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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JENNIFER LUCERO and RAFAEL
12 SOLORZANO, individually and on
behalf of all others similarly situated,

13 Plaintiffs,

14 v.

15 SEARS HOLDINGS MANAGEMENT
CORPORATION, a Delaware
16 Corporation; SEARS, ROEBUCK,
AND CO., a New York Corporation;
and DOES 1-50, inclusive,

17 Defendants.
18

Case No.: 14-cv-1620 AJB (WVG)

ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
STAY ACTION

(Doc. No. 6.)

19
20 The matter before the Court is Defendants Sears Holdings Management Corporation
21 and Sears, Roebuck, and Co.'s motion to compel arbitration and stay the action (Doc. No.
22 6). Having fully and carefully considered the motion and opposition, the Court **GRANTS**
23 the motion and stays the action for the reasons set forth herein.

24 **I. BACKGROUND**

25 **A. Procedural Background**

26 On January 29, 2014, Plaintiffs Jennifer Lucero and Rafael Solorzano (collectively,
27 "Plaintiffs") filed a complaint, individually and on behalf of all others similarly situated, in
28 the Superior Court of California for the County of San Diego, Case No. 37-2014-00000431-

1 CU-OE-CTL. Lucero was employed by Defendants as an assistant store manager from
2 February 2012 to April 2014. (Not. Remov. Ex. A ¶ 6 (“FAC”), Doc. No. 1-1.) Solorzano
3 was employed by Defendants as an assistant store manager since September 2007. (*Id.* ¶ 7.)
4 At all times during their employment with Defendants, Plaintiffs were classified as salaried
5 employees exempt from overtime pay and legally required meal breaks. (*Id.* ¶¶ 6-7.)

6 On June 3, 2014, Plaintiffs filed their First Amended Complaint asserting five causes
7 of action: (1) unfair competition; (2) failure to pay overtime compensation; (3) failure to
8 provide accurate itemized wage statements; (4) failure to provide wage when due; and (5)
9 violation of the Private Attorney General Act (“PAGA”). (FAC ¶¶ 55-104.) Plaintiffs seek
10 relief in the form of restitution, unpaid wages, penalties under the Labor Code and Industrial
11 Welfare Commission, injunctive relief, declaratory relief, and costs. (*Id.* at 40-41.)

12 On July 8, 2014, Defendants removed the action to this Court (Doc. No. 1) and on
13 July 29, 2014, Defendants moved to compel arbitration and stay the action (Doc. No. 6).
14 Plaintiffs filed an opposition on August 15, 2014, and Defendants later filed a reply. (Doc.
15 Nos. 14-15.)

16 B. Factual Background

17 During the week of April 2, 2012, Defendants introduced an arbitration pol-
18 icy/agreement (“the Agreement”) under which participating employees and Defendants each
19 waived the right to pursue certain claims in court, and agreed instead to submit such
20 disputes to binding arbitration. (Kaselitz Decl. ¶ 5, Doc. No. 6-2.) The Agreement provides:

21 Under this Agreement, and subject to certain exceptions specified within the
22 Agreement, all employment-related disputes between you (“Associate”) and
23 Company that are not resolved informally shall be resolved by binding
24 arbitration in accordance with the terms set forth below. This Agreement
applies equally to disputes related to Associate’s employment raised by either
Associate or by Company.

25 **Accordingly, Associate should read this Agreement carefully, as it**
26 **provides that virtually any dispute related to Associate’s employment**
27 **must be resolved only through binding arbitration. Arbitration replaces**
28 **the right of both parties to go to court; including the right to have a jury**
decide the parties’ claims. Also, this Agreement prohibits Associate and
Company from filing, opting into, becoming a class member in, or
recovering through a class action, collective action, representative action
or similar proceeding.

1 **If Associate does not wish to be bound by the Agreement, Associate must**
2 **opt out by following the steps outlined in this Agreement within 30 days**
3 **of receipt of this Agreement. Failure to opt out within the 30-day period**
4 **will demonstrate Associate’s intention to be bound by this Agreement and**
 Associate’s agreement to arbitrate all disputes arising out of or related to
 Associate’s employment as set forth below.

5 (*Id.* Ex. A at 1, Doc. No. 6-4 (emphasis in original).)

6 Employees received the Agreement via training portals. (Kaselitz Decl. ¶¶ 3-9.) Prior
7 to September 14, 2012, employees participated in training and acknowledged their receipt
8 of employment policies using Defendants’ “My Personal Information” (“MPI”) online portal
9 and the former training system, the “Online Performance Training System.” (*Id.* ¶ 6.)
10 Employees were required to complete a series of policy acknowledgments in the MPI portal,
11 including the Agreement. (*Id.* ¶ 9.) Once an employee clicks the red-colored link for the
12 Agreement acknowledgment, the employee is brought to a page with four links identified
13 as: (1) Arbitration Policy/Agreement (PDF); (2) Arbitration Policy/Agreement (Text); (3)
14 “Opt Out Form Action is required to protect your legal rights to sue the Company in court
15 and/or to participate in any way in a class action, collective action or representative action”;
16 and (4) Acknowledgment receipt of the Arbitration Policy/Agreement. (*Id.* ¶¶ 10-11.) After
17 reviewing the Agreement and opt out form, employees acknowledge their receipt of the
18 Agreement by clicking on the “Acknowledge receipt of the Arbitration Policy/Agreement”
19 link. (*Id.* ¶ 12.) After clicking on the link, the employee receives a message:

20 **By clicking below, I acknowledge that I have reviewed and agreed to the**
21 **terms and conditions set forth in the Arbitration Policy/Agreement. I also**
22 **understand that I may change my mind and opt out of the Agreement within**
 30 days of today’s date by returning to the Arbitration Policy/Agreement
 Opt Out form located at the end of the Agreement.

23 (*Id.* ¶ 13 (emphasis in original).) To submit the acknowledgment, the employee must click
24 a “Yes” button, and then click “Submit.” (*Id.* ¶ 14.)

25 Once an employee completes the acknowledgment in the MPI portal, the human
26 resources system is automatically updated to reflect the employee’s receipt and acknowledg-
27 ment of the Agreement. (*Id.* ¶ 15.)

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1 Defendants hired Lucero on January 23, 2012, and Solorzano on September 18, 2000.
2 (*Id.* ¶ 19.) Plaintiffs received the Agreement as part of the 2012 launch of the new
3 Agreement in the week of April 2, 2012. (*Id.* ¶ 20.) Lucero acknowledged receipt of and
4 accepted the Agreement on April 11, 2012, and Solorzano acknowledged receipt of and
5 accepted the Agreement on April 26, 2012, both in accordance with the procedure set forth
6 above. (*Id.* ¶¶ 23-24; Exs. C & D.) Neither plaintiff revoked their acceptance of the
7 Agreement within the 30-day window nor did either attempt to do so any time thereafter.
8 (Kaselitz Decl. ¶ 26.)

9 Following the filing of this action, Defendants' counsel provided Plaintiffs' counsel
10 with the Agreement and asked Plaintiffs to stipulate to individual arbitration, but Plaintiffs
11 refused. (Liburt Decl. ¶ 2, Doc. No. 6-1.) Accordingly, Defendants ask this Court to compel
12 individual arbitration. (Doc. No. 6.)

13 **II. LEGAL STANDARD**

14 The Federal Arbitration Act ("FAA") governs the enforcement of arbitration
15 agreements involving interstate commerce. 9 U.S.C. § 2. Pursuant to Section 2 of the FAA,
16 an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such
17 grounds as exist at law or in equity for the revocation of any contract." *Id.* The FAA permits
18 "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a
19 written agreement for arbitration [to] petition any United States District Court . . . for an
20 order directing that such arbitration proceed in the manner provided for in [the arbitration]
21 agreement." *Id.* § 4. Further, given the liberal federal policy favoring arbitration, the FAA
22 "mandates that district courts shall direct parties to proceed to arbitration on issues as to
23 which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470
24 U.S. 213, 218 (1985). Thus, in a motion to compel arbitration, the district court's role is
25 limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2)
26 whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank Nat. Ass'n*,
27 673 F.3d 947, 955-56 (9th Cir. 2012) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
28 207 F.3d 1126, 1130 (9th Cir. 2000)).

1 **III. DISCUSSION**

2 **A. Existence of a Valid Agreement**

3 In opposing the motion to compel arbitration, Plaintiffs do not dispute that they
4 signed the Agreement, or that their claims, other than the PAGA claims, are within the
5 purview of the Agreement. (Pls.' Resp. 1, Doc. No. 14 ("The disputed issue in this motion
6 is the PAGA waiver in Defendant's agreement.")). Rather, Plaintiffs assert that the
7 Agreement is unenforceable as to the representative PAGA claims pursuant to the California
8 Supreme Court's recent decision in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (Cal.
9 2014). Plaintiffs argue that, because the PAGA waiver is invalid and the Agreement states
10 that the PAGA waiver is not severable, the entire Agreement is unenforceable. (*Id.* at 4.)

11 As an initial matter, the Court notes that the validity of the Agreement has been
12 litigated in the Southern District of California. *See Velazquez v. Sears, Roebuck & Co.*, No.
13 13CV680-WQH-DHB, 2013 WL 4525581, at *1 (S.D. Cal. Aug. 26, 2013) (determining the
14 claims raised were arbitrable and staying the case pending arbitration). The *Velazquez* court
15 undertook a thorough and careful analysis of the Sears arbitration agreement and its
16 conscionability. The court concluded the provisions were not substantively or procedurally
17 unconscionable. (*Id.* at *4-7.) The court also addressed PAGA claims and concluded that
18 pursuant to the FAA, the PAGA and class action waivers did not render the agreement
19 substantively unconscionable (*id.* at *6) and were enforceable (*id.* at *7). Among other
20 sources, the *Velazquez* court cited the United States Supreme Court case, *AT&T Mobility*
21 *LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), which provided, "[w]hen state law
22 prohibits outright the arbitration of a particular type of claim, the analysis is straightforward:
23 the conflicting rule is displaced by the FAA."

24 In the present matter, Plaintiffs argue there are numerous reasons that the motion to
25 compel should be denied, including that contractual waiver of PAGA claims is contrary to
26 public policy, that the FAA does not preempt state law that protects substantive rights from
27 forfeiture, and that the FAA does not bind non-governmental entities to private arbitration
28 agreements, among others. As discussed, the arguments revolve around *Iskanian*.

1 In *Iskanian*, the state supreme court “conclude[d] that where . . . an employment
2 agreement compels the waiver of representative claims under the PAGA, it is contrary to
3 public policy and unenforceable as a matter of state law.” *Iskanian*, 59 Cal. 4th at 384. The
4 supreme court reasoned that “[t]he government entity on whose behalf the plaintiff files suit
5 is always the real party in interest in the suit,” and that an employee could not waive the
6 government’s right to enforce the Labor Code via representative PAGA claims. *Id.* at 382.
7 Thus, the supreme court determined that under California law, an employee’s right to bring
8 a representative PAGA claim is not waiveable and therefore any purported waiver in an
9 arbitration agreement is unenforceable as a matter of state law. *Id.* at 383-84. The *Iskanian*
10 decision also discussed the FAA, with the supreme court determining that the rule against
11 waiving representative PAGA claims is not preempted by the FAA. *See id.* at 385, 388-89.

12 The Court notes that it is not bound by the state supreme court’s interpretation of
13 federal law. *Einaradt v. Stone*, No. C-96-2111 MHP, 1996 WL 532114, at *5 (N.D. Cal. Sept.
14 16, 1996) (“Although a federal court may find state court interpretations of federal law
15 instructive, federal courts are the final arbiters of federal law and are not bound by state
16 court decisions interpreting a federal statute.”). Thus, although Plaintiffs rely heavily on
17 *Iskanian* and the cases cited in that opinion,¹ this Court is not bound by the state supreme
18 court’s determination that the FAA does not preempt the state’s rule that arbitration
19 agreements are unconscionable if they waive an employee’s right to bring a representative
20 PAGA claim. As other cases have demonstrated, the FAA preempts certain rules that
21 classify some arbitration agreements as unconscionable. *See, e.g., Concepcion*, 131 S. Ct.
22 at 1753 (holding that a California rule was preempted by the FAA and noting that the rule
23 was preempted by the FAA because it “stands as an obstacle to the accomplishment and
24 execution of the full purposes and objectives of Congress” (citation and quotation marks
25 omitted)). The FAA provides that an arbitration agreement “shall be valid, irrevocable, and
26 enforceable, save upon such grounds as exist at law or in equity for the revocation of any

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28 ¹ *E.g., Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

1 contract.” 9 U.S.C. § 2. Accordingly, arbitration agreements may “be invalidated by
2 generally applicable contract defenses, such as fraud, duress, or unconscionability, but not
3 by defenses that apply only to arbitration or that derive their meaning from the fact that an
4 agreement to arbitrate is at issue.” *Concepcion*, 131 S. Ct. at 1746 (internal quotation marks
5 omitted). Notably, however, even “a doctrine normally thought to be generally applicable,
6 such as duress or . . . unconscionability” can be impermissibly “applied in a fashion that
7 disfavors arbitration.” *Id.* at 1747.

8 Several other federal courts have recently faced the issue presented here, and have
9 determined that the rule against representative PAGA claim waivers set forth in *Iskanian*
10 treats arbitration agreements unfavorably. *See Mill v. Kmart Corp.*, No. 14-CV-02749-KA-
11 W, 2014 WL 6706017, at *7 (N.D. Cal. Nov. 26, 2014) (discussing substantive
12 unconscionability and providing that despite *Iskanian* and in accordance with *Concepcion*,
13 the FAA preempts California’s rule against PAGA waivers); *Langston v. 20/20 Companies,*
14 *Inc.*, No. EDCV 14-1360 JGB SPX, 2014 WL 5335734, at *8 (C.D. Cal. Oct. 17, 2014)
15 (concluding that “the FAA preempts California’s rule against arbitration agreements that
16 waive an employee’s right to bring representative PAGA claims”); *Chico v. Hilton*
17 *Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 WL 5088240, at *12-13 (C.D. Cal. Oct.
18 7, 2014) (noting that “numerous federal courts have determined that the FAA preempts
19 California’s rule prohibiting waiver of representative PAGA claims” and “agree[ing] and
20 adopt[ing] the reasoning of these cases”); *Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13-
21 cv01619, 2014 WL 4691126, at *11 (E.D. Cal. Oct. 1, 2014) (“It is clear that the majority
22 of federal district courts find that PAGA action waivers are enforceable because a rule
23 stating otherwise is preempted by the FAA and *Concepcion*. As such, this Court holds that
24 representative PAGA waivers are enforceable.”); *Fardig v. Hobby Lobby Stores, Inc.*, No.
25 SACV 14-00561 JVS, 2014 WL 4782618, at *4 (C.D. Cal. Aug. 11, 2014) (“Even in light
26 of *Iskanian*, the Court continues to hold that the rule making PAGA waivers unenforceable
27 is preempted by the FAA. There is nothing in *Iskanian* that persuades the Court otherwise,
28 and the Court is not bound by the California Supreme Court’s understanding of federal

1 law.”). The *Iskanian* court concluded that an employee’s agreement not to bring a
2 representative PAGA action is contrary to public policy if it takes place before any dispute
3 arises, but nevertheless explained that, after a labor dispute arises, an employee is free to
4 choose not to bring a representative PAGA claim. *See Iskanian*, 59 Cal. 4th at 383. As one
5 federal court recently explained:

6 Thus, although the [*Iskanian*] court asserts that the basis for holding represen-
7 tative PAGA claim waivers unconscionable is that an employee cannot waive
8 a right that properly belongs to the government, the court nevertheless
9 acknowledges that an employee may actually sometimes waive the govern-
10 ment’s right to bring a PAGA claim. *See id.* That inconsistency illuminates the
11 fact that, it is not an individual’s ability to waive the government’s right that
12 drives the court’s rule, but rather the [*Iskanian*] court’s general disfavor for
13 pre-existing agreements to arbitrate such claims individually.

14 *Langston*, 2014 WL 5335734, at *7. This Court agrees.

15 Plaintiffs discuss the United States Supreme Court’s decision in *Waffle House* in
16 support of their assertion that an individual cannot waive the government’s interest in
17 litigating PAGA claims. (Pls.’ Resp. 11, 18); *Waffle House*, 534 U.S. at 279. As discussed
18 by other federal district courts, *Waffle House* held that an employee’s arbitration agreement
19 could not prevent the EEOC from bringing suit against the employer for labor law violations
20 with respect to the employee. *Id.* at 294; *see also Langston*, 2014 WL 5335734, at *7. The
21 *Waffle House* EEOC suits differ from agreements to arbitrate PAGA claims on an individual
22 basis. Notably, in EEOC actions, the EEOC controls the litigation, but in PAGA claims, the
23 employee is the named plaintiff and directs the litigation. *See Langston*, 2014 WL 5335734,
24 at *7 (citing *Fardig*, 2014 WL 4782618, at *4).

25 As discussed, Plaintiffs set forth numerous arguments in light of *Iskanian* in support
26 of its various attacks on the Agreement. The Court has carefully reviewed the authorities
27 and arguments and is unconvinced of their merit. Instead, the Court reaches the same
28 conclusion as several other courts on this matter—the FAA preempts California’s rule
29 against arbitration agreements that waive an employee’s right to bring representative PAGA
30 claims. As such, the Court is satisfied that the Agreement is valid despite the challenges

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1 lodged by Plaintiffs and thus moves to the next step of the requisite analysis regarding
2 arbitration.²

3 **B. Agreement Encompasses the Disputes at Issue**

4 Defendants assert that the Agreement encompasses the disputes at issue and Plaintiffs,
5 outside of their attacks regarding the PAGA, do not dispute Defendants' assertion. The
6 Court also agrees. Plaintiffs bring various claims related to their employment with
7 Defendants, which are clearly in the purview of the Agreement.

8 Having satisfied its burden, Defendants have established that a valid agreement
9 encompasses the disputes at issue. As such, the Court grants the pending motion as to
10 arbitration and compels individual arbitration of Plaintiffs' claims.

11 **IV. REQUEST FOR STAY**

12 Defendants also request that the action be stayed. The FAA provides that upon
13 determining that a matter is referable to arbitration under an agreement, a court must stay
14 the pending matter. 9 U.S.C. § 3. Defendants have moved to stay this action pending the
15 outcome of arbitration proceedings. As discussed herein, the Court finds that the claims
16 raised by Plaintiffs are referable to arbitration pursuant to the Agreement. As such, the Court
17 stays this matter pursuant to 9 U.S.C. § 3.

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27 ² Having determined the Agreement's validity in light of the FAA and despite
28 *Iskanian*, the Court need not address Plaintiffs' argument that the opt-out fails to make
the Agreement enforceable. (*See* Pls.' Mem. 19.)

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants' Motion to Compel Arbitration and Stay the
3 Action (Doc. No. 6) is **GRANTED** and this case is hereby **STAYED** pending arbitration.
4 The Clerk of Court is instructed to administratively close this case without prejudice to any
5 party moving to have the case reopened for good cause.

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7 IT IS SO ORDERED.

8 DATED: December 2, 2014

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Hon. Anthony J. Battaglia
11 U.S. District Judge
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