cal. Dec. 11, 2018). Neither
25 party contends that the Agreement in the present case delegates the issue of waiver to the
26 arbitrator, and the Court concludes that it does not. The Court therefore addresses
27 Schwendeman’s waiver argument, as follows.

28 With respect to the first prong of the test for waiver, Health Carousel clearly knew of its

1 right to compel arbitration, as it filed the present motion to compel arbitration along with a copy of
2 the Agreement. The Agreement contains a clear delegation clause. Schwendeman’s waiver
3 argument thus turns on whether she can show that Health Carousel acted inconsistently with its
4 right to enforce the delegation clause, and that she suffered resulting prejudice.

5 Health Carousel’s opening brief did not request that questions of arbitrability be referred to
6 the arbitrator. Instead, Health Carousel asked the Court to determine that the parties had entered
7 into a valid and binding arbitration agreement which encompasses the PAGA claim. *See* Motion,
8 ECF 19. Health Carousel submitted the signed Agreement, argued that the Agreement is valid and
9 enforceable, and asserted that the PAGA claim falls within scope of the claims covered by the
10 Agreement. *See id.* at 5-9.

11 Schwendeman advanced three arguments in her opposition brief as to why Health Carousel
12 did not satisfy the gateway requirements. First, she argued that no valid agreement to arbitrate
13 exists, because the state of California is the real party in interest with respect to the PAGA claim
14 and Schwendeman lacked authority to bind the state when she entered into the Agreement. *See*
15 *Opp.* at 1, ECF 25. Second, she argued that the Agreement does not encompass the PAGA claim.
16 *See id.* And finally, she argued that the Agreement restricts the arbitrator to awarding “individual
17 capacity” remedies, and thus the arbitrator could not award remedies on a representative basis as
18 sought in the PAGA claim. *See id.*

19 In its reply brief, Health Carousel addressed Schwendeman’s first argument on the merits,
20 contending that her execution of the Agreement is binding as to the PAGA claim. Health Carousel
21 asserted that Schwendeman’s second and third arguments raised issues of contract interpretation
22 that properly should be decided by the arbitrator under the Agreement’s delegation clause, but it
23 also addressed the second and third arguments on the merits. *See Reply* at 1-5, ECF 26.

24 Nowhere in this course of conduct did Health Carousel assert that the Agreement’s
25 validity, and in particular Schwendeman’s authority to agree to arbitrate the PAGA claim, should
26 be reserved for the arbitrator. Both parties appear to assume that this issue should be determined
27 by the Court. Accordingly, although this Court likely would find the issue to be within the scope
28 of the delegation clause, Health Carousel has acted inconsistently with its right to have the issue

1 reserved for the arbitrator. Absent notice to Schwendeman that the issue might be reserved to the
2 arbitrator for decision, and an opportunity to argue against such reservation, compelling arbitration
3 of this issue would prejudice Schwendeman. The Court therefore decides this issue, below.

4 However, the Court finds that Health Carousel has not acted inconsistently with its right to
5 have the arbitrator determine the scope of the Agreement, and in particular the contract
6 interpretation issues raised by Schwendeman in her opposition. It is true that Health Carousel did
7 not simply identify the Agreement in its opening brief and request that arbitrability of the PAGA
8 claim be referred to the arbitrator. However, immediately upon Schwendeman’s assertion of
9 specific arguments going to the scope of the Agreement, Health Carousel contended in its reply
10 that those arguments properly had been delegated to the arbitrator. None of the cases cited by
11 Schwendeman found the existence of waiver in similar circumstances.

12 In *Martin*, cosmetology students brought a putative class and collective action against their
13 cosmetology school, alleging that the school’s requirement that the students perform unpaid labor
14 to graduate violated state labor laws and the Fair Labor Standards Act. *Martin*, 829 F.3d at 1120.
15 Approximately seventeen months after the complaint was filed, and after receiving a number of
16 adverse rulings from the court, the defendants filed a motion to compel arbitration. *Id.* at 1122.
17 The Ninth Circuit held that the district court did not abuse its discretion in finding that the
18 defendants had waived their right to arbitrate. The defendants acted inconsistently with their
19 arbitration right when they spent seventeen months litigating the case, filed a motion to dismiss on
20 a key merits issue, entered into a protective order, answered discovery, and told the district judge
21 that they likely were better off in federal court than in arbitration. *Id.* at 1126. The Ninth Circuit
22 found that the plaintiffs were prejudiced by the defendants’ conduct, holding that “[w]hen a party
23 has expended considerable time and money due to the opposing party’s failure to timely move for
24 arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel,
25 the party is indeed prejudiced.” *Id.* at 1127.

