NO. _____

IN THE
Supreme Court of the United States

COVERALL NORTH AMERICA, INC.,

Petitioner,

v.

CARLOS RIVAS, IN HIS CAPACITY AS
PRIVATE ATTORNEY GENERAL REPRESENTATIVE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Appendix A

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS RIVAS, in his capacity as Private Attorney General Representative, Plaintiff-counter-defendant-Appellee, v. COVERALL NORTH AMERICA, INC., Defendant-counter-claimant-Appellant.	No. 20-55140 D.C. No. 8:18-cv-01007-JGB-KK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted November 19, 2020
Pasadena, California

Before: CALLAHAN and BUMATAY, Circuit Judges, and PRESNELL,** District Judge.
Concurrence by Judge BUMATAY

Coverall North America, Inc., appeals the denial of its motion to compel

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

arbitration of Carlos Rivas's Private Attorneys General Act (PAGA)[1] claim on an individual basis. We have jurisdiction under 9 U.S.C. § 16(a)(1)(B), and, reviewing de novo, we affirm. *See Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 564 (9th Cir. 2014).

Coverall first argues that the district court improperly decided issues that the parties' arbitration agreement reserved for an arbitrator. Specifically, the company contends that the court had no business deciding whether Rivas could arbitrate claims on behalf of other allegedly aggrieved employees. The problem with Coverall's argument, however, is that the company specifically and repeatedly urged the district court to compel arbitration on "an individual, not a representative, basis." It further asserted that the question was for the court, not an arbitrator. It is hard to see how Coverall's position before the district court is consistent with its position on appeal.[2] In the end, the court answered the questions

[1] PAGA is a California law that "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state." *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 133 (2014); *see* Cal. Lab. Code §§ 2698–99.6.

[2] In arguing that the district court overstepped its authority, Coverall invokes a rule developed in the context of class arbitrations. *See Shivkov v. Artex Risk Solutions*, 974 F.3d 1051, 1065–66 (9th Cir. 2020) (holding that the availability of class arbitration is a "gateway" issue for the courts absent clear and unmistakable evidence to the contrary). Setting aside whether such a rule is appropriately applied to provisions governing the arbitration of PAGA claims, courts addressing whether class arbitration is available necessarily also address the enforceability of

put to it by Coverall; it simply ruled on the enforceability of a provision that it was asked to enforce. We perceive no reversible error.

Coverall next contends that the Federal Arbitration Act preempts California's rule against waivers of representative PAGA claims. Although *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), forecloses this argument, Coverall asserts that the Supreme Court effectively overruled that decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *Lamps Plus, Inc. v. Valera*, 139 S. Ct. 1407 (2019). We disagree. To the extent tension exists between Supreme Court case law and *Sakkab*, it largely stems from *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), a case *Sakkab* considered at length. There, the Court held that the Federal Arbitration Act preempts state laws that interfere with arbitration's "fundamental attributes," including, primarily, its procedural informality. *Id.* at 348–49. The Supreme Court then reiterated and reapplied that rule in *Epic Systems* and *Lamps Plus*. But neither case expanded upon *Concepcion* in such a way as to abrogate *Sakkab*. *See United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) (specifying that even "strong[] signals" from the Supreme Court that our precedent is wrong do not

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class-waiver provisions, just as the district court decided the enforceability of the purported representative PAGA waiver here. *See, e.g.*, *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013).

allow a three-judge panel to overrule circuit precedent). Accordingly, insofar as the disputed provision of the parties' arbitration agreement bars Rivas from arbitrating his PAGA claim in full, it remains unenforceable under California law.

Coverall's remaining arguments are similarly unavailing. The company likens PAGA actions to class arbitrations, which, given their procedural complexity, can frustrate the aims of the Federal Arbitration Act. *See, e.g.*, *Concepcion*, 563 U.S. at 348–50. Yet in *Sakkab* we explained that the two proceedings markedly differ.[3] Namely, PAGA arbitrations "do not require the formal procedures of class arbitration." *Sakkab*, 803 F.3d at 436. Coverall lastly urges that California's rule fails to qualify as a generally applicable contract defense under the Federal Arbitration Act's savings clause. But because we also rejected this argument in *Sakkab*, 803 F.3d at 432–33, the district court properly applied California law and denied Coverall's motion to compel arbitration on an individual basis.

AFFIRMED.

[3] This Court and the California Supreme Court have recently reiterated the fundamental differences between the two types of proceedings. *See Canela v. Costco Wholesale Corp.*, 971 F.3d 845, 851–53 (9th Cir. 2020); *Kim v. Reins Int'l Cal., Inc.*, 459 P.3d 1123, 1130–31 (Cal. 2020).

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U.S. COURT OF APPEALS

Rivas v. Coverall North America, No. 20-55140

BUMATAY, Circuit Judge, concurring:

Our precedent puts us in the middle of the jurisprudential equivalent of a rock and a hard place. By affirming the denial of the motion to compel here, we have faithfully applied our precedent as well as any three-judge panel of this court could. I therefore join the majority decision.

But I write separately to explain how that precedent has been seriously undermined and should be revisited by our court en banc.

I.

Rivas's PAGA claim is plainly within the scope of the arbitration agreement, which requires that "all controversies, disputes or claims" between Coverall and Rivas "be submitted promptly for arbitration." The agreement also requires arbitration be conducted on an "individual, not class wide basis." Without our precedent, this would have been a simple case. To enforce the parties' agreement, we should have just compelled arbitration of Rivas's PAGA claim on an individual basis. That is the only solution that gives proper effect to the parties' expressed intent.

But this isn't a simple case. The problem is that PAGA claims are "representative" by their very nature. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 381 (2014); *see* Cal. Lab. Code § 2699(a) (2016). And forcing

Rivas to arbitrate the PAGA claim on an "individual" basis would run headlong into California law. As the majority decision summarizes, the so-called *Iskanian* rule makes any waiver of representative PAGA claims in an employment agreement unenforceable. *See Iskanian*, 59 Cal. 4th at 383. This wouldn't have posed an obstacle if, like most state laws that frustrate and interfere with arbitration agreements, the *Iskanian* rule was preempted by the Federal Arbitration Act ("FAA"). 9 U.S.C. § 2. But, here's the rub: In *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427 (9th Cir. 2015), we held the *Iskanian* rule was not preempted by the FAA.

This leaves us with several bad options. We could, like the district court suggested, hold that the PAGA claim falls outside the scope of the arbitration agreement. But doing so would have us ignore the plain text of the parties' agreement, which is not something we can do. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (The FAA requires courts to rigorously "enforce arbitration agreements according to their terms[.]") (simplified).

We could also compel arbitration of the PAGA claim, but on a "representative" basis. Of course, that would require transforming the arbitration agreement, which only permits arbitration on an individual basis, into one that allows representative arbitration as well. Yet, we can't just compel parties into any type of arbitration without their consent. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,

559 U.S. 662, 685 (2010) (holding that class arbitration cannot be imposed on parties based on silence in the arbitration agreement).

Instead, we affirm the district court, which held the arbitration agreement unenforceable because, under *Iskanian* and *Sakkab*, it works as an implied waiver of PAGA claims. This solution, while compelled by our precedent, undermines the parties' promises to each other and potentially upends all arbitration agreements. We now creep closer to the day that a party may always sidestep an arbitration agreement simply by filing a PAGA claim.[1]

II.

Recent Supreme Court decisions in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), make clear that our precedent is in serious need of a course correction. While I agree that *Sakkab* is not clearly irreconcilable with *Epic Systems* and *Lamps Plus* and that we are required to continue to apply *Sakkab*, the writing is on the wall that the Court disfavors our approach. We should correct our law before being countermanded by the Court yet again.

[1] When we arrive there formally, we'll be late to the party: California courts have already said as much. *Collie v. Icee Co.*, 52 Cal. App. 5th 477, 481 (2020) (suggesting that an otherwise valid arbitration agreement does not provide a basis to compel arbitration of a PAGA claim) (collecting cases).

In *Epic Systems*, the Court overturned our view of the FAA's saving clause. 138 S. Ct. at 1622–23, 1632. That provision states 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 contract." 9 U.S.C. § 2. We held that this provision preserves the unenforceability of an agreement requiring individualized arbitration proceedings based on federal law deeming such contracts illegal. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 985 (9th Cir. 2016). But the clause, the Court instructed, "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Sys. Corp.*, 138 S. Ct. at 1622 (simplified). That means § 2 does not protect "defenses that target arbitration either by name or by more subtle methods." *Id*. In other words, the saving clause doesn't preserve defenses that interfere with the "fundamental attributes of arbitration." *Id.* (simplified).

Most importantly here, *Epic Systems* specifically denoted that defenses that "attack[] . . . the *individualized* nature of arbitration proceedings," instead of "class or collective ones," fall into the category of law that interferes with arbitration's fundamental attributes. *Id.* (emphasis added). So the Court held preempted the defense that allowed a party to demand a classwide arbitration since it alters "the traditionally individualized and informal nature of arbitration." *Id*. at 1623. The lesson from *Epic Systems* is thus: defenses that render "a contract . . . unenforceable

just because it requires bilateral arbitration" are not within the saving clause's aegis. *Id*.

Only a year later, the Court again reviewed our arbitration jurisprudence in *Lamps Plus*. There, we applied a California common-law contract principle to construe an ambiguous arbitration agreement as requiring class arbitration. 139 S. Ct. at 1417. Even though the contract-law canon was "nondiscriminatory" and "neutral," and gave "equal treatment" to all contracts, the Supreme Court still found it not protected by the FAA's saving clause. *Id*. at 1418. The Court reiterated that "courts may not rely on state contract principles to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Id*. (simplified).

The tensions between *Epic Systems*/*Lamps Plus* and *Sakkab* are obvious. By holding that the *Iskanian* rule is not preempted by the FAA, we interfere with "arbitration's fundamental attributes." *Epic Sys. Corp.*, 138 S. Ct. at 1622. Indeed, its application in this case requires that the parties not arbitrate a claim *at all*. Otherwise, in other cases, *Sakkab* would mandate "representative," rather than individual, arbitration. 803 F.3d at 438–39; *see id*. at 436 (PAGA claims would require arbitration of "penalties arising out of violations against others employees"). But, that is precisely the type of defense that targets an arbitration agreement "*just because it requires bilateral arbitration*," which the Court held doesn't survive the

FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1623. Furthermore, *Sakkab* held the *Iskanian* rule not preempted because its purpose is to enforce California's labor laws, a traditional police power. 803 F.3d at 439. But like the state's traditional interest in contract law in *Lamps Plus*, state law doesn't survive preemption if it "reshape[s] traditional individualized arbitration." 139 S. Ct. at 1418 (simplified). Based on these cases, *Sakkab* remains good—but severely hobbled—law.[2]

III.

The Supreme Court has repeatedly emphasized that the FAA's saving clause's offers no protection to state laws that interfere with parties' choice to engage in individual, bilateral arbitration. To the extent that the *Iskanian* rule undermines that choice—and it clearly does—it runs afoul of the FAA and must be preempted.

Unfortunately, our saving-clause precedent is in disharmony with the Supreme Court's. Both *Epic Systems* and *Lamps Plus* required the Supreme Court to step in and correct our saving-clause decisions—two times in the course of two terms. We should listen to what the Court is telling us and revisit our precedent before again being forced to do so.

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[2] *Sakkab* also held that the *Iskanian* rule is a "generally applicable" contract defense under § 2. 803 F.3d at 432–33. I have serious doubts that such is the case. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352–55 (2011) (Thomas, J., concurring) (explaining that, to come within § 2, a contract defense not only must apply to *any* contract, but also that the defense must concern the *revocability*—not enforceability—of the arbitration agreement).