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December 4, 2014

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Sakkab v. Luxottica Retail North America, Inc.*, Case No. 13-55184
Appellee's Citation of Supplemental Authorities [F.R.A.P. 28(j)]

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellee Luxottica Retail North America Inc. ("LRNA") respectfully submits for consideration in the above-referenced appeal the following decisions issued after briefing concluded: (1) *Lucero v. Sears Holdings Mgmt. Corp.* ("*Lucero*"), 14-cv-01620 AJB (WVG) (S.D. Cal. 2014); and (2) *Mill v. Kmart Corp.* ("*Mill*"), 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. 2014).

The California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*"), 59 Cal. 4th 348 (2014) held that the Federal Arbitration Act ("FAA") does not preempt the California Private Attorneys General Act of 2004 ("PAGA") because the FAA "aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state Agency." *Id.* at 383. *Lucero* explains that *Iskanian* is internally inconsistent and is preempted by the FAA because it disfavors arbitration:

> "'Thus, although the [*Iskanian*] court asserts that the basis for holding representative PAGA claim waivers unconscionable is that an employee cannot waive a right that properly belongs to the government, the court nevertheless acknowledges that an employee may actually sometimes waive the government's right to bring a PAGA claim. [Citation omitted] That inconsistency illuminates the fact that, it is not an individual's ability to waive the government's

> right that drives the court's rule, but rather the [*Iskanian*] court's general disfavor for pre-existing agreements to arbitrate such claims individually.'"

Lucero, at p. 8, *citing Langston v. 20/20 Companies, Inc.* ("*Langston*"), 2014 U.S. Dist. LEXIS 151477 (C.D. Cal. 2014).[1]

Lucero and *Mill* conclude that the FAA preempts *Iskanian's* rule against PAGA waivers under the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Lucero*, pp. 7-8; *Mill*, 2014 U.S. Dist. LEXIS 165666 at *18. These two recent decisions affirm LRNA's position that the Court should follow U.S. Supreme Court precedent preempting any state law or policy that, like PAGA, conflicts with the FAA's policy of enforcing agreements requiring bilateral arbitration. *See* LRNA's Answering Brief, pp. 19-29, 32-36.

Sincerely,

/s/ *Keith A. Jacoby*

Enclosures: Attachment A, *Lucero v. Sears Holdings Mgmt. Corp.*, 14-cv-01620 AJB (WVG) (S.D. Cal. 2014); Attachment B, *Mill v. Kmart Corp.*, 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. 2014)

cc: See Attached Certificate of Service

[1] LRNA submitted the *Langston* decision for the Court's consideration on October 21, 2014.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6, I certify that the body of the above letter does not exceed 350 words.

Dated: December 4, 2014

Respectfully submitted,

By: */s/ Keith A. Jacoby*

KEITH A. JACOBY
SCOTT LIDMAN
JUDY M. IRIYE
Attorneys for Defendant/Appellee
LUXOTTICA RETAIL NORTH AMERICA INC.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 4, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Jonna Newcomb-Carter*

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ATTACHMENT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JENNIFER LUCERO and RAFAEL SOLORZANO, individually and on behalf of all others similarly situated, Plaintiffs, v. SEARS HOLDINGS MANAGEMENT CORPORATION, a Delaware Corporation; SEARS, ROEBUCK, AND CO., a New York Corporation; and DOES 1-50, inclusive, Defendants.	Case No.: 14-cv-1620 AJB (WVG) ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY ACTION (Doc. No. 6.)

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

I. BACKGROUND

A. Procedural Background

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

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

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

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

B. Factual Background

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

> Under this Agreement, and subject to certain exceptions specified within the Agreement, all employment-related disputes between you ("Associate") and Company that are not resolved informally shall be resolved by binding 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.
>
> **Accordingly, Associate should read this Agreement carefully, as it provides that virtually any dispute related to Associate's employment must be resolved only through binding arbitration. Arbitration replaces 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.**

> **If Associate does not wish to be bound by the Agreement, Associate must opt out by following the steps outlined in this Agreement within 30 days of receipt of this Agreement. Failure to opt out within the 30-day period 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.**

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

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

> **By clicking below, I acknowledge that I have reviewed and agreed to the terms and conditions set forth in the Arbitration Policy/Agreement. I also 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.**

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

Once an employee completes the acknowledgment in the MPI portal, the human resources system is automatically updated to reflect the employee's receipt and acknowledgment of the Agreement. (*Id.* ¶ 15.)

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

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

II. LEGAL STANDARD

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

III. DISCUSSION

A. Existence of a Valid Agreement

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

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

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

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

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

[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).

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

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

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

> Thus, although the [*Iskanian*] court asserts that the basis for holding representative PAGA claim waivers unconscionable is that an employee cannot waive a right that properly belongs to the government, the court nevertheless acknowledges that an employee may actually sometimes waive the government's right to bring a PAGA claim. *See id.* That inconsistency illuminates the fact that, it is not an individual's ability to waive the government's right that drives the court's rule, but rather the [*Iskanian*] court's general disfavor for pre-existing agreements to arbitrate such claims individually.

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

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

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

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

B. Agreement Encompasses the Disputes at Issue

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

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

IV. REQUEST FOR STAY

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

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

V. CONCLUSION

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

IT IS SO ORDERED.

DATED: December 2, 2014

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

ATTACHMENT B

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1	2014 U.S. Dist. LEXIS 165666	done	done
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Citation #1
2014 U.S. Dist. LEXIS 165666

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Mill v. Kmart Corp., 2014 U.S. Dist. LEXIS 165666 (N.D. Cal. Nov. 26, 2014)

Restrictions: *Analysis (ALLNEGATIVE)*
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 {Caution} -- Possible negative treatment

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 {Cited} -- Citation information available

SHEPARD'S SUMMARY

Restricted *Shepard's* Summary

No subsequent appellate history.

Citing References: None

LEXSEE

KERRY MILL, Plaintiff, v. KMART CORPORATION, et al., Defendants.

Case No. 14-cv-02749-KAW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2014 U.S. Dist. LEXIS 165666

November 26, 2014, Decided
November 26, 2014, Filed

CORE TERMS: arbitration, arbitration agreement, unconscionable, unconscionability, E-Sign Act, opt, state law, compel arbitration, unenforceable, acknowledgement, procedurally, reply, agreement to arbitrate, enforceable, arbitrator, portal's, clicking, substantively, electronic, quotation, preempted, print, binding arbitration, class action, failure to comply, invalidated, encompasses, referable, consumer, labeled

COUNSEL: [*1] For Kerry Mill, on behalf of herself, all other similarily situtated, and the general public, Plaintiff: Chaim Shaun Setareh, LEAD ATTORNEY, Setareh Law Group, Beverly Hills, CA; Neil Michael Larsen, Setareh Law Group, Los Angeles, CA.

For KMART Corporation, an Illinois corporation, Sears Holdings Management Corporation, a Delaware corporation, Defendant: Christian N Brown, Orrick, Herrington & Sutcliffe, San Francisco, CA; Joseph Charles Liburt, Orrick, Herrington & Sutcliffe LLP, Menlo Park, CA.

JUDGES: KANDIS A. WESTMORE, United States Magistrate Judge.

OPINION BY: KANDIS A. WESTMORE

OPINION

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION

Dkt. No. 14

On September 2, 2014, Defendants Kmart Corporation ("Kmart") and Sears Holding Management Corporation ("SHMC") filed a Motion to Compel Arbitration and Stay Action pursuant to the arbitration agreement introduced in 2010 under which participating employees and Defendants waived their right to pursue employment-related claims in court in favor of submitting such disputes to binding arbitration. (Defs.' Mot., Dkt. No. 14 at 3.)

On November 25, 2014, the Court held a hearing. For the reasons set forth below, the Court finds the arbitration agreement [*2] enforceable and, accordingly, GRANTS Defendants' Motion to Compel Arbitration and Stay Action.

I. BACKGROUND

During the week of April 2, 2012, Kmart introduced an arbitration policy/agreement ("Agreement") under which participating employees and Kmart each waived the right to pursue employment-related claims in court, and, instead, agreed to submit such disputes to binding arbitration. (Decl. of Kaselitz Decl., "Kaselitz Decl.," Dkt. No. 11-2 ¶ 5). The Agreement contains an introduction, which states:

> Under this Agreement, and subject to certain exceptions specified within the Agreement, all employment-related disputes between you ("Associate") and Company that are not resolved informally shall be resolved by binding 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.
>
> **Accordingly, Associate should read this Agreement carefully, as it provides that virtually any dispute related to Associate's employment must be resolved only through binding arbitration. Arbitration replaces the right of both parties to go to court, including the right to have a jury decide the parties'** [*3] **claims. Also, this Agreement prohibits Associate from filing, opting into, becoming a class member in, or recovering through a class action, collective action, representative action or similar proceeding.**
>
> **If Associate does not wish to be bound by the Agreement, Associate must opt out by following the steps outlined in this Agreement within 30 days of receipt of this Agreement. Failure to opt out within the 30-day period 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.**

(Arbitration Agreement, Kaselitz Decl., Ex. A at 1(emphasis in original).) The Agreement further provides:

> Except as it otherwise provides, this Agreement applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, pay, benefits, breaks and rest periods, termination, discrimination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, as amended Family and Medical Leave Act, Fair Labor Standards Act, [*4] Employee retirement and Income Security Act, Genetic Information Non-Disclosure Act, and any and all state statutes addressing the same or similar subject matters, and all other state or federal statutory and common law claims.

Id.

Prior to September 14, 2012, Kmart employees participated in trainings and acknowledged their receipt of various employment policies using both Kmart's My Personal Information ("MPI") portal and the former training system known as the "Online Performance Training System." (Kaselitz Decl. ¶ 7). Once logged into the MPI portal, employees may print any documents or pages viewed in the portal, using Kmart-owned equipment and supplies and at no cost to the employee. *Id.* at ¶ 8. Prior to September 14, 2012, employees were required to complete a series of policy acknowledgements in the MPI portal. *Id.* at ¶ 9. Prior to acknowledging the receipt of the Agreement, the link to the Agreement appears in red-colored font on the "Policy Acknowledgements" page. *Id.* at ¶ 10. Upon clicking the link for the Agreement acknowledgement, the employee is brought to a page containing four additional links, labeled (i) "Arbitration Policy/Agreement (PDF)"; (ii) "Arbitration Policy/Agreement [*5] (Text)"; (iii) "Opt Out form Action is required to protect your legal rights to sue the Company in court and/or to participate in any way in a class action, collective action or representative action"; and (iv) "Acknowledgement receipt of the Arbitration Policy/Agreement." *Id.* at ¶ 11. After reviewing the Agreement and Opt Out form, employees are asked to acknowledge their receipt of the Agreement by clicking on the "Acknowledge receipt of the Arbitration Policy/Agreement" link. *Id.* at ¶ 12. Upon clicking on the acknowledgement link, the employee receives the following message on the acknowledgement page:

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

Agreement.

Id. at ¶ 13 (emphasis in original). To submit their acknowledgement, employees are required to click on the "Yes" button and then click "Submit." *Id.* at ¶ 14.

Plaintiff Kerry Mill was hired by Kmart on September 14, 2011. (Kaselitz Decl. ¶ 19.) Plaintiff [*6] received the Agreement during the week of April 2, 2012. *Id.* at ¶ 20. On April 21, 2012, Plaintiff acknowledged receipt of the Agreement by clicking "Yes" and "Submit" on the Agreement's acknowledgement page. (Kaselitz Decl. ¶¶ 21-22, Ex. C.) Following her review and acceptance of the Agreement, Plaintiff had a 30-day period during which she could revoke her acceptance of the Agreement. (Kaselitz Decl. ¶ 23.) Plaintiff did not revoke her acceptance of the Agreement within the 30-day period, nor did she attempt to do so at any time thereafter. *Id.* at ¶ 24. Other employees did opt out. (*See* Kaselitz Decl., Ex. D.)

On May 13, 2014, Plaintiff filed a class action complaint in Alameda County Superior Court alleging violations of California wage and hour laws. Thereafter, it was removed to federal court. Plaintiff filed an amended complaint to add a claim for civil penalties under California's Private Attorneys General Act ("PAGA"), California Labor Code § 2698 *et seq.* (Am. Compl., Dkt. No. 5-1.)

On September 2, 2014, Defendants filed a motion to compel arbitration and to stay the action. On September 22, 2014, the Court granted the parties' stipulated briefing schedule for the instant motion. On September 23, 2014, Plaintiff [*7] filed her opposition. (Pl.'s Opp'n, Dkt. No. 18.) On October 3, 2014, Defendants filed their reply. (Defs.' Reply, Dkt. No. 19.) On October 6, 20, and 23, Defendants filed notices of supplemental authority. (Dkt. Nos. 20-22.)

On November 25, 2014, the Court held a hearing on the motion to compel arbitration.

II. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of a contract." 9 U.S.C. § 2. "Once the court has determined that an arbitration agreement relates to a transaction involving interstate commerce, thereby falling under the FAA, the court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the dispute falls within that agreement." *Ramirez v. Cintas Corp.*, No. C 04-00281 JSW, 2005 U.S. Dist. LEXIS 43531, 2005 WL 2894628, at *3 (N.D. Cal. Nov. 2, 2005) (citing 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

Generally, in deciding whether a dispute is subject to an arbitration agreement, the Court must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). As such, the Court's role "is limited to determining arbitrability and enforcing [*8] agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir. 1991).

The FAA reflects a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). An arbitration agreement may only "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). Therefore, courts may not apply traditional contractual defenses like duress and unconscionability, in a broader or more stringent manner to invalidate arbitration agreements and thereby undermine FAA's purpose to "ensur[e] that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)).

If the court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the [*9] agreement." 9 U.S.C. § 4. The action should be stayed "until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U .S.C. § 3.

III. DISCUSSION

Defendants seek to compel arbitration consistent with the Agreement electronically signed by Plaintiff. Plaintiff contends that the agreement is unenforceable on the grounds that it is unconscionable.

A. Existence of a Valid Arbitration Agreement

In deciding whether to compel arbitration, the Court must "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (quotation omitted). "If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

In making this determination, the Court "should apply ordinary state-law principles that govern the formation of contracts." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). Under California law, a valid contract requires: (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) sufficient cause or consideration. Cal. Civ. Code § 1550. Plaintiff does not argue that a contract does not exist, but rather that it is unenforceable.

An arbitration agreement cannot be invalidated [*10] for unconscionability absent a showing of both procedural and substantive unconscionability. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000). The procedural element focuses on oppression or surprise due to unequal bargaining power; the substantive element focuses on overly harsh or one-sided results. *Kilgore v. Keybank, Nat'l Ass'n*, 673 F.3d 947, 963 (9th Cir. 2012) (quoting *Armendariz*, 24 Cal.4th at 89, 99). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal.4th 223, 247, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012).

At the hearing, the parties agreed that the FAA governs and that the Agreement encompasses all of the claims at issue. Plaintiff, however, contends that the Agreement is not valid and enforceable because the Agreement is unconscionable under California law.

B. The Agreement satisfies *Armendariz*'s requirements

Plaintiff contends that the Agreement's silence as to which party pays the "costs unique to arbitration" makes it generally unconscionable under *Armendariz v. Found. Health Psychcare Servs., Inc.*, because it only provides for the payment of the arbitrator's fees. (Pl.'s Opp'n at 7.) In *Armendariz*, the California Supreme Court held that a mandatory arbitration agreement, in order to be lawful, "must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written [*11] decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 91, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000).

Defendants argue that *Armendariz*'s requirements do not apply post-*Concepcion*, but even if they do, the Agreement satisfies the requirement that Kmart bear costs unique to arbitration, because it provides that Kmart will pay all fees that it is legally required to pay as an employer under state law. (Defs.' Reply at 5-6; Arbitration Agreement § 6(c).) In fact, the *Armendariz* court held the employment arbitration agreement "impliedly obliges the employer to pay all types of costs that are unique to arbitration." 24 Cal. 4th at 113.

As an initial matter, it is unclear whether *Armendariz* even applies, as this is not a mandatory arbitration agreement, because Plaintiff had an opportunity to opt out without facing any adverse employment action. The Court, however, need not make a legal determination of *Armendariz*'s applicability at this juncture.

Nonetheless, Plaintiff could not articulate, in either her opposition or at the hearing, any "unique costs" other than the arbitrator's fees. Further, the Agreement explicitly provides that "[e]ach party shall pay the fees for his, her or its own attorneys, and any other [*12] costs that would otherwise be borne by a party were the claims brought in court, subject to any remedies to which

that party may later be entitled under applicable law." (Arbitration Agreement § 7.) Since most costs in arbitration are also borne when claims are brought in court, and Plaintiff could not specifically identify any "unique costs," she has not satisfied her burden.

In light of the above, as the Agreement provides, Kmart is responsible for all costs unique to arbitration if required by California law, so, in this regard, the Agreement is valid.

C. Unconscionability

"Under the FAA savings clause, state law that arose to govern issues concerning the validity, revocability, and enforceability of contracts generally remains applicable to arbitration agreements." *Kilgore*, 718 F.3d at 1058 (quotation omitted). Thus, under California law, an arbitration agreement may only be invalidated for unconscionability if it is both procedurally and substantively unconscionable. *Id.* (citing *Armendariz*, 24 Cal. 4th at 114). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. "[T]he party opposing arbitration has the burden [*13] of proving the arbitration provision is unconscionable." *Higgins v. Superior Court*, 140 Cal.App.4th 1238, 1249, 45 Cal. Rptr. 3d 293 (2006) (quotation omitted).

1. Procedural Unconscionability

"Procedural unconscionability focuses on the factors of surprise and oppression." *Kilgore*, 718 F.3d at 1059 (quotation omitted). Plaintiff claims that the Agreement is procedurally unconscionable for three reasons: (1) the Agreement was an adhesion contract, such that Plaintiff did not have an opportunity to negotiate its terms; (2) the Agreement did not attach the rules of arbitration; and (3) that the Agreement violates the E-Sign Act.

a. Whether it was a contract of adhesion rendering it unconscionable

Plaintiff contends that the Agreement in unconscionable, because she "was not given an opportunity to negotiate the terms of the Agreement allegedly presented to her." (Pl.'s Opp'n at 9.) Under California law, "it is procedurally unconscionable to require employees, as a condition of employment, to waive their right to seek redress of grievances in a judicial forum." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (citing *Armendariz*, 24 Cal. 4th at 114-15).

"[I]f an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable." *Davis*, 485 F.3d at 1073 (citing *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002)). Here, Plaintiff was given [*14] thirty days to opt out of the Agreement by mailing or faxing a one-page form. (Kaselitz Decl. ¶¶ 16-17; Arbitration Agreement at 7). The Agreement was not combined with any other employment terms, conditions or agreements, and clearly notified the employee, in bold font, that opting out would not result in any adverse employment action. (Arbitration Agreement § 11.) Thus, the Court finds that the opportunity to opt-out was not "buried in fine print ..., but was instead ..., clearly labeled, in boldface." *Kilgore*, 718 F.3d at 1059 (no procedural unconscionability when plaintiffs had time to reject the arbitration clause and the clause was not "buried in fine print in the Note, but was instead in its own section, clearly labeled, in boldface"); *see also Velazquez v. Sears, Roebuck & Co.*, No. 13-CV-00680-WQH-DHB, 2013 U.S. Dist. LEXIS 121400, 2013 WL 4525581, at *6 (S.D. Cal. Aug. 26, 2013).

Plaintiff could have opted out, thereby rejecting all of the terms of the Agreement, without adversely effecting her employment. In fact, other Kmart employees did opt out. (Kaselitz Decl. ¶¶ 24-25, Ex. D.) Thus, the Agreement is not procedurally unconscionable.

b. Whether Defendant failed to provide the rules of arbitration

Plaintiff argues that Defendants' failure to provide Plaintiff with the arbitration rules [*15] at the time of electronic signing renders the Agreement unenforceable. (Pl.'s Opp'n at 9-10.) Defendants contend that they did provide the rules, because the Agreement had a hyperlink to the arbitration rules. (Def.'s Reply at 9; Arbitration Agreement § 7.) In addition to the hyperlink, the Agreement also provided: "If you are unable to access or print the JAMS rules, you may obtain a printout of the rules from your Human Resources representative or from your manager." (Arbitration Agreement § 7.)

Accordingly, the arbitration rules were provided.

c. Whether the Agreement's format violated the E-Sign Act

Plaintiff contends that the online portal's failure to comply with the E-Sign Act renders the Agreement void and unenforceable. (Pl.'s Opp'n at 13.) As an initial matter, Defendants argue that the E-Sign Act's purpose is to effectuate, rather than to invalidate, electronic agreements. (Defs.' Reply at 9.) Courts have uniformly applied the E-Sign Act to subsequent interpretations of the FAA's written provision requirement, finding that the E-Sign Act "likely precludes any flat rule that a contract to arbitrate is unenforceable . . . solely because its promulgator chose to use [an electronic] [*16] medium to effectuate the agreement." *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 556 (1st Cir. 2005); *see also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 n. 11 (2d Cir. 2002); *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 602 (4th Cir. 2013). Thus, as applied, the E-Sign Act would serve to validate the Agreement, because to hold otherwise, simply because it was entered into electronically, would thwart the congressional intent behind the E-Sign Act.

Additionally, Plaintiff cites § 7001(c)(1)(B)(iv) as requiring that Defendants inform Plaintiff of her right to obtain a paper copy of the Agreement. (Pl.'s Opp'n at 12.) Subsection (c), however, pertains to "consumers," which are defined as "individual[s] who obtain[], through a transaction, products or services which are used primarily for personal, family, or household purposes." 15 U.S.C. § 7006(1). Defendants argue that Plaintiff is not a "consumer" within the meaning of the Act, because she is an employee. (Defs.' Reply at 9.) At the hearing, Plaintiff conceded that she was not a consumer under the E-Sign Act.

Accordingly, Defendants' alleged failure to comply with the E-Sign Act does not render it procedurally unconscionable, because, if anything, the E-Sign Act validates the electronic means Defendants utilized to enter into the Agreement.

2. Substantive Unconscionability

Plaintiff contends that the Private Attorney General Act ("PAGA") Waiver is both substantively unconscionable and [*17] unenforceable in light of the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 384, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014), which held that such waivers were unenforceable as a matter of state law. (Pl.'s Opp'n at 3-5.) PAGA permits plaintiffs to bring representative claims on behalf of other aggrieved employees for an employer's California Labor Code violations for the purpose of collecting civil penalties. Cal. Lab. Code § 2699, *et seq.* PAGA permits employees to seek penalties for labor law violations "that could otherwise only be assessed by California's Labor and Workforce Development Agency." *Fardig v. Hobby Lobby Stores Inc.*, No. SACV 14-00561 JVS, 2014 U.S. Dist. LEXIS 139359, 2014 WL 4782618, at *2 (C.D. Cal. Aug. 11, 2014) (quoting *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. LEXIS 90256, 2013 WL 3233211, at *5 (C.D. Cal. June 25, 2013). Most federal district courts within the state, however, have held that a waiver of PAGA claims is enforceable because it is preempted by the FAA.

In *Concepcion*, the United States Supreme Court held that "a state law rule, however laudable, may not be enforced if it is preempted by the FAA." 131 S.Ct. at 1748. The two primary goals of the FAA are the "enforcement of private agreements" and the "encouragement of efficient and speedy dispute resolution." *Id.* There are two situations where a state law rule is preempted by the FAA. *Kilgore*, 673 F.3d at 957 (citing *Concepcion*, 131 S.Ct. at 1747-48). First, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the [*18] analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* (citing *Concepcion*, 131 S.Ct. at 1747). Second, "when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. . . . a court must determine whether the state law rule 'stand[s] as an obstacle to the accomplishment of the FAA's objectives,' which are principally to 'ensure that private arbitration agreements are enforced according to their terms.'" *Id.* (citing *Concepcion*, 131 S.Ct. at 1748). "If the state law rule is such an obstacle, it is preempted." *Id.*

Since *Iskanian*, at least three federal courts have addressed whether the FAA preempts California's rule prohibiting the waiver of representative PAGA claims, and all have concluded that it does. *See Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13-CV-01619, 2014 U.S. Dist. LEXIS 140552, 2014 WL 4961126, at *9 (E.D. Cal. Oct.

1, 2014); *Langston v. 20/20 Companies, Inc.*, No. EDCV 14-1360 JGB SPX, 2014 U.S. Dist. LEXIS 151477, 2014 WL 5335734, at *7 (C.D. Cal. Oct. 17, 2014); *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 U.S. Dist. LEXIS 147752, 2014 WL 5088240, at *12 (C.D. Cal. Oct. 7, 2014). Thus, "[i]n accordance with *Concepcion*, [] the FAA likewise preempts California's rule against PAGA waivers." *Chico* 2014 U.S. Dist. LEXIS 147752, 2014 WL 5088240, at *13. Accordingly, the PAGA waiver is not substantively unconscionable.

In light of [*19] the foregoing, the Agreement is valid and enforceable.

D. Stay

Defendants have moved for a stay of this case pending the outcome of the arbitration proceedings. Under the FAA:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in the proceeding with such arbitration.

9 U.S.C. § 3. Here, the Court finds that the claims raised by Plaintiff in the Complaint are referable to arbitration pursuant to the Agreement. Accordingly, this action is stayed pursuant to 9 U.S.C. § 3.

IV. CONCLUSION

In light of the foregoing, the Court GRANTS Defendants Kmart Corporation and Sears Holding Management Corporation's Motion to Compel Arbitration and Stay Action. Thus, pursuant to 9 U.S.C. § 3, this action is STAYED pending arbitration. The parties shall file [*20] a joint status report on or before May 26, 2015, and every three months thereafter until the arbitrator issues a decision.

IT IS SO ORDERED.

Dated: November 26, 2014

/s/ Kandis A. Westmore

KANDIS A. WESTMORE

United States Magistrate Judge