26 In *Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 938
27 (9th Cir. 2019), the operator of senior living communities was sued by residents alleging fraud
28 with respect to staffing levels. The defendant filed a motion to compel arbitration and a motion to

1 dismiss, but then withdrew those motions. *Id.* at 938-39. The parties stipulated to the filing of a
2 second amended complaint and the defendant moved to dismiss that pleading. *Id.* at 939. Over
3 the next eleven months, while the motion to dismiss was pending, the parties engaged in discovery
4 and settlement negotiations. *Id.* The district court ultimately denied the motion to dismiss, after
5 which the defendant filed a renewed motion to compel arbitration, approximately a year after
6 withdrawing the initial motion to compel. *Id.* The Ninth Circuit found that the defendant acted
7 inconsistently with its right to arbitration by litigating the arbitrable claims for two years and filing
8 a renewed motion to compel arbitration only after receiving an adverse ruling. *Id.* at 942. The
9 plaintiffs were prejudiced, because if the motion to compel had been granted, the plaintiffs would
10 have been forced to relitigate key legal issues on which they already had prevailed. *Id.* at 944.

11 These cases are factually distinguishable from the present case, in which Health Carousel
12 filed its motion to compel arbitration less than two months after service of the original complaint
13 and less than two weeks after the filing of the operative FAC containing the PAGA claim. *See*
14 Return of Summons, ECF 12, 13; FAC, ECF 17; Motion to Compel Arb., ECF 19. Health
15 Carousel did not engage in months or years of litigation prior to seeking to compel arbitration, nor
16 did it seek to compel arbitration only after an adverse judicial ruling.

17 The facts of *Vesta Corp. v. Amdocs Mgmt. Ltd.*, No. 3:14-CV-1142-HZ, 2016 WL
18 4541035, at *1 (D. Or. Aug. 31, 2016), are closer to those of the present case. In *Vesta*, the
19 defendants filed a motion to dismiss certain of the plaintiffs’ allegations as precluded by an
20 arbitration provision in the parties’ memorandum of understanding (“MOU”). In their motion, the
21 defendants urged the district court to determine whether a valid arbitration agreement existed and
22 whether the agreement encompassed the dispute at issue. *Id.* The district court concluded that the
23 arbitration provision in the MOU did not encompass the dispute. *Id.* The defendants sought
24 reconsideration, arguing for the first time that the district court did not have jurisdiction to decide
25 the issue of arbitrability. *Id.* at *2. The district court denied the motion for reconsideration,
26 finding that “[b]y asking this Court to determine whether ‘there is a valid agreement to arbitrate
27 the dispute here,’ Defendants waived their right to send this case to an arbitrator for that
28 determination.” *Id.* at *3.

1 Schwendeman argues that this Court likewise should find that Health Carousel waived the
2 right to send the issue of arbitrability to the arbitrator when it asked this Court to determine that
3 the PAGA claim falls within the scope of the Agreement and to dismiss the action on that basis.
4 While Schwendeman’s argument has some superficial appeal, she ignores a key difference
5 between *Vesta* and the present case, which is that the *Vesta* the defendants waited until they had
6 lost their motion to dismiss before attempting to enforce the delegation clause of the arbitration
7 agreement. In contrast, Health Carousel raised the delegation clause in the briefing on its motion.

