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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PLACIDO VALDEZ, Plaintiff, v. TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, a Delaware limited partnership dba ANTIMITE TERMITE AND PEST CONTROL, Defendants.	Case No. CV 14-09748 DDP (Ex) **ORDER RE MOTION TO DISMISS OR COMPEL ARBITRATION** [Dkt. No. 20]

Presently before the Court is Defendant's motion to dismiss the First Amended Complaint ("FAC") and compel arbitration. Having heard oral arguments and considered the parties' submissions, the Court adopts the following order.

I. BACKGROUND

Plaintiff is Defendant's former employee; he worked as a Termite Technician from March 1994 to November 2013. (FAC, ¶ 12.) Plaintiff alleges that Defendant did not allow its employees to take rest and meal breaks as required by California law. (Id. at ¶¶ 13, 24-33.) Plaintiff further alleges that Defendant failed to

pay wages due and failed to maintain accurate wage records. (Id. at ¶¶ 34-38, 48-52.) Plaintiff also argues that these wage and hour violations are unfair business practices under California's Unfair Competition Law ("UCL"), (Id. at ¶¶ 39-47.) In addition to compensatory damages, penalties, and injunctive relief on his own behalf and on behalf of a class of employees as to the above, Plaintiff also seeks penalties on behalf of the state under the Private Attorneys General Act of 2004 ("PAGA"). (Id. at ¶¶ 53-60.)

Defendant alleges, and Plaintiff does not argue otherwise, that Plaintiff signed an arbitration agreement that formed part of his employment contract. (Mot. at 2; id., Exs. A & B.) That agreement states that it is a "mutual agreement to arbitrate covered Disputes which is the exclusive, final, and binding remedy for both the Company and me and a class action waiver." (Id., Ex. B, § 1.) In the agreement, the employee agrees that he and the company

> mutually consent to resolution under the [agreement] and to final and binding arbitration of all Disputes, including, but not limited to, any preexisting, past, present or future Disputes, which arise out of or are related to . . . my employment, [or] the termination of my employment . . . on-duty or off-duty, in or outside the workplace . . . .

(Id. at § 3.) "Disputes" are specifically defined to include "all employment related laws," including state laws. (Id.)

The agreement contains a class action waiver and a waiver of the right to bring a "representative action." (Id. at § 10.) The class action waiver is not severable. (Id.) However, the "representative action" waiver *is* severable, "if it would otherwise

render this [agreement] unenforceable in any action brought under a private attorneys general law." (Id.)

The agreement also contains a choice of law provision that requires that it be "construed, interpreted and its validity and enforceability determined," under the Federal Arbitration Act ("FAA") and Tennessee law, "unless otherwise required by applicable law." (Id. at § 13.)

With the exception of the class action waiver, provisions of void or unenforceable provisions of the agreement may be modified or severed. (Id. at § 18.)

Defendant moves to dismiss the FAC and compel arbitration under the terms of the agreement.

II. LEGAL STANDARD

Under the FAA, 9 U.S.C. § 1 et seq. , a written agreement that controversies between the parties shall be settled by arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and a party to the agreement may petition a district court with jurisdiction over the dispute for an order directing that arbitration proceed as provided for in the agreement. 9 U.S.C. §§ 2, 4. The FAA reflects a "liberal federal policy favoring arbitration agreements" and creates a "body of federal substantive law of arbitrability." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). The FAA therefore preempts state laws that "stand as an obstacle to the accomplishment of the [statute]'s objectives." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011). This includes "defenses that apply only to arbitration or that derive their

meaning from the fact that an agreement to arbitrate is at issue," as well as state rules that act to fundamentally change the nature of the arbitration agreed to by the parties. Id. at 1746, 1750 (California rule allowing consumers to invoke class arbitration post hoc was neither "consensual" nor the kind of arbitration envisioned by the FAA).

On the other hand, "[t]he principal purpose of the FAA is to ensure that *private* arbitration agreements are enforced according to their terms." Id. at 1748 (emphasis added) (internal quotation marks and brackets omitted). Moreover, parties to an arbitration agreement cannot bind non-parties. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 293-94 (2002). Thus, an individual cannot contract away the government's right to enforce its laws, even if the government seeks to recover "victim-specific" remedies such as punitive damages. Id. at 294-95. This is true even where the individual victim may have the ability to limit the relief the government can obtain in court. Id. at 296.

