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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAVI WHITWORTH, ET AL.,
Plaintiffs,
v.
SOLARCITY CORP., et al.,
Defendants.

Case No.16-cv-01540-JSC

**ORDER RE: MOTION TO COMPEL
ARBITRATION AND MOTION TO
STAY**

Re: Dkt. No. 116

United States District Court
Northern District of California

Plaintiff Ravi Whitworth brought this putative class and collective action against his former employer Defendant SolarCity Corporation. Plaintiff later amended his complaint to include the claims of four additional named Plaintiffs. (Dkt. No. 68.) The Court denied SolarCity’s motion to compel arbitration given the Ninth Circuit’s decision in *Morris v. Ernst & Young*, 834 F.3d 975 (9th. Cir. 2016), holding that employment arbitration agreements containing class action waivers are invalid and unenforceable under the National Labor Relations Act (NLRA). (Dkt. Nos. 41 & 81.) On May 21, 2018, the Supreme Court reversed the Ninth Circuit’s decision in *Morris*. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

The parties have submitted supplemental briefing regarding the motion to compel arbitration following *Epic*. Having reviewed the parties’ original and supplemental briefs, and having had the benefit of oral argument on August 9, 2018, the Court DENIES the motion to compel arbitration of Plaintiffs Whitworth, Carranza, and Frias’s PAGA claims, but GRANTS the motion to compel arbitration of their individual claims and GRANTS the motion to compel as to Plaintiffs Farrohki and Whitford’s individual claims. The Court also GRANTS SolarCity’s motion to stay proceedings pending arbitration.

1 **DISCUSSION**

2 Following the Supreme Court’s decision in *Epic*, the Court held a Status Conference to discuss
 3 how to proceed in this action. (Dkt. No. 114.) As a threshold matter, the parties agree that three of
 4 the five Plaintiffs—Whitworth, Carranza, and Frias—have valid arbitration agreements and that
 5 these agreements contain representative action waivers which preclude them from pursuing
 6 representative actions. The parties also agree that Plaintiffs Whitworth, Carranza, and Frias
 7 cannot bring class claims and that their individual non-PAGA claims must be arbitrated. The
 8 parties cannot agree, however, about whether Plaintiffs Farrohki and Whitford have valid arbitration
 9 agreements or how the Court should handle Plaintiffs Whitworth, Carranza, and Frias’s PAGA
 10 claims.

11 The Court thus directed the parties to provide supplemental briefing regarding three issues.
 12 (Dkt. No. 116.) First, whether *Epic* overruled *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425,
 13 431 (9th Cir. 2015), such that Plaintiffs Whitworth, Carranza, and Frias’s PAGA claims must be
 14 compelled to arbitration along with their other claims. Second, to address SolarCity’s argument that
 15 the Court must compel Plaintiffs to arbitrate their PAGA claims first.¹ Finally, whether the Court must
 16 compel Plaintiffs Farrohki and Whitford to arbitrate their individual claims. Subsumed within this
 17 question are whether the arbitration agreements are invalid because they include non-severable waivers
 18 of representative actions including PAGA claims, and the question of whether Farrohki and Whitford
 19 have standing to challenge the validity of their arbitration agreements on this ground given that they
 20 have not pled PAGA claims. Upon review of the original motion to compel briefing, as well as the
 21 parties’ supplemental submissions, and having had the benefit of oral argument, the Court rules as
 22 follows.

23 **A. Plaintiffs Whitworth, Carranza, and Frias’s PAGA Claims**

24 There are two issues with respect to Plaintiffs Whitworth, Carranza, and Frias’s PAGA
 25 claims. First, whether *Epic* overruled *Sakkab* such that Plaintiffs must now arbitrate their PAGA
 26

27 ¹ While the Court understood this to be the issue following the Case Management Conference, the
 28 parties’ briefing indicates that the real issue is whether the Court should stay Plaintiffs’ PAGA
 claims pending arbitration or whether those should proceed in this Court.

1 claims with their other claims. Second, whether Plaintiffs' PAGA claims based on violations of Labor
 2 Code section 558 must be arbitrated even if their other PAGA claims cannot be compelled to
 3 arbitration.

4 **1) *Epic* did not overrule *Sakkab***

5 As a general rule, "circuit precedent, authoritative at the time that it issued, can be
 6 effectively overruled by subsequent Supreme Court decisions that are closely on point, even
 7 though those decisions do not expressly overrule the prior circuit precedent." *Miller v. Gammie*,
 8 335 F.3d 889, 899 (9th Cir. 2003) (internal citation and quotation marks omitted). While "the
 9 issues decided by the higher court need not be identical in order to be controlling [], the relevant
 10 court of last resort must have undercut the theory or reasoning underlying the prior circuit
 11 precedent in such a way that the cases are *clearly irreconcilable*." *Id.* at 900 (emphasis added).
 12 SolarCity argues *Epic* is clearly irreconcilable with *Sakkab* because *Morris* (which *Epic* overruled)
 13 and *Sakkab* both rest on the same interpretation of the FAA's savings clause, an interpretation
 14 which *Epic* rejected. In particular, SolarCity contends:

15 The Supreme Court [in *Epic*] thus emphatically held that a rule
 16 attacking a contract for requiring individualized arbitration—even
 17 when based on a general contract defense of illegality—cannot be
 18 preserved by the FAA's saving clause if that rule does not "render
 any contract enforceable," but only renders arbitration agreements
 unenforceable."

19 (Dkt. No. 122 at 10.²)

20 Accepting SolarCity's characterization of *Epic*, it is still not clearly irreconcilable with
 21 *Sakkab*. *Sakkab* applied the same interpretation of the savings clause as articulated by SolarCity:
 22 the court held that the FAA's savings clause "requires that a state contract defense place
 23 arbitration agreements on equal footing with the non-arbitration agreements." 803 F.3d at 432. It
 24 then went on to hold that "[t]he *Iskanian* rule complies with this requirement. The rule bars any
 25 waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a
 26 non-arbitration agreement." *Id.* SolarCity ignores that in *Iskanian* the California Supreme Court

27 _____
 28 ² 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 found that a waiver of representative actions bars a PAGA claim on behalf of the state in its
 2 entirety; even if an employee could bring and therefore arbitrate an individual PAGA claim, such
 3 individual’s claims “do not ‘result in the penalties contemplated under the PAGA to punish and
 4 deter employer practices that violate the rights of numerous employees under the Labor Code.’”
 5 *Sakkab*, 803 F.3d at 431 (quoting *Iskanian*, 59 Cal. 4th at 383). As *Sakkab* explained, “[a]n
 6 agreement to waive ‘representative’ PAGA claims—that is, claims for penalties arising out of
 7 violations against other employees—is effectively an agreement to limit the penalties an
 8 employee-plaintiff may recover on behalf of the state.” *Id.*; see also *id.* at 739 (“PAGA action is a
 9 statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving
 10 the claims of other employees.”). *Epic* does not require an interpretation of the FAA that allows a
 11 private party to immunize itself from liability under a particular law, especially a law prosecuted
 12 on behalf of a state.

13 In sum, *Sakkab* is not clearly irreconcilable with *Epic*; rather, there remains a “meaningful
 14 basis for the [*Sakkab*] rule.” *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993). Therefore,
 15 in the absence of Ninth Circuit authority stating otherwise, this Court must follow *Sakkab*.

16 **2) Plaintiffs’ Section 558 Claims are Not Subject to Arbitration**

17 SolarCity next insists that even if the Court is not persuaded that *Epic* implicitly overruled
 18 *Sakkab*, the Court should nonetheless compel arbitration of the PAGA claims to the extent that the
 19 claims are predicated on California Labor Code section 558. SolarCity’s argument is based on an
 20 unpublished Ninth Circuit Court of Appeals decision favoring one of two diverging California
 21 Court of Appeals cases on this question. See *Mandviwala v. Five Star Quality Care, Inc.*, 723 F.
 22 App’x 415, 417-18 (9th Cir. Feb. 2, 2018) (discussing *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th
 23 1228, 1234 (2017); *Lawson v. ZB, N.A.*, 18 Cal.App.5th 705 (2017), as modified (Dec. 21, 2017),
 24 review granted March 21, 2018)). However, *Mandviwala*—as an unpublished decision—is not
 25 binding; instead, this Court must “attempt to determine how the California Supreme Court might
 26 decide the issue.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); see also 9th Cir. Rule
 27 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent, except when
 28 relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”).

1 Labor Code section 558(a) provides that:

2 (a) Any employer or other person acting on behalf of an employer
3 who violates, or causes to be violated, a section of this chapter or
4 any provision regulating hours and days of work in any order of the
Industrial Welfare Commission shall be subject to a civil penalty as
follows:

5 (1) For any initial violation, fifty dollars (\$50) for each
6 underpaid employee for each pay period for which the
employee was underpaid in addition to an amount sufficient
7 to recover underpaid wages.

8 (2) For each subsequent violation, one hundred dollars
9 (\$100) for each underpaid employee for each pay period for
which the employee was underpaid in addition to an amount
sufficient to recover underpaid wages.

10 (3) Wages recovered pursuant to this section shall be paid to
11 the affected employee.

12 The *Esparza* court held when a plaintiff seeks to recover lost wages under Labor Code
13 section 558(a) through a PAGA claim, the *Iskanian* rule does not apply because such wage claims
14 are private disputes arising out of the employment contract with the employer, and therefore
15 subject to arbitration. *Esparza*, 13 Cal. App. 5th at 1246. The court reasoned that because the wage
16 portion of the section 558 civil penalty is not allocated at all to the state, the *Iskanian* rule does not
17 prevent the underpaid wage portion of the section 558(a) claim from being compelled into
18 arbitration. *Id.* at 1234. In particular, the court held “[a]lthough the statute refers to the amount ‘as
19 a penalty,’ it does not constitute a ‘civil penalty’ as that term is used in *Iskanian* because it is
20 payable to the employees and not a state agency.” *Id.* at 1242.

21 In *Lawson*, in contrast, the court held that the unpaid wage portion of a section 558(a)
22 PAGA claim is part of the civil penalty and therefore *Iskanian* applies; the trial court thus had
23 erred by bifurcating the unpaid wages portion of the plaintiff’s section 538(a) claim and ordering
24 arbitration of that portion of the 558(a) claim. 18 Cal.App. 5th at 712. The court reasoned that it
25 had previously held that the unpaid wages portion of a section 558(a) claim is a civil penalty. *Id.*
26 at 722; see also *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1147-48
27 (2012). Further, in *Iskanian* the court “made it clear that the distinction between civil penalties
28 and victim specific statutory damages hinges in large measure on whether, prior to enactment of

1 the PAGA, they could only be recovered by way of regulatory enforcement or whether they
2 supported a private right of action.” Because section 558(a) is only enforceable by the state or
3 through PAGA, it falls within *Iskanian*’s definition of civil penalties. *Id.* at 724. Finally, while
4 *Iskanian* “also relied on the fact the penalties it was considering were ‘largely’ payable to the
5 state,” the “civil penalty” recoverable under section 538(a) is also “largely” payable to the state,
6 even when the unpaid wages are included in that civil penalty bucket. *Id.* The California Supreme
7 Court granted review of *Lawson* in March 2018.

8 *Mandviwala* concluded—without analysis—that *Esparza* was “more consistent with the
9 ruling of *Iskanian* [because] *Esparza* specifically distinguished between individual claims for
10 compensatory damages (such as unpaid wages) and PAGA claims for civil penalties, which is
11 more consistent with *Iskanian* and reduces the likelihood that *Iskanian* will create FAA
12 preemption issues.” *Mandviwala*, 723 F. App’x at 417–18 (9th Cir. 2018). Only one district court
13 has considered this issue since *Mandviwala* and it too adopted *Mandviwala*’s favoring of
14 *Esparza*’s rationale without discussion. *See Cabrera v. CVS Rx Servs., Inc.*, No. C 17-05803
15 WHA, 2018 WL 1367323, at *5 (N.D. Cal. Mar. 16, 2018) (“This order finds the reasoning of
16 *Mandviwala* persuasive and agrees that claims for unpaid wages under PAGA may be pursued in
17 arbitration.”).

18 This Court respectfully disagrees and concludes that the California Supreme Court is most
19 likely to follow *Lawson* for several reasons. First, *Esparza*’s conclusion that a claim under
20 section 558 “is a private dispute because, among other things, it could be pursued by Employee in
21 his own right,” 13 Cal.App.5th at 1246, is unsupported, and as *Lawson* explains, likely wrong.
22 *Lawson*, 18 Cal. App. 5th at 723.

23 Second, *Esparza*’s cursory treatment of the appellate court’s prior decision in *Thurman*,
24 203 Cal.App.4th 1112, is not persuasive. *Thurman* analyzed the plain language of the statute and
25 held that “the language of section 558, subdivision (a) is more reasonably construed as providing a
26 civil penalty that consists of *both* the \$50 or \$100 penalty amount *and* any underpaid wages, with
27 the underpaid wages going entirely to the affected employee or employees as an express exception
28 to, the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the

1 Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved
 2 employees.” *Lawson*, 18 Cal. App. 5th at 717 (quoting *Thurman*, 203 Cal.App.4th at 1145)
 3 (emphasis in original). *Esparza* stated, without discussion, that “the *Thurman* court’s
 4 determination that an award of unpaid wages under Labor Code section 558 is a civil penalty does
 5 not control how we interpret the term civil penalty as it is used in the *Iskanian* rule—a rule of
 6 nonarbitrability carefully crafted to avoid federal preemption.” *Esparza*, 13 Cal. App. 5th at 1243.
 7 *Esparza* seems to have based this finding at least in part on the fact that *Thurman* was decided two
 8 years prior to *Iskanian*. *Lawson* rejected any such limitation on *Thurman*, reasoning that

9 [w]hile we agree *Thurman* was decided before *Iskanian*, and that in
 10 *Thurman* we had no occasion to address the preemption issues
 11 discussed in *Iskanian*, those circumstances in no sense undermine
 12 the continuing validity of our holding in *Thurman*, to wit: in
 13 enacting section 558, the Legislature intended the underpaid wages
 14 recoverable under the statute, as well as the \$50 and \$100
 15 assessments provided by the statute, be treated as civil penalties and
 16 that as civil penalties, neither type of recovery is severable for
 17 purposes of applying the PAGA.

18 *Lawson*, 18 Cal. App. 5th at 723–24. Indeed, “the court in *Iskanian* made it clear that the
 19 distinction between civil penalties and victim specific statutory damages hinges in large measure
 20 on whether, prior to enactment of the PAGA, they could only be recovered by way of regulatory
 21 enforcement or whether they supported a private right of action.” *Lawson*, 18 Cal. App. 5th at 724.
 22 As *Lawson* concluded, there is no meaningful basis to distinguish *Thurman*’s holding that all
 23 recovery under section 558 is a penalty from *Iskanian*’s definition of a penalty for purposes of the
 24 preemption analysis.

25 Third, *Esparza*’s heavy reliance on the fact that the unpaid wage portion of the section
 26 558(a) penalty is paid to the employee rather than the state is also not persuasive. *Lawson* also
 27 noted that *Iskanian* focused on the fact that the penalties it was considering were “largely” payable
 28 to the state.³ *Id.* at 724. Section 558 assesses a penalty of \$50 for each initial violation and \$100
 for each subsequent violation in a pay period in addition to “an amount sufficient to recover

³ When an employee recovers civil penalties under PAGA, 75 percent is allocated to the Labor and Workforce Development Agency and the remaining 25 percent is allocated to the aggrieved employees. *See* Cal. Lab. Code § 2699(i).

1 underpaid wages.” Cal. Lab. Code § 558(a)(1)-(2). It was unlikely that “the predominate amounts
 2 recovered under section 558 w[ould] be in the form of underpaid wages payable to employees”
 3 because “depending upon how many violations occurred during a pay period and the effected
 4 employees’ rate of pay, it [wa]s quite possible that, at least as to the rest break and meal break
 5 allegations, the underpaid wage portion of any recovery w[ould] fall within the 25 percent range
 6 implicitly approved by the court in *Iskanian*.” *Lawson*, 18 Cal. App. 5th at 724. In other words,
 7 the \$50 to \$100 penalty per violation in a pay period would exceed any unpaid wage recovery and
 8 ensure that the majority of the recovery goes to the state as opposed to an individual.

9 Moreover, while both *Esparaza* and *Lawson* assume without analysis that in a PAGA
 10 action the unpaid wages portion of the section 558(a) civil penalty will go entirely to the aggrieved
 11 employees, this Court is not so certain. The PAGA was enacted *after* section 558, and provides
 12 that 75 percent of the civil penalties recovered by an aggrieved employee are allocated to the state.
 13 If the entire section 558 recovery is considered the penalty, including the unpaid wages portion,
 14 then pursuant to a PAGA claim 75 percent of that penalty, including 75 percent of the unpaid
 15 wages, are allocated to the state. To put it another way, when the State enforces section 558, the
 16 \$50 or \$100 per violation portion of the penalty goes to the state, and all of the unpaid wages
 17 portion goes to the aggrieved employees. On the other hand, when an employee brings a PAGA
 18 claim based on a section 558 violation, 75 percent of the penalty goes to the state and 25 percent to
 19 the employee, including 25 percent of the portion that in a state-enforcement action would go
 20 entirely to the state. This possible construction of PAGA and section 558 is another reason
 21 *Esparza* is not persuasive.

22 The Court thus concludes that the California Supreme Court is most likely to follow
 23 *Lawson* which is most consistent with the language and history of section 558(a) and *Iskanian*.

24 * * *

25 The Court therefore denies SolarCity’s motion to compel arbitration of Plaintiffs
 26 Whitworth, Carranza, and Frias’s PAGA claims.

27 //

28 //

1 **B. Plaintiffs Farrohki and Whitford Must Arbitrate Their Claims**

2 Plaintiffs Farrohki and Whitford were added as Plaintiffs in the First Amended Complaint
3 pleading wage and hour claims under the Fair Labor Standards Act and California Labor Code §§
4 510 and 1194, as well as a claim under California Business & Professions Code § 17200 et seq.
5 (Dkt. No. 68.) SolarCity moved to compel arbitration of these claims based on arbitration
6 agreements signed by Farrohki and Whitford at the start of their employment with SolarCity.
7 (Dkt. Nos. 71; 71-5 at 8 (Farrohki’s Arbitration Agreement); 71-5 at 33 (Whitford’s Arbitration
8 Agreement).) In response to the motion to compel, Plaintiffs Farrohki and Whitford argued that
9 their arbitration agreements are invalid due to the presence of an unlawful PAGA waiver. The
10 Court declined to reach this issue because it denied the motion to compel arbitration based on
11 *Morris*. In doing so, the Court suggested that it also had concerns regarding Farrohki and
12 Whitford’s standing to raise this challenge since they have not pled PAGA claims. In light of
13 *Epic*, the Court must now decide whether it must compel Farrohki and Whitford to arbitrate their
14 claims.

15 **1. Issue Preclusion Does not bar SolarCity From Enforcing the Arbitration**
16 **Agreements**

17 Plaintiffs Farrohki and Whitford bring wage and hour claims on behalf of themselves and a
18 putative class; they do not bring any PAGA claims. There is no dispute that they each signed
19 employment agreements that require them to arbitrate their individual claims. (Dkt. No. 71-5 at 12,
20 37.) The arbitration agreements also waive their ability to bring the claims on behalf of a putative
21 class or through a collective action. In particular, the waiver language of their arbitration
22 agreements states:

23 “In arbitration, the parties will have the right to conduct civil
24 discovery, bring motions, and present witnesses and evidence as
25 provided by the forum state’s procedural rules applicable to court
26 litigation as interpreted and applied by the arbitrator. **However,**
27 **there will be no right or authority for any dispute to be brought,**
28 **heard or arbitrated as a class or collective action (“Class Action**
Waiver”), or in a representative or private attorney general
Notwithstanding any other clause contained in this Agreement, the
preceding sentence shall not be severable from this Agreement in
any case in which the dispute to be arbitrated is brought as a class or
collective action, or in a representative or private attorney general
capacity on behalf of a class of persons or the general public.”

1 (Dkt. No. 71-5 at 12-13, 39-40 ¶ 12(d) (emphasis added.) After *Epic*, these arbitration provisions,
 2 including the class action waiver, are enforceable. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616
 3 (2018). Plaintiffs nonetheless resist the motion to compel on the grounds that the arbitration
 4 agreements in their entirety are unenforceable because they contain non-severable PAGA waivers
 5 and two California appellate courts have previously held that SolarCity’s arbitration agreements
 6 with nearly identical language were unenforceable under *Iskanian*.⁴ See *Wan v. SolarCity Corp.*,
 7 No. H042103, 2017 WL 25497, at *1 (Cal. Ct. App. Jan. 3, 2017), review denied (Mar. 22, 2017);
 8 *Altman v. SolarCity Corp.*, No. D067582, 2016 WL 2892733, at *3 (Cal. Ct. App. May 13, 2016),
 9 reh’g denied (June 8, 2016), review denied (July 27, 2016).⁵ Plaintiffs insist that offensive
 10 collateral estoppel or issue preclusion precludes SolarCity from enforcing these agreements
 11 against them. The Court disagrees.

12 Issue preclusion “prohibits the relitigation of issues argued and decided in a previous case,
 13 even if the second suit raises different causes of action.” *DKN Holdings LLC v. Faerber*, 61
 14 Cal.4th 813, 824 (2015). Issue preclusion applies “(1) after final adjudication (2) of an identical
 15 issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who
 16 was a party in the first suit or one in privity with that party.” *Id.* at 825.

17 In *Wan*, the plaintiff brought a PAGA claim against his former employer SolarCity
 18 following *Iskanian*. SolarCity unsuccessfully moved to compel arbitration of the plaintiff’s status
 19 as an aggrieved employee for purposes of his PAGA claim. *Wan*, 2017 WL 25497, at *2. On
 20 appeal, the appellate court first concluded that the arbitration agreement’s provision purporting to
 21 require arbitration of the plaintiff’s aggrieved status for purposes of the PAGA claim was
 22 unenforceable under *Iskanian*. *Id.* at *9. The court next held that the arbitration agreement’s
 23 waiver of the right to bring a representative PAGA claim in any forum, a provision that was
 24 unenforceable under *Iskanian*, was not severable from the arbitration agreement given that it

25 _____
 26 ⁴ At oral argument, SolarCity conceded that the agreements are identical in all material respects.

27 ⁵ Although *Wan* and *Altman* are unpublished California appellate court decisions, the Court is not
 28 precluded from citing them or relying on them for estoppel purposes. California Rule of Court
 8.1115(b)(1), which governs citation of unpublished decisions, provides an exception for cases
 where “the opinion is relevant under the doctrines of law of the case, res judicata, or collateral
 estoppel.”

1 states:

2 “Notwithstanding any other clause contained in this Agreement, the
3 preceding sentence shall not be severable from this Agreement in
4 any case in which the dispute to be arbitrated is brought as a class
action or collective action, or in a representative or private attorney
general capacity on behalf of a class of persons or the general
public.”

5 *Id.* at *11. Because the plaintiff brought his case as a private attorney general action, the non-
6 severability clause applied. The court therefore concluded: “the arbitration agreement contains an
7 invalid PAGA waiver under *Iskanian*, and that because the waiver is not severable, the entire
8 arbitration agreement is unenforceable.” *Id.* at 12.

9 In *Altman*, the plaintiff brought wage and hour claims as a class action and also a
10 representative PAGA action. 2016 WL 2892733 at * 1. SolarCity moved to compel arbitration of
11 plaintiff’s individual claims, including plaintiff’s status as an aggrieved employee, to dismiss the
12 class claims, and to stay the PAGA claims pending arbitration. *Altman*, 2016 WL 2892733, at *1.
13 The trial court denied SolarCity’s motion, and on appeal the court held that the PAGA waiver was
14 unenforceable under *Iskanian*. *Id.* at * 3 (citing *Securitas Security Services USA, Inc. v. Superior
15 Court of San Diego County*, 234 Cal.App.4th 1109, 1116–1117 (2015)). Having determined that
16 the waiver was unenforceable, the court next had to decide if it was nonetheless severable from the
17 arbitration agreement. *Id.* at 4. Citing the same language as did the *Wan* court—
18 “[n]otwithstanding any other clause in this Agreement, the preceding sentence shall not be
19 severable from this Agreement in any case in which the dispute to be arbitrated is brought as a . . .
20 representative action”—the court held that the invalid PAGA waiver was not severable and
21 therefore the entire arbitration agreement was unenforceable. *See also Securitas*, 234 Cal.App.4th
22 at 1126 (finding that a nearly identical arbitration agreement was unenforceable because it
23 contained a nonseverable PAGA waiver).

24 Issue preclusion does not compel this Court to hold that Farrohki and Whitford’s
25 arbitration agreements are likewise unenforceable in their entirety. The holdings in *Wan* and
26 *Altman* turned on the non-severability of the invalid PAGA waiver. The issue actually litigated
27 and necessarily decided was whether the invalid PAGA waiver was not severable and therefore the
28 arbitration agreement in its entirety unenforceable when the plaintiff brings a PAGA claim; these

1 cases did not address whether the invalid PAGA waiver is not severable under these agreements
2 when the plaintiff does *not* bring a PAGA claim. Thus, *Wan* and *Altman* did not decide the issue
3 presented here: whether the PAGA waiver is not severable, and the entire arbitration agreement
4 unenforceable, when the plaintiff does not bring a PAGA claim. To put it another way, *Wan* and
5 *Altman* did not involve the identical factual issues as here because there the plaintiffs brought
6 PAGA claims and here they do not. See *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342 (1990).

7 Plaintiffs' insistence that *Wan* and *Altman* held that the arbitration agreements are "void
8 from the beginning" is not supported by the reasoning of those cases. After the courts determined
9 that the arbitration agreements included an unenforceable PAGA waiver, they went on to analyze
10 whether the waiver was severable. They held the waiver was not severable because the plain
11 language of the non-severability clause applied; namely, the PAGA waiver was not severable
12 because the plaintiffs sought to bring their actions as private attorney generals. *Wan*, 2017 WL
13 25497, at *10-11; *Altman*, 2016 WL 2892733, at *4. If, as Plaintiffs contend, the agreements were
14 void from the beginning solely because of the presence of the PAGA waiver, there was no need
15 for the courts to analyze whether the PAGA waiver was severable. It is thus unsurprising that
16 Plaintiffs do not cite any case that holds an entire arbitration agreement is void *ab initio* merely
17 because it includes a PAGA waiver. Thus, issue preclusion does not compel this Court to hold
18 that Farrohki and Whitford's arbitration agreements are void and unenforceable in their entirety.

19 **2. The Invalid PAGA Waiver is Severable**

20 Having concluded that issue preclusion does not require a finding of unenforceability, the
21 Court must still address the effect of the presence of the invalid PAGA waiver. The Court
22 previously raised a concern as to whether Farrohki and Whitford have standing to challenge the
23 enforceability of the arbitration agreement based on the invalid PAGA waiver given that they do
24 not bring PAGA claims. And indeed, in similar circumstances, some courts have held that they do
25 not. See, e.g., *Gerton v. Fortiss, LLC*, No. 15-CV-04805-TEH, 2016 WL 613011 *3 n.3 (N.D.
26 Cal. Feb. 16, 2016) (holding that a plaintiff did not have standing to challenge a PAGA waiver
27 invalid under *Iskanian* as a provision making the arbitration agreement unconscionable given that
28 he did not and could not bring a PAGA claim).

1 In any event, assuming, without deciding, that Farrohki and Whitford can argue that the
2 arbitration agreement in its entirety is unenforceable because it contains a PAGA waiver that does
3 not apply to their claims, the Court concludes that the invalid PAGA waiver is severable. “Where
4 a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful,
5 in whole or in part, the contract is void as to the latter and valid as to the rest.” Cal. Civ. Code §
6 1599; *see also Fair v. Bakhtiari*, 195 Cal.App.4th 1135, 1157, 125 Cal.Rptr.3d 765 (2011) (“Civil
7 Code section 1599 codifies the common law doctrine of severability of contracts.”) That is, “[i]f
8 the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be
9 enforced.” *Marathon Entm’t, Inc. v. Blasi*, 42 Cal.4th 974, 996 (2008) (internal quotation marks
10 and citations omitted). However, “[i]f the illegality is collateral to the main purpose of the
11 contract, and the illegal provision can be extirpated from the contract by means of severance or
12 restriction, then such severance and restriction are appropriate.” *Id.* “[C]ourts will generally sever
13 illegal provisions and enforce a contract when nonenforcement will lead to an undeserved benefit
14 or detriment to one of the parties that would not further the interests of justice.” *Armendariz v.*
15 *Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 127 (2000)

16 Farrohki and Whitford do not argue, and the Court does not find, that the central purpose
17 of the parties’ arbitration agreement is tainted with illegality; indeed, with the exception of the
18 PAGA waiver, Plaintiffs do not contend that any other provision is invalid. Further, the single
19 invalid provision—the PAGA waiver—has no applicability to Farrohki and Whitford’s case given
20 that they do not bring any PAGA claims. Thus, the PAGA waiver should be severed and the
21 remainder of the agreement enforced.

22 Farrohki and Whitford nonetheless appear to assert that the Court cannot sever the PAGA
23 waiver under the plain language of the arbitration agreements. In particular, because the
24 agreements state that the class, collective and PAGA waiver “shall not be severable from this
25 Agreement in any case in which the dispute to be arbitrated is brought as a class or collective
26 action, or in a representative or private attorney general capacity on behalf of a class of persons or
27 the general public,” and Farrohki and Whitford bring their wage and hour claims as a class and
28 collective action, the PAGA claims are not severable. The Court does not agree.

1 The agreements' requirement that Farrohki and Whitford arbitrate their individual claims
 2 and waive any class and collective claims is valid following *Epic*. It makes no sense to read the
 3 arbitration agreements as precluding the severability of the PAGA waiver because, in violation of
 4 their arbitration agreements, Farrohki and Whitford nonetheless filed suit in federal court and
 5 asserted claims on behalf of a class. To put it another way, the PAGA waiver is severable if no
 6 PAGA claim is brought. To hold otherwise would violate the "liberal federal policy favoring
 7 arbitration." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011).

8 Accordingly, to the extent Plaintiffs have standing to challenge the invalid PAGA waiver,
 9 the Court severs the PAGA waiver and grants SolarCity's motion to compel arbitration of
 10 Farrohki and Whitford's claims.

11 **C. A Stay Pending Arbitration is Appropriate**

12 Having concluded that Plaintiffs Whitworth, Carranza, and Frias's PAGA claims are not
 13 subject to arbitration, the question is whether these claims should proceed in this Court while the
 14 arbitration proceeds on all of Plaintiffs' individual claims or whether the claims should be stayed.
 15 SolarCity insists that the claims should be stayed and Plaintiffs oppose any such stay.

16 Pursuant to 9 U.S.C. § 3, the Court must "stay litigation of arbitral claims pending
 17 arbitration of those claims 'in accordance with the terms of the agreement.'" *AT&T Mobility LLC*
 18 *v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting 9 U.S.C. § 3). If a court "determines that all of
 19 the claims raised in the action are subject to arbitration," the court "may either stay the action or
 20 dismiss it outright." *Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072, 1074 (9th Cir.
 21 2014). "However, if a court finds that the plaintiff asserts both arbitrable and nonarbitrable claims,
 22 district courts have 'discretion whether to proceed with the nonarbitrable claims before or after the
 23 arbitration and [have] ... authority to stay proceedings in the interest of saving time and effort for
 24 itself and litigants.'" *Jenkins v. Sterling Jewelers, Inc.*, 2018 WL 922386, at *7 (S.D. Cal. Feb. 16,
 25 2018) (quoting *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984)); *see also Leyva v.*
 26 *Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (holding that the defendant "was
 27 not entitled to a stay pursuant to section 3 of the Arbitration Act" on a nonarbitrable claim, but
 28 noting that "sound reasons may exist" for the district court to stay the action based on its inherent

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Northern District of California

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authority to control its docket).

While the PAGA claims are not identical to the claims compelled to arbitration (overtime, minimum wage, rest period, wages on termination, wage statements, indemnification, and unfair business practices claims), the factual allegations underlying the claims are the same. Further, “Plaintiffs[’] PAGA claims are derivative in nature of [their] substantive claims that will proceed to arbitration, and the outcome of the nonarbitrable PAGA claims will depend upon the arbitrator’s decision.” *Shepardson v. Adecco USA, Inc.*, No. 15-CV-05102-EMC, 2016 WL 1322994, at *6 (N.D. Cal. Apr. 5, 2016); *see also Hermosillo v. Davey Tree Surgery Co.*, 2018 WL 3417505 * 20 (N.D. Cal. July 13, 2018) (staying PAGA claim pending arbitration of individual wage and hour claims). While a stay is not mandatory, the Court in its discretion GRANTS SolarCity’s request to stay the PAGA claims pending arbitration of the individual claims. A stay is most consistent with Rule 1 of the Federal Rules of Civil Procedure and these Plaintiffs’ agreement to arbitrate their individual claims.

CONCLUSION

For the reasons stated above, SolarCity’s motion to compel arbitration is GRANTED IN PART AND DENIED IN PART: it is DENIED as to Plaintiffs Whitworth, Carranza, and Frias’s PAGA claims; and it is GRANTED as to Plaintiffs Whitworth, Carranza, and Frias’s non-PAGA claims and all of Plaintiffs Farrohki and Whitford’s claims.

SolarCity’s motion for a stay pending arbitration is GRANTED.

IT IS SO ORDERED.

Dated: August 21, 2018



JACQUELINE SCOTT CORLEY
United States Magistrate Judge