8 *In re Checking Account Overdraft Litigation*, 754 F.3d 1290 (11th Cir. 2014), is
9 distinguishable from the present case for the same reason. Johnson, a bank customer, sued
10 KeyBank for overcharging in overdraft fees. “KeyBank asked the district court to take up the
11 threshold question of arbitrability and to compel arbitration of Johnson’s claim in accordance with
12 his deposit agreement.” *Id.* at 1292. “The district court decided the gateway issue, but not in
13 KeyBank’s favor: it refused to enforce the arbitration agreement as unconscionable.” *Id.* Only
14 after the case was remanded to the district court for reconsideration in light of recent precedent did
15 KeyBank for the first time point to the delegation clause, arguing that the district court should
16 have reserved the gateway issue for the arbitrator. *Id.* The Eleventh Circuit concluded that
17 KeyBank waived enforcement of the delegation clause by raising it only after the issuance of an
18 unfavorable unconscionability ruling. *Id.* Here, of course, Health Carousel asserted the delegation
19 clause in its reply brief, during the litigation of its motion to compel arbitration and dismiss the
20 case.

21 None of the authorities cited by Schwendeman persuade the Court that Health Carousel has
22 waived its right to enforce the delegation clause regarding arbitrability issues. Health Carousel
23 filed its motion to compel arbitration shortly after being served with the complaint and less than
24 two weeks after the filing of the operative FAC containing the PAGA claim. Health Carousel
25 asserted the delegation clause as soon as Schwendeman argued specific contract interpretation
26 issues in opposition to the motion. While the Court agrees that a better approach would have been
27 for Health Carousel to raise the delegation clause in its opening brief, none of the cited authorities
28 compel a finding of waiver when Health Carousel raised the delegation clause in its reply brief.

1 Schwendeman argues Health Carousel’s failure to raise the delegation clause in its opening
2 brief caused her to litigate issues relating to the scope of the arbitration agreement in this forum,
3 and that she will be prejudiced if she is forced to relitigate those issues in the arbitration forum.
4 This argument lacks force. Schwendeman chose to file this action as a class and collective action
5 in the district court despite clear language in the Agreement barring such suit, and she persisted in
6 litigating her PAGA claim here despite the breadth of the Agreement and Ninth Circuit authority
7 holding that arbitration of a PAGA claim may be compelled based on language similar to that in
8 the Agreement. *See Valdez v. Terminix Int’l Co. Ltd. P’ship*, 681 F. App’x 592, 594 (9th Cir.
9 2017). “To prove prejudice, plaintiffs must show more than ‘self-inflicted’ wounds that they
10 incurred as a direct result of suing in federal court contrary to the provisions of an arbitration
11 agreement.” *Martin*, 829 F.3d at 1126. “[I]n order to establish prejudice, the plaintiffs must show
12 that, as a result of the defendants having delayed seeking arbitration, they have incurred costs that
13 they would not otherwise have incurred, that they would be forced to relitigate an issue on the
14 merits on which they have already prevailed in court, or that the defendants have received an
15 advantage from litigating in federal court that they would not have received in arbitration.” *Id.*
16 (citations omitted). Schwendeman has not established prejudice of that type, except perhaps
17 insofar as she may end up repeating contract interpretation arguments to the arbitrator that she
18 made here. However, she may well be able to utilize the same research and briefing before the
19 arbitrator, thus expending minimal additional resources. Moreover, she has not demonstrated that
20 any prejudice suffered by having to repeat her arguments would be so substantial as to meet her
21 “heavy burden” of establishing waiver on this record.

22 Accordingly, the Court concludes that the issue of Schwendeman’s authority to agree to
23 arbitrate the PAGA claim properly is addressed to the undersigned, but that the arbitrability of the
24 PAGA claim otherwise has been delegated to the arbitrator, and Health Carousel has not waived
25 such delegation.

26 **C. Schwendeman’s Authority to Agree to Arbitrate PAGA Claim**

27 Under PAGA, “an employee may seek civil penalties for Labor Code violations committed
28 against her and other aggrieved employees by bringing – on behalf of the state – a representative

1 action against her employer.” *ZB*, 8 Cal. 5th at 181 (2019) (citing Cal. Lab. Code § 2699(a)).
2 Under California Labor Code § 2699(a), any provision of the California Labor Code that provides
3 for assessment of a civil penalty by the Labor and Workforce Development Agency (“LWDA”)
4 may, as an alternative, be enforced by means of “a civil action brought by an aggrieved employee
5 on behalf of himself or herself and other current or former employees.” Cal. Lab. Code § 2699(a).
6 That statute defines “aggrieved employee” as “any person who was employed by the alleged
7 violator and against whom one or more of the alleged violations was committed.” Cal. Lab. Code
8 § 2699(c). In bringing a representative action under PAGA, an aggrieved employee acts “as the
9 proxy or agent of the state’s labor law enforcement agencies.” *Arias v. Superior Court*, 46 Cal.
10 4th 969, 986 (2009). Civil penalties recovered under PAGA are distributed between the aggrieved
11 employees (25%) and the LWDA (75%). Cal. Labor Code § 2699(i).

12 Health Carousel cites Ninth Circuit authority that “an individual employee, acting as an
13 agent for the government, can agree to pursue a PAGA claim in arbitration.” *Valdez*, 681 F.
14 App’x at 594; *see also Wulfe v. Valero Ref. Co.-Cal.*, 641 Fed. Appx. 758, 760 (9th Cir. 2016)
15 (“The district court did not err in compelling arbitration of Wulfe’s [PAGA] claim.”). In *Valdez*,
16 an employer appealed the district court’s order denying its motion to dismiss or compel arbitration
17 of the plaintiff’s representative PAGA claim. *Valdez*, 681 F. App’x at 593. The district court had
18 “reasoned that a PAGA claim belongs to the state, and the state has not waived the judicial forum,
19 even where a private employee signs an employment contract requiring that PAGA claims be
20 pursued in arbitration.” *Id.* at 594 (internal quotation marks omitted). The Ninth Circuit found
21 that “[t]he district court’s holding on this point is incorrect,” pointing out that “*Iskanian* and
22 *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration,
23 and thus that individual employees can bind the state to an arbitral forum.” *Id.* The Ninth Circuit
24 noted that under California law, judgment in a PAGA representative action is binding not only on
25 the named plaintiff but also on governmental agencies and other aggrieved employees. *Id.* Thus,
26 the Ninth Circuit reasoned, “[e]mployees can bind government agencies because they represent
27 the same legal right and interest as the government in PAGA proceedings.” *Id.* (internal quotation
28 marks and alterations omitted).

1 Schwendeman cites California appellate authority reaching the opposite conclusion. *See*
2 *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 621-22 (Cal. Ct. App. 2019). In *Correia*,
3 the state appellate court reasoned that that “[w]ithout the state’s consent, a predispute agreement
4 between an employee and an employer cannot be the basis for compelling arbitration of a
5 representative PAGA claim because the state is the owner of the claim and the real party in
6 interest, and the state was not a party to the arbitration agreement.” *Id.* at 622. The court
7 suggested that the employee’s agreement to arbitrate may be enforceable once the state has
8 provided the employee with implicit or explicit authority to bring the PAGA claim. *Id.* Before
9 that time, however, the court concluded that “the employee has no authority or authorization to
10 waive the state’s rights to bring the state’s claims in court.” *Id.*

11 The *Correia* court acknowledged the contrary approach taken by the Ninth Circuit, but it
12 found those cases to be unpersuasive. Addressing *Valdez* in particular, the *Correia* court observed
13 that the Ninth Circuit “focused on the employee’s role as the state’s proxy (with the ability to bind
14 the state and other employees) to support a rule that the employee’s signature on a predispute
15 arbitration agreement waives the employee’s rights to bring the *state’s* enforcement claims in
16 court.” *Correia*, 32 Cal. App. 5th at 623-24. In the *Correia* court’s view, the Ninth Circuit’s
17 reasoning is flawed, because “the plaintiff does not assume this proxy role until it is an ‘aggrieved
18 employee,’” and the plaintiff is not “aggrieved” prior to a dispute arising. *Correia*, 32 Cal. App.
19 5th at 624. In the predispute period, the *Correia* court opined, “he or she is signing the agreement
20 solely on his or her own behalf and not on behalf of the state or any other third party.” *Id.* The
21 court acknowledged that *Sakkab* assumed that PAGA claims can be arbitrated, but it gave *Sakkab*
22 little weight based on the fact that *Sakkab* did not expressly consider “whether a private party can
23 waive the state’s right to litigate its PAGA claims in court *before any dispute has arisen.*” *Id.*

24 It is clear from the record that Schwendeman had not yet begun her first assignment when
25 she signed the Agreement. Schwendeman signed the Agreement on July 6, 2017, and she began
26 work the following month, in August 2017. *See* Dalton Decl. ¶¶ 3-4, ECF 19-1. Given this
27 timeline, Schwendeman argues that under *Correia* she was not an aggrieved employee with
28 authority to bind the state when she signed the Agreement.

1 Schwendeman argues that *Correia* controls, because the Court must apply California law
 2 to determine whether a valid arbitration agreement exists. “In determining whether a valid
 3 arbitration agreement exists, federal courts apply ordinary state-law principles that govern the
 4 formation of contracts.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014)
 5 (internal quotation marks and citation omitted). “Federal courts sitting in diversity look to the law
 6 of the forum state – here, California – when making choice of law determinations.”¹ *Id.* In
 7 California, absent a choice of law by the parties, a contract is interpreted under the law of the place
 8 of performance or, if it does not indicate the place of performance, under the law of the place of
 9 creation. *Welles v. Turner Entm’t Co.*, 503 F.3d 728, 738 (9th Cir. 2007). Schwendeman’s
 10 employment was performed in California. *See* FAC ¶ 4 (“Plaintiff is a citizen of Florida who was
 11 employed as a non-exempt hourly employee of Health Carousel, LLC and Health Carousel Travel
 12 Network, LLC in Palo Alto, California from August 2017 to February 2018.”). Accordingly,
 13 California principles governing formation of contracts apply.

14 This does not necessarily mean that this Court must apply *Correia*, however. “When
 15 interpreting state law, federal courts are bound by decisions of the state’s highest court.” *Vestar*
 16 *Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (citation omitted). “In
 17 the absence of such a decision, a federal court must predict how the highest state court would
 18 decide the issue using intermediate appellate court decisions, decisions from other jurisdictions,
 19 statutes, treatises, and restatements as guidance.” *Id.* “However, where there is no convincing
 20 evidence that the state supreme court would decide differently, a federal court is obligated to
 21 follow the decisions of the state’s intermediate appellate courts.” *Id.*

22 The California Supreme Court has not addressed whether a predispute agreement between
 23 an employee and an employer can be the basis for compelling arbitration of a representative
 24 PAGA claim. This Court therefore must predict how the California Supreme Court would resolve
 25 that issue. In making that prediction, the Court must follow *Correia* absent convincing evidence
 26 that the California Supreme Court would decide the issue differently. This Court finds convincing
 27

28 ¹ The operative FAC alleges subject matter jurisdiction based on diversity of citizenship. *See* FAC
 ¶ 2, ECF 17.

1 evidence in the reasoning of the California Supreme Court’s decision in *Iskanian v. CLS*
 2 *Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 388 (2014), and the Ninth Circuit’s decision in
 3 *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015).

4 In *Iskanian*, the California Supreme Court held that a predispute employment agreement to
 5 waive representative PAGA claims “is contrary to public policy and unenforceable as a matter of
 6 state law.” *Iskanian*, 59 Cal. 4th at 384. In reaching that conclusion, the *Iskanian* court observed
 7 that PAGA was enacted to address Labor Code violations, both by imposing civil penalties for
 8 such violations and by alleviating the “shortage of government resources to pursue enforcement”
 9 by permitting PAGA actions to be brought by individual employees. *Id.* at 379. The court
 10 emphasized that “an aggrieved employee’s action under the PAGA functions as a substitute for an
 11 action brought by the government itself” and it therefore “is fundamentally a law enforcement
 12 action.” *Id.* at 381 (internal quotation marks, citations, and alterations omitted). The court
 13 determined that “agreements requiring the waiver of PAGA rights would harm the state’s interests
 14 in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter
 15 violations.” *Id.* at 383. The *Iskanian* court left open the question of whether the employee’s
 16 representative PAGA claim would proceed in arbitration or in the court, indicating that the parties
 17 should address that issue on remand. *Id.* at 392.

18 In *Sakkab*, the Ninth Circuit considered whether the *Iskanian* rule barring waivers of
 19 representative PAGA claims is preempted by the FAA. *See Sakkab*, 803 F.3d at 427. The *Sakkab*
 20 court noted that the FAA was enacted “in response to widespread judicial hostility to arbitration
 21 agreements.” *Sakkab*, 803 F.3d at 431 (internal quotation marks and citation omitted). Under the
 22 FAA’s “savings clause,” arbitration agreements may be invalidated by generally applicable
 23 contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only
 24 to arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Moreover, even a
 25 state law rule that is “generally applicable” may be preempted if it conflicts with the FAA’s
 26 objectives. *Id.* at 343. The Ninth Circuit concluded that the *Iskanian* rule is ‘generally applicable’
 27 because it “bars any waiver of PAGA claims, regardless of whether the waiver appears in an
 28 arbitration agreement or a non-arbitration agreement.” *Sakkab*, 803 F.3d at 432.

1 The *Sakkab* court also concluded that the *Iskanian* rule does not conflict with the FAA’s
2 objectives, because “[t]he *Iskanian* rule prohibiting waiver of representative PAGA claims does
3 not diminish parties’ freedom to select informal arbitration procedures.” *Sakkab*, 803 F.3d at 436.
4 The Ninth Circuit engaged in an extensive discussion regarding the issues attendant on arbitration
5 of a representative PAGA claim, which the court characterized as “a statutory action for penalties
6 brought as a proxy for the state.” *Id.* at 435-39. The court found that those issues did not provide
7 a basis for finding that arbitration is not a workable means for resolving PAGA claims. *Id.* The
8 Ninth Circuit summarized its ruling as follows: “In sum, the *Iskanian* rule does not conflict with
9 the FAA, because it leaves parties free to adopt the kinds of informal procedures normally
10 available in arbitration. It only prohibits them from opting out of the central feature of the
11 PAGA’s private enforcement scheme – the right to act as a private attorney general to recover the
12 full measure of penalties the state could recover.” *Id.* at 439.

13 Nothing in *Sakkab* suggests that an employee’s predispute agreement to arbitrate a PAGA
14 claim is not binding. Indeed, the entire basis of *Sakkab*’s determination that *Iskanian* does not run
15 afoul of the FAA would be eviscerated by such a ruling. Arbitration agreements such as the one at
16 issue here commonly are executed at the start of employment, before any dispute has arisen and
17 thus before the employee is “aggrieved” under the reasoning of *Correia*. Application of *Correia*
18 thus would exempt most, if not all, PAGA claims from arbitration in the employment context.
19 This Court is not persuaded that the California Supreme Court would adopt *Correia* under these
20 circumstances, when doing so would call into question the validity of the *Iskanian* rule.

21 This Court therefore concludes, consistent with the Ninth Circuit’s rulings in *Valdez* and
22 *Wulfe*, that Schwendeman had authority to agree to arbitration of the PAGA claim. Whether the
23 PAGA claim falls within the scope of the arbitration agreement is a question for the arbitrator, for
24 the reasons discussed above.

25 **D. Dismissal versus Stay Pending Arbitration**

26 Health Carousel asks the Court to compel arbitration of the PAGA claim and dismiss this
27 action. Because it is yet to be decided whether the PAGA claim is arbitrable under the terms of
28 the Agreement, however, the Court finds it more appropriate to stay the action pending arbitration.

1 The Clerk shall administratively close the action during the pendency of the arbitration. If it is
2 determined by the arbitrator that the PAGA claim is not subject to arbitration, Schwendeman may
3 file a request to reopen the action and lift the stay, and the Court will do so immediately.


4 **IV. ORDER**

5 (1) The motion to compel arbitration is GRANTED. As discussed herein, the
6 arbitrability of the PAGA claim shall be decided by the arbitrator.

7 (2) The action is STAYED pending arbitration. The Clerk shall administratively close
8 the action. If the arbitrator determines that the PAGA claim is not subject to
9 arbitration, Schwendeman may file a request to reopen the action and lift the stay.

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Dated: November 20, 2019


BETH LABSON FREEMAN
United States District Judge