III. DISCUSSION

Plaintiff does not dispute the existence of the arbitration agreement. However, he does argue that California, rather than Tennessee, law applies; that Defendant has violated the agreement by failing to initiate mediation; that the agreement is both procedurally and substantively unconscionable; and that in any event the agreement cannot apply to his claims for injunctive relief or his claims under PAGA. (Opp'n generally.) The Court addresses each argument in turn.

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A. Applicable Law

California courts apply the law of the state designated by the contract "unless (1) the chosen state has no substantial relationship to the parties or transaction; or (2) such application would run contrary to a California public policy or evade a California statute." Gen. Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1506 (9th Cir. 1995).

Plaintiff argues that the state designated in the arbitration agreement, Tennessee, has "no substantial relationship to the parties," although Defendant is headquartered there, because Plaintiff has "never stepped foot in Tennessee." (Opp'n at 4.) However, in the sentence immediately after the one quoted above, Gen. Signal Corp. makes clear that only one party need have a substantial relationship with the designated state. 66 F.3d at 1506 ("The fact that GSX is incorporated in New York is sufficient to establish a 'substantial relationship.'").

Plaintiff also argues (albeit under the unconscionability analysis) that the agreement evades California statutes by applying "Tennessee substantive law." (Opp'n at 7.) The Court does not, however, read the agreement as precluding substantive wage and hour claims under California law. Rather, the agreement requires that the *contract* be interpreted under Tennessee law: "I expressly agree that this Plan shall be construed, interpreted and its validity and enforceability determined strictly in accordance with . . . the laws of Tennessee." (Mot., Ex. B at § 13.) The disputes governed by the agreement include "all employment related laws," including state laws. (Id. at § 3.) Thus, the substantive law governing the

claims is (in this case) California law, while the law to be applied in interpreting the *arbitration agreement* is Tennessee law.

The Court therefore concludes that the agreement is to be interpreted and analyzed under Tennessee law, unless doing so as to a specific provision would "run contrary to California public policy" or deprive Plaintiff of a California statutory right.

B. Mediation

Plaintiff argues that Defendant cannot compel arbitration, because it has not yet attempted mediation. Defendant, however, argues that the plain terms of the agreement only require *Plaintiff* to mediate.

The arbitration agreement lays out a three-stage process by which an employee may attempt to resolve "disputes" with the company. (Mot., Ex. B at §§ 5-6.) The employee first initiates a complaint with the human resources department through one of several channels. An "Ombudsman" is appointed to investigate and prepare a "Final Response" to the complaint. If the employee is not satisfied, he or she may, first, have the Ombudsman's response reviewed by a panel of "senior executives"; second, initiate mediation; and third, initiate arbitration. These steps are sequential and cumulative, and "failure to exhaust these contractual remedies may be raised as an affirmative defense in arbitration." (Id. at § 5.) However, California employees may bypass the executive review stage and proceed directly to mediation. (Id. at § 7.)

According to Defendant:

> Plaintiff argues that *Defendant* should have initiated mediation before seeking arbitration, ignoring that the

> agreement requires *Plaintiff* to first pursue mediation on his claims. Defendant Terminix did not bring a claim against Plaintiff. Only Plaintiff has violated his arbitration agreement.

(Reply at 1.)

Defendant's argument, as phrased, is ambiguous. If Defendant argues that it is not bound by the same requirements as Plaintiff in resolving disputes, that would seem to make the contract so one-sided as to be unconscionable. Taylor v. Butler, 142 S.W.3d 277, 286 (Tenn. 2004). On the other hand, if, as seems more likely, Defendant merely means to argue that because Plaintiff initiated this complaint, it is Plaintiff's responsibility, rather than Defendant's, to seek out mediation, that is a correct reading of the contract. The structure of the agreement's dispute resolution process is such that the party initiating the process – which can include the filing of an arbitrable claim in court (id. at § 5) – is responsible for escalating from filing a request to initiate the process with the human resources department, to mediation, and finally to arbitration.

