

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAVI WHITWORTH, ET AL.,
Plaintiffs,
v.
SOLARCITY CORP.,
Defendant.

Case No.16-cv-01540-JSC

**ORDER RE: DEFENDANT’S MOTIONS
TO COMPEL ARBITRATION AND TO
STAY**

Re: Dkt. Nos. 56, 57 & 71

Plaintiff Ravi Whitworth brought this putative class and collective action against his former employer Defendant SolarCity Corporation (“Defendant”). The Court previously denied a motion to compel arbitration as to Plaintiff Whitworth. SolarCity then moved to stay the case pending the United States Supreme Court’s decision in *Ernst & Young LLP v. Morris*. (Dkt. No. 56.) Before the Court heard argument on that motion, Whitworth filed his First Amended Complaint adding four additional Plaintiffs. (Dkt. No. 68.) At the hearing on the motion to stay, SolarCity indicated that it intended to move to compel arbitration as to these newly added Plaintiffs. SolarCity’s motion to compel arbitration or alternatively stay proceedings pending a decision in *Morris* is now fully briefed. (Dkt. No. 71.) Having considered the parties’ briefs, and having had the benefit of oral argument on March 9 and May 11, 2017, the Court GRANTS IN PART AND DENIES IN PART SolarCity’s motions.

1 **BACKGROUND**

2 **A. Factual Background**

3 SolarCity provides solar power systems for public and private customers throughout the
 4 United States. (First Amended Complaint (“FAC”) ¶ 1.) Plaintiff Whitworth worked for
 5 SolarCity as a Photo Installer II for less than three months in 2015. (*Id.* ¶ 11.) Plaintiff Greg
 6 Carranza has worked for SolarCity since August 2015 as a Photo Installer I and II. (*Id.* ¶ 13.)
 7 Plaintiff Javier Frias worked for SolarCity as a Photo Installer I and II from August 2014 through
 8 May 2016. (*Id.* ¶ 15.) Plaintiff Cris Farrohki worked for SolarCity as a PV Installer from June
 9 through October 2013. (*Id.* ¶ 17.) Plaintiff Michael Whitford worked for SolarCity as a Jr. PV
 10 Installer and a Crew Lead from June to October 2013. (*Id.* ¶ 19.)

11 There is no dispute that each Plaintiff was required to sign an arbitration agreement as a
 12 condition of employment and that each arbitration agreement contains a waiver of Plaintiffs’ rights
 13 to participate in a class, collective, or representative action. (Dkt. No. 41 at 2; Dkt. No. 71-3 at ¶¶
 14 12, 21, 30, 38.¹) Each arbitration agreement also provides that any arbitration must be on an
 15 individual basis and that the arbitrator must decide whether Plaintiffs are “aggrieved persons for
 16 purposes of any representative or private attorney general proceeding.” (Dkt. No. 71-4 at 23, 53;
 17 Dkt. No. 71-5 at 13, 38-39.) Plaintiff Farrohki and Whitford’s arbitration agreements also include
 18 clauses which provide that the representative and class action waiver clauses are non-severable
 19 from the agreement. (Dkt. No. 71-5 at 13, 38.)

20 **B. Procedural Background**

21 In March 2016, Plaintiff Whitworth filed this putative class and collective action on behalf
 22 of himself and a class of similarly situated individuals alleging nine claims for relief under the Fair
 23 Labor Standards Act (“FLSA”), the California Labor Code, California’s Private Attorney General
 24 Act (“PAGA”), and California Business & Professions Code § 17200 et seq. (Complaint at ¶¶ 73-
 25 128.) Plaintiff contends that SolarCity failed to (1) pay employees involved in the installation and
 26 maintenance of solar systems for travel time during the workday; (2) provide these same

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 28 ¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the
 ECF-generated page numbers at the top of the documents.

1 oppose both requests, and ask the Court to allow discovery; namely, production of a class list even
2 if the Court is inclined to grant the stay.