Defendant is therefore not barred from seeking to compel arbitration because it has not sought to mediate.[1]

C. Unconscionability

In Tennessee, "enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or

[1] But see Part III.C.2.b., infra, discussing unconscionability of the use of the mediation requirement as an affirmative defense in arbitration.

unconscionable." Taylor, 142 S.W.3d at 286. "Unconscionability may arise from a lack of a meaningful choice on the part of one party (procedural unconscionability) or from contract terms that are unreasonably harsh (substantive unconscionability)." Trinity Indus., Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 170-71 (Tenn. Ct. App. 2001). However, "[i]n Tennessee we have tended to lump the two together . . . ." Id. Thus, in Tennessee the focus is on inequality, whether procedural or substantive, in light of "all the facts and circumstances of a particular case," including relative bargaining power. Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984). A contract is unconscionable if "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." Id. Another way to put this is that the provisions, and the circumstances under which the contract is signed, are "so one-sided that the contracting party is denied any opportunity for a meaningful choice." Id. In general, "[c]ourts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party." Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996).

1. Procedural Unconscionability

In the context of employment agreements, the inequality of bargaining power between employers and employees (at least in the absence of collective bargaining) can be quite stark – especially when the employees have little education and are unlikely to have

legal representation. A federal district court in Tennessee described the problem as follows:

> [M]any of the hallmarks of procedural unconscionability are present. The applicants are seeking low-wage jobs and many have limited education, while attorneys for EDSI, a corporation, have tailored the Agreement to its needs. Ryan's does not permit potential employees to modify any portion of the Agreement or Rules . . . . [E]mployees are not permitted to meaningfully consider the Agreement for any period of time, as they are required to sign it on the spot or forfeit the opportunity to be considered for employment. Potential employees may confer with an attorney before signing the Agreement, but this is an empty opportunity, given the time constraints on signing and the perceived bad impression that consulting an attorney might engender in the potential employer. Also, there is no provision for employees to unilaterally revoke consent to the agreement after signing it, even if they do not obtain a position at Ryan's.

Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916, 933 (M.D. Tenn. 2003).

On the other hand, this procedural unconscionability analysis, if read at a high level of abstraction, in many ways simply mirrors the definition of a contract of adhesion – that is, a “take-it-or leave it,” non-negotiable offer by a party that substantially controls access to something desirable. Such contracts have, for better or worse, become somewhat routine in American life. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) (“[T]he times in which consumer contracts were anything other than adhesive

are long past."). Thus, the mere fact that an employment contract is drafted by an employer and may be non-negotiable likely does not suffice to make it unconscionable. Rather, the contract must be evaluated in terms of both the conditions under which it is signed and the harshness of its substantive provisions.

As noted by the Tennessee federal court above, conditions showing unequal bargaining power or a coercive environment affecting an employment contract include: the educational background and likely job prospects of the individual; whether the arbitration agreement must be signed before or after the hiring process; whether, if it must be signed beforehand, it may be revoked if the employee is not hired; and whether the employee is able to take the contract away and read it privately – or consult an attorney – before signing.

Plaintiff argues that he was "not provided reasonable notice of his opportunity to negotiate or reject the terms of the Arbitration Agreements, nor did he have an actual, meaningful, and reasonable choice to exercise that discretion." (Opp'n at 6-7.) He also cites a case in which a "job applicant [was] required to sign [an] arbitration agreement before being considered for employment." (Id. at 6.) However, he does not present specific facts that would show that *he* was required to sign an arbitration agreement to be considered for a job, and indeed it appears that this was not the case. (FAC, ¶ 12 (Plaintiff was employed by Defendant from 1994 to 2013); Mot., Ex. A & B (Plaintiff signed initial arbitration agreement in 2010 and current arbitration agreement in 2011). He also does not present any particular facts, or even concrete allegations, as to whether he was given an

opportunity to read the agreement privately or consult an attorney. He also does not describe his educational level.

Plaintiff does allege that he was a non-exempt, hourly worker making $21.75 an hour. (FAC, ¶ 12.) This militates slightly in favor of a finding of unconscionability. Nonetheless, because there are few specific facts pointing to shockingly unfair or unequal circumstances, for the Court to find the agreement unconscionable, the substantive terms of the agreement must be oppressive or egregiously one-sided.

2. Substantive Unconscionability

a. Ability to Bring Claims Under California Law

Plaintiff's primary argument for substantive unconscionability – the contention that the agreement deprives him of the right to bring claims under California law – has already been dealt with above. The Court does not read the plain language of the contract that way, nor do the assumptions undergirding the FAA about the operation of arbitration agreements support such a reading. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

b. "Affirmative Defense" Clause and Mediation

Plaintiff's argument does raise one small issue of unconscionability, however. Defendant, as noted above, asserts that Plaintiff has "violated" the terms of the arbitration agreement by not seeking to mediate the issue. The Court observes that the agreement provides that "I must follow the steps of the

Plan in order and the failure to exhaust these contractual remedies may be raised as an affirmative defense in arbitration." (Mot., Ex. B, § 5.) Thus, it would appear there is some danger that Defendant will attempt to bar Plaintiff from obtaining relief on his statutory claims based on a procedural default under the terms of the agreement.

The Court finds that the "affirmative defense" mechanism, if so applied, would be unconscionable. Allowing an employer to set up a cumbersome procedural mechanism for its employees to follow, in order to increase the likelihood of procedural default, would undermine the principle that a party who signs an arbitration agreement "does not forgo the substantive rights afforded by the statute." Mitsubishi Motors, 473 U.S. at 628. Presumably, the "substantive rights" afforded by a statute include a limitation of affirmative defenses to be applied against the statutory claim to those envisioned by the legislature, against the background of the state's statutory and common law scheme, as well as the constitutional right to due process. This is not to say that an arbitration agreement can never set its own procedures, of course. But it is to say that such procedures are not vetted by either a democratic process or judicial solicitude for the rights of litigants, and a court should be cautious about allowing the more powerful party to a contract to create procedural pitfalls for the weaker party.

Nor does the contract clearly spell out, for an unsophisticated party, the consequences of the "affirmative defense," so that he could reasonably be said to assent to what amounts to a potential waiver of rights. Walker v. Ryan's Family

Steak Houses, Inc., 289 F. Supp. 2d 916, 933 (M.D. Tenn. 2003) (finding unconscionable arbitration agreement that stated employees gave up their right to "litigation in state or federal court," because "'litigation' is not as recognizable a term as 'trial' or 'jury' to persons of limited education") aff'd, 400 F.3d 370, 382 (6th Cir. 2005) ("[M]ost of the plaintiffs lack even a high school degree and, therefore, were at a disadvantage when attempting to comprehend the Arbitration Agreement's legalistic terminology."). An employee of ordinary reason, but lacking in legal education, would be surprised to learn that he could unwittingly waive the right to vindicate his statutory rights at all by failing to carefully hew to the three-process.

This is particularly the case when two of the steps do not involve binding arbitration and are essentially mere opportunities for the company to delay resolution of an employee's claim in the hope that he will give up. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) (purpose of FAA is to promote arbitration, in part, in order to achieve "streamlined proceedings and expeditious results"). Nor is this finding of unconscionability precluded by the FAA; the purpose of the FAA is to encourage *arbitration*, not mediation or "senior executive review" or investigations by ombudsmen. "There is no federal policy favoring arbitration under a certain set of procedural rules" – much less a federal policy favoring in-house, multi-step procedures prior to arbitration. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).

Finally, the "affirmative defense" provision, in conjunction with other provisions of § 5, creates anomalies that are not easily resolved. For example, the agreement states that filing "a claim in court" will "be considered as a request to Initiate the Plan." (Mot., Ex. B, § 5.) Does that means that filing a lawsuit is simply one of many acceptable paths for initiating the process? Or does it mean that an employee has, as Defendant argues, "violated" the agreement? Under such circumstances, is he also still required to go through the preliminary step of notifying a manager or human resources representative? Or does it become the responsibility of Defendant, once a claim is filed in court, to initiate the Ombudsman process, because there has been a "request"? And where an employee files a claim in court and the employer successfully moves to compel *arbitration*, does the court's order place the parties at the arbitration stage of "the Plan," or merely at the preliminary stage? If the former, has the employee "fail[ed] to exhaust . . . contractual remedies," so as to trigger the affirmative defense provision? Asking an employee or prospective employee to untangle these questions while filling out new-hire paperwork, so that he can realistically consent to a provision that waives his substantive claims if he fails to "follow the steps of the Plan," is not reasonable.

The Court therefore concludes that the "affirmative defense" provision in § 5 of the agreement is unconscionable, at least inasmuch as it might be applied to prevent Plaintiff from vindicating his claims in arbitration.[2] It is also severable,

[2]If following the steps of "the Plan" was a material term of (continued...)

under § 18 of the agreement. The Court therefore holds the provision unenforceable and severed from the agreement.

c. Statute of Limitations

Plaintiff argues that the agreement is unconscionable because it deprives him of the benefit of the statutes of limitations as to his state claims, bringing them all under a single one-year limitation by contract. (Opp'n at 9.) Defendant, however, specifically disavows any intent to interfere with the California statutes of limitations. (Reply at 4-5.)

Plaintiff's quotation of an alleged "Arbitration Agreement" in the Opposition is not supported by any documentation. It is similar, but not identical to, the language found in Defendant's Exhibit A. Exhibit A, an agreement signed in 2010, is explicitly superseded by the 2011 agreement, Defendant's Exhibit B. (Mot., Ex. B, § 21.) The 2011 agreement says of statutes of limitations that "Disputes must be Initiated with the Plan prior to the end of the applicable statute of limitations." (Id. at § 11.) Plaintiff's right to bring a California statutory claim within the applicable California statute of limitations is therefore not prejudiced.

The Court concludes that the arbitration agreement is therefore enforceable against all claims within its ambit, with the exception of the "affirmative defense" clause as discussed above.

D. Claims for Injunctive Relief

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[2](...continued)
the contract, of course, Defendant might still have a breach of contract claim against Plaintiff, to the degree that it can show damages.

Plaintiff, citing Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303 (2003), argues that claims for injunctive relief under the UCL are not arbitrable. (Opp'n at 10.) However, the Ninth Circuit has overruled earlier cases relying on Cruz in the wake of Concepcion, on the ground that state laws shielding entire types of claims from arbitration are preempted by the FAA. Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928, 935 (9th Cir. 2013); Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 960 (9th Cir. 2012). Plaintiff's UCL claim is therefore arbitrable.

E. PAGA Claims

The arbitration agreement in this case contains a waiver of "representative actions," apparently including private attorneys general laws like PAGA. (Mot., Ex. B, § 10.) Plaintiff argues that his PAGA claim, which is on behalf of the state and resembles a qui tam action in that regard, cannot be the subject of an arbitration agreement, because the state is not a party to the arbitration agreement and because subjecting such claims to limitation by private agreement would undermine the statutory scheme, per Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348 (2014) cert. denied, 135 S. Ct. 1155 (2015). Defendant argues that Iskanian is not binding on this Court and that the Court should decline to follow it even as persuasive authority because after Concepcion it is clear that the FAA "displaces" a state's "policy concerns" about enforcement of its labor laws. (Reply at 6.)

As an initial matter, California law applies to the determination of the validity of the waiver, because, to the extent that Tennessee law differs, it would be contrary to the public

policy of California, as embodied in Iskanian and other cases described below, to apply Tennessee law.

California's PAGA law provides that, as an alternative to direct enforcement actions on labor code violations by the Labor and Workforce Development Agency (LWDA), an "aggrieved employee" may bring a "civil action" "on behalf of himself or herself and other current or former employees" to collect penalties on the violations. Cal. Lab. Code § 2699(a). The penalties are split 75/25, with the state taking the larger share and the plaintiff taking the smaller. Cal. Lab. Code § 2699(i). California courts have noted that it was the state legislature's intent that individual plaintiffs act as proxies for the state:

> The Legislature has made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. *Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct.* Restitution is not the primary object of a PAGA action, as it is in most class actions.

Franco v. Athens Disposal Co., 171 Cal. App. 4th 1277, 1300 (2009) (emphasis added). These civil penalties, it should be noted, are separate from so-called "statutory penalties" that might arise under the Labor Code in individual cases. Villacres v. ABM Indus. Inc., 189 Cal. App. 4th 562, 579 (2010). "Before the PAGA was enacted, an employee . . . could not collect civil penalties. The Labor and Workforce Development Agency (LWDA) collected them. The PAGA changed that." Franco, 171 Cal. App. 4th at 1300.

A question that frequently arises, in the wake of the United States Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), is whether employees may enter into arbitration agreements as to claims made under PAGA, and if so, what agreements they may make. Specifically, there are two questions: is a blanket waiver of PAGA claims in an employment contract possible under California law, and if not, is the claim nonetheless subject to the arbitration agreement?

1. Waiver of PAGA Claims

Distinguishing Concepcion, the California Supreme Court in Iskanian answers the first question in the negative. Concepcion held that a California common law rule, prohibiting as unconscionable certain class action waivers, was preempted by the FAA, because the federal statute preempts not just outright prohibitions on arbitration, but also general contract defenses that are "applied in a fashion that disfavors arbitration." 131 S. Ct. at 1747. The Court held that the rule against class waivers disfavored arbitration, because class actions require cumbersome procedures to protect the rights of absent parties, "sacrific[ing] the principal advantage of arbitration – its informality." Id. at 1751. A class action waiver therefore helps parties to an arbitration agreement achieve their contractual goals -- streamlining dispute resolution and reducing costs and delay. Id. Congress has determined that the enforcement of contracts as the parties intended simply outweighs state public policy considerations. Id. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

Iskanian points out, however, that the PAGA claim waiver is different from a class action waiver, because a PAGA claim is not a private dispute; it is "a dispute between an employer and the state Labor and Workforce Development Agency." 59 Cal. 4th at 384. The court noted that the rule *only* applies to waivers of the right to sue for civil penalties on behalf of the state, "where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers," and not to waivers of any sort of collective or representative action on private damages. Id. at 387-88. Thus, "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." Id. at 386.

Defendant points out that Iskanian's interpretation of the FAA is not binding on this Court, which is true. Nonetheless, a state supreme court's characterization of the state's statutory scheme and whether the government is the real party in interest in a particular claim are, to say the least, deserving of a great deal of deference. Moreover, Iskanian's reasoning is compelling. Not only does the state take the lion's share of the statutory penalty (suggesting an individual plaintiff's share is really more of a "finder's fee" than any sort of individual award), and not only is the state bound by the result in the qui tam action, but an individual plaintiff must give notice to the LWDA of his intent to pursue a PAGA claim and may *only* bring the claim if the LWDA declines to pursue the action itself. Cal. Lab. Code §§ 2699.3, 2699(h). That is, the state agency effectively controls the availability of such claims.

Additionally, contrary to the holdings of some federal district courts finding PAGA waivers enforceable,[3] under California law a plaintiff may not bring an "individual" PAGA claim at arbitration – the claim is always a representative claim on behalf of the state. Brown, 197 Cal. App. 4th at 503 n.8 (PAGA claim cannot be brought on an individual basis); Reyes v. Macy's, Inc., 202 Cal. App. 4th 1119, 1123 (2011) ("[T]he claim is not an individual one. A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees.'"); Machado v. M.A.T. & Sons Landscape, Inc., No. 2:09-CV-00459JAMJFM, 2009 WL 2230788, at *3 (E.D. Cal. July 23, 2009) (same). This, too, suggests that the claim is the state's enforcement action against the employer for its behavior as to all employees, and not the individual's remedy for personal wrongs.[4]

The PAGA claim therefore belongs primarily to the state; the right to bring it cannot be waived by a contract to resolve private disputes.

2. Whether the PAGA Claim May Be Submitted to Arbitration

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[3] E.g., Quevedo v. Macy's, Inc., 798 F. Supp. 2d 1122, 1141 (C.D. Cal. 2011) ("Nothing in the arbitration Plan Document would appear to preclude Plaintiff from pursuing this *individual* claim for civil penalties in arbitration . . . .").

[4] The fact that a PAGA claim cannot be brought on an individual basis also helps to distinguish this type of waiver from the class action waivers at issue in Concepcion – to the Court's knowledge, the Supreme Court has never approved an arbitration agreement that would deprive the individual plaintiff of a certain type of claim altogether, and this seems contrary to the teaching of, e.g., Mitsubishi Motors that an arbitration agreement does not eliminate "substantive rights afforded by the statute." 473 U.S. at 628.

Courts that have found that the rule against PAGA waivers is not preempted by the FAA have split on whether the claims may be submitted to arbitration.[5] There are good arguments for both approaches. On the one hand, the claim belongs to the state, and the state has not waived the judicial forum. The logical underpinning of Iskanian – lack of state consent to modification of the state's claim – suggests that an individual plaintiff also cannot impose a particular forum on the state's claim, either. On the other hand, the state may have somewhat less interest in the specific choice of forum than it does in enforcement and recovery of some kind, and even a government agency prosecuting the state's claim may be to some degree constrained by the actions of an individual plaintiff. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 296, 122 S. Ct. 754, 765-66 (2002) ("Baker's conduct may have

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[5]Compare Plows v. Rockwell Collins, Inc., 812 F. Supp. 2d 1063, 1070 (C.D. Cal. 2011) (denying motion to compel arbitration of PAGA claim); Urbino v. Orkin Servs. of California, Inc., 882 F. Supp. 2d 1152, 1167 (C.D. Cal. 2011) (holding arbitration agreement unenforceable because "the PAGA arbitration waiver . . . taints the entirety of the Agreement with illegality") vacated on other grounds, 726 F.3d 1118 (9th Cir. 2013), with Hernandez v. DMSI Staffing, LLC., No. C-14-1531 EMC, 2015 WL 458083, at *6 (N.D. Cal. Feb. 3, 2015) (PAGA claim does not require procedures "inconsistent with the FAA," because it does not require class certification, notice, or opt-out, and its preclusive effect is limited); Zenelaj v. Handybook Inc., No. 14-CV-05449-TEH, 2015 WL 971320, at *8 (N.D. Cal. Mar. 3, 2015) ("Defendant in this case has not shown that arbitration of these claims would be particularly complex, cumbersome, time-consuming, or expensive."); Mohamed v. Uber Technologies, Inc., No. C-14-5200 EMC, 2015 WL 3749716, at *25 (N.D. Cal. June 9, 2015) ("PAGA imposes no *procedural* requirements on arbitrators . . . beyond those that apply in an individual labor law case."). In some cases, there is a nonseverability clause requiring the entire agreement to be thrown out if the waiver is invalid. E.g., Montano v. The Wet Seal Retail, Inc., 232 Cal. App. 4th 1214, 1224 (2015). However, in this case, the waiver clause is explicitly severable; thus, the issue is simply whether the claim is within the scope of the arbitration agreement at all.

the effect of limiting the relief that the EEOC may obtain in court.").

The Court finds that the PAGA claim should not be submitted to arbitration. As a matter of logic, if the claim belongs primarily to the state, it should be the state and not the individual defendant that agrees to waive the judicial forum. In the PAGA statute, the Legislature has explicitly selected a judicial forum as the default forum. E.g., Cal. Lab. Code § 2699(e)(1) ("[W]henever the Labor and Workforce Development Agency . . . has discretion to assess a civil penalty, *a court* is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.") (emphasis added). Thus, both federalism and separation-of-powers concerns are at their apex here. Moreover, civil enforcement of state labor laws is a matter of traditional, if not preeminent, state regulation. Accordingly, it should not be understood to be preempted or superseded by a federal statute absent very clear evidence of congressional intent. United States v. Locke, 529 U.S. 89, 108 (2000). The Court sees no such evidence here, and in the absence of guidance from a higher court, the Court will not presume to deprive a state of the mechanism chosen by its legislature to enforce its civil laws.

The PAGA claim remains before this Court.[6]

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[6]This issue of the application of arbitration agreements to PAGA claims has been contentious and is currently before the Ninth Circuit on a consolidated set of appeals. See Sakkab v. Luxottica Retail N. America, No. 13-55184 (9th Cir., June 30, 2015) (oral arguments). But the Court notes that even if the FAA could apply to PAGA claims, the practical benefit of streamlined dispute resolution is not necessarily thwarted by including a PAGA claim in the arbitration. As a California appellate court has noted, arbitration of a PAGA claim "would not have the attributes of a (continued...)

IV. CONCLUSION

The Court hereby orders the parties to engage in arbitration under the terms of the arbitration agreement, with the exception of the PAGA claim, which remains before the Court and is not stayed. The "affirmative defense" clause, however, is unconscionable and unenforceable and severed from the agreement.

IT IS SO ORDERED.

Dated: July 14, 2015

DEAN D. PREGERSON
United States District Judge

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[6](...continued)
class action that the AT&T case said conflicted with arbitration, such as class certification, notices, and opt-outs." Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489, 503 (2011). See also Arias v. Superior Court, 46 Cal. 4th 969, 981 (2009) (PAGA action need not meet the requirements of a class action). Thus, Concepcion does not require the finding that the FAA preempts the Iskanian rule, because it is not a rule "demanding procedures incompatible with arbitration." Concepcion, 131 S. Ct. at 1747. Thus, *at most*, an arbitration agreement could force a PAGA representative claim to arbitration; there is no reason to think the state could not declare *waivers* of such claims unlawful as a matter of contract. However, absent a ruling to the contrary by the Ninth Circuit, the logic of Iskanian compels this Court to find that PAGA claims are simply beyond the scope the arbitration agreement altogether and are therefore not subject to a motion to compel arbitration.