3 **A. SolarCity’s Motion to Compel Arbitration**

4 SolarCity moves to compel the newly added Plaintiffs to arbitrate their claims. SolarCity’s
5 motion must be denied for the same reasons the Court denied the motion as to Plaintiff
6 Whitworth—the Court is bound by the Ninth Circuit’s decision in *Morris* holding that
7 employment arbitration agreements containing class action waivers are invalid and unenforceable
8 under the National Labor Relations Act (NLRA). *See Whitworth v. Solarcity Corp.*, No. 16-CV-
9 01540-JSC, 2016 WL 6778662, at *2 (N.D. Cal. Nov. 16, 2016); *see also McElrath v. Uber*
10 *Techs., Inc.*, No. 16-CV-07241-JSC, 2017 WL 1175591, at *3 (N.D. Cal. Mar. 30, 2017). Further,
11 Plaintiffs Carranza and Frias cannot be compelled to arbitrate their PAGA claims because their
12 arbitration agreements contain unenforceable PAGA waivers. *See Sakkab v. Luxottica Retail N.*
13 *Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015); *Iskanian v. CLS Transportation Los Angeles, LLC*,
14 59 Cal. 4th 348, 384 (2014); *see also Perez v. U-Haul Co. of California*, 3 Cal. App. 5th 408, 421
15 (Cal. Ct. App. 2016) (“California law prohibits the enforcement of an employment agreement
16 provision that requires an employee to individually arbitrate whether he or she qualifies as an
17 aggrieved employee under PAGA, and then (if successful) to litigate the remainder of the
18 representative action in the superior court”).

19 **B. SolarCity’s Motion to Stay**

20 “[T]he power to stay proceedings is incidental to the power inherent in every court to
21 control the disposition of the causes on its docket with economy of time and effort for itself, for
22 counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In deciding whether
23 to grant a stay, a court may weigh the following: (1) the possible damage which may result from
24 the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go
25 forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating
26 of issues, proof, and questions of law which could be expected to result from a stay.”² *CMAX, Inc.*

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28 ² Instead of applying *Landis*, the parties apply the stay standard from *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009), which relies on the Supreme Court’s prior decision in *Hilton v. Braunskill*, 481

1 v. *Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (internal citations and quotation omitted). However,
2 “[o]nly in rare circumstances will a litigant in one case be compelled to stand aside while a litigant
3 in another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255. A
4 district court’s decision to grant or deny a *Landis* stay is a matter of discretion. *See Dependable*
5 *Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). The proponent of
6 a stay has the burden of proving such a discretionary stay is justified. *Clinton v. Jones*, 520 U.S.
7 681, 708 (1997).

8 SolarCity moves to stay this action pending the Supreme Court’s review of the Ninth
9 Circuit’s decision in *Morris*. SolarCity maintains that a stay is necessary to save the parties from
10 engaging in potentially unnecessary class litigation and to ensure the orderly course of justice. At
11 oral argument, SolarCity insisted that a stay was appropriate because *Morris* will likely be
12 overruled and under the then-enforceable arbitration agreements, Plaintiffs would not have any
13 class claims and their individual claims would be subject to arbitration rather than court litigation.
14 However, Plaintiffs Whitworth, Carranza, and Frias all have PAGA claims which will be litigated
15 in this Court rather than in arbitration regardless of *Morris*. Further, notwithstanding SolarCity’s
16 insistence that *Morris* will be overturned, this is nothing more than reading tea leaves at this
17 juncture and *Morris*—which renders the arbitration agreements here unenforceable—is the law in
18 the Ninth Circuit which this Court is bound to follow.

19 Plaintiffs have articulated specific harms to Plaintiffs and the putative class in the event of
20 a stay: (1) delay of any monetary or injunctive relief, (2) restraint on Plaintiffs’ efforts to gather
21 evidence in support of their claims, and (3) an increased risk that with the passage of time class
22 members may inadvertently destroy evidence because they are unaware of the litigation.
23 Plaintiffs’ first argument as to delay in any monetary or injunctive relief is unpersuasive. Any stay
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25 U.S. 770, 776 (1987). The parties offer no explanation for why the *Nken* standard, rather than the
26 *Landis* standard applies, and the Court can see none. *Landis* sets forth the standard “where a party
27 seeks to stay a district court proceeding pending the resolution of another action. The *Hilton*
28 standard, in contrast, applies where a party seeks to stay enforcement of a judgment or order
pending an appeal of that same judgment or order in the same case.” *Lal v. Capital One Fin.*
Corp., No. 16-CV-06674-BLF, 2017 WL 282895, at *2 (N.D. Cal. Jan. 23, 2017) (internal citation
omitted).

1 would likely be of a relatively short duration and the Ninth Circuit has held monetary recovery
2 should not serve as the foundation to deny a stay. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098,
3 1110 (9th Cir. 2005); *McElrath*, 2017 WL 1175591, at *5 (“Although it is unlikely *Morris* will be
4 resolved this Supreme Court term, it does not appear that a decision on the merits is more than a
5 year away. While any estimate regarding when the Supreme Court will issue its *Morris* opinion is
6 necessarily somewhat speculative, two factors are concrete: this case is in its early stages, and the
7 outcome of *Morris* will have a significant impact on this case. Thus, this factor weighs slightly in
8 favor of a stay.”). The Court is, however, persuaded as to Plaintiffs’ concerns regarding the loss
9 of evidence over the months’ long stay awaiting disposition of *Morris*.

10 Courts in this district are split as to whether a stay is warranted in similar cases pending
11 *Morris*. In both *Rivera v. Saul Chevrolet, Inc.*, and *Daugherty v. SolarCity Corp.*, the courts
12 denied stays because “much of the discovery at issue in this case will aid both this action and any
13 eventual arbitration.” *Rivera*, No. 16-CV-05966-LHK, 2017 WL 1862509, at *5 (N.D. Cal. May
14 9, 2017); *Daugherty*, 2017 WL 386253, at *4 (N.D. Cal. Jan. 26, 2017). Likewise, in *Cashon v.*
15 *Kindred Healthcare Operating, Inc.*, the court denied a stay because “[t]here is no evidence that
16 the case is likely to settle or that the Supreme Court is likely to reverse the Ninth Circuit’s
17 decision in *Morris*. While Defendants will be forced to spend time and money litigating claims
18 they might ultimately arbitrate, a stay will further deprive Cashon and other plaintiffs the relief
19 allegedly owed to them. Overall, the interests of justice do not warrant a continuance or a stay.”
20 *Id.*, No. 16-CV-04889-RS, Dkt. No. 41 (N.D. Cal. Feb. 6, 2017). However, courts have granted
21 stays in an equal number of cases. *See, e.g., McElrath*, 2017 WL 1175591, at *5; *Mackall v.*
22 *Healthsource Global Staffing, Inc.*, No. 16-cv-03810-WHO, Dkt. No. 55 (N.D. Cal. Jan, 18,
23 2017). *Echevarria v. Aerotek, Inc.*, No. 16-CV-04041-BLF, Dkt. No. 70 (N.D. Cal. April 3,
24 2017). Notably, the case in which this Court granted a stay did not include a PAGA claim.
25 *McElrath*, 2017 WL 1175591, at *2.

26 Here, Plaintiffs Whitworth, Carranza, and Frias all have PAGA claims which will proceed
27 in this Court regardless of what happens in *Morris*, and discovery as to all the Plaintiffs’
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1 individual claims will be relevant either here or in any arbitration.³ *Rivera*, 2017 WL 1862509, at
 2 *5; *Daugherty*, 2017 WL 386253, at *4. The Court thus denies the motion to stay as to discovery
 3 regarding the individual and representative PAGA claims. Further, while the Court is not
 4 persuaded that the harms articulated by Plaintiffs warrant wholesale denial of a stay, the Court is
 5 persuaded that notice of the litigation to the putative class is appropriate to ensure that evidence is
 6 not lost during the pendency of the stay of the class and collective claims.

7 The Court thus turns to Plaintiffs' request for a class list. (Dkt.No. 57.) At the March 9,
 8 2017 hearing, Plaintiffs modified their request to seek a limited class list containing only names
 9 and addresses. SolarCity argues that production of such a class list is improper because the
 10 Supreme Court's decision in *Morris* may foreclose Plaintiffs' class claims entirely. However,
 11 SolarCity has not identified any prejudice to it if the members of the putative class are sent a letter
 12 notifying them of the existence of this action. That additional individuals may become aware of
 13 their rights does not constitute prejudice; rather, notifying the putative class members of the
 14 existence of the action will ameliorate the effect of the delay in the action while the class claims
 15 are stayed. *See, e.g., Bradberry v. T-Mobile USA, Inc.*, No. 06-6567 CW, 2007 WL 2221076, at
 16 *4 (N.D. Cal. Aug. 2, 2007) ("risk and the delay in litigation [during a stay pending appeal]
 17 constitute a substantial injury to Plaintiff"); *see also Perez v. Safelite Grp. Inc.*, 553 F. App'x 667,
 18 669 (9th Cir. 2014), as amended on denial of reh'g and reh'g en banc (Mar. 7, 2014) (holding that
 19 once a plaintiff shows that class discovery is likely to substantiate class allegations "it is an abuse

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 21 ³ In their opposition brief, Plaintiffs argued that the Court should declare Plaintiffs Farrokhi and
 22 Whitford's arbitration agreements void and unenforceable because they contain non-severable
 23 PAGA waivers. In so arguing, Plaintiffs rely on two unpublished California Court of Appeals
 24 decisions voiding SolarCity arbitration agreements containing identical non-severability clauses.
 25 *See Wan v. SolarCity Corp.*, No. H042103, 2017 WL 25497, at *1 (Cal. Ct. App. Jan. 3, 2017),
 26 review denied (Mar. 22, 2017); *Altman v. SolarCity Corp.*, No. D067582, 2016 WL 2892733, at
 27 *3 (Cal. Ct. App. May 13, 2016), reh'g denied (June 8, 2016), review denied (July 27, 2016).
 28 However, unlike the plaintiffs in *Wan* and *Altman*, neither Farrokhi nor Whitford have pled PAGA
 claims, and according to SolarCity, they are now time barred from doing so. As discussed at
 oral argument, the Court is not persuaded that either Farrokhi or Whitford has Article III standing
 to challenge the PAGA waiver since they have not pled PAGA claims; however, the Court
 declines to reach this issue now because it may ultimately be unnecessary to do so following a
 decision in *Morris*.

1 of discretion to deny precertification discovery”); *McCowen v. Trimac Transportation Servs. (W.)*,
2 *Inc.*, No. 14-CV-02694-RS (JSC), 2015 WL 5184473, at *4 (N.D. Cal. Sept. 4, 2015) (noting that
3 “numerous courts in this District have found that disclosure of class members’ contact information
4 is appropriate in pre-certification class actions” and collecting cases regarding the same).

5 Accordingly, the parties are ordered to meet and confer to draft a proposed notice to the
6 putative class and a plan for its distribution.

7 **CONCLUSION**

8 For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART
9 SolarCity’s motions to compel arbitration and to stay. The motion to compel arbitration is
10 DENIED, the motion to stay is GRANTED IN PART and DENIED IN PART. Discovery
11 regarding the individual Plaintiffs’ claims and the PAGA claims of Plaintiffs Whitworth,
12 Carranza, and Frias’ may proceed. The parties shall meet and confer by June 2, 2017 regarding
13 the form and plan for notice to the putative class.

14 The Court sets a further Case Management Conference for June 15, 2017 at 1:30 p.m.,
15 Courtroom F, 450 Golden Gate Ave., San Francisco, California. One week prior to the conference
16 the parties shall file a joint statement regarding the status of their meet and confer regarding the
17 notice, outlining any issues of dispute, and attaching the proposed form of notice. If the parties
18 are able to reach an agreement regarding notice, they shall promptly notify the Court and the Case
19 Management Conference will be vacated.

20 This Order disposes of Docket Nos. 56, 57 & 71.

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22 **IT IS SO ORDERED.**

23 Dated: May 15, 2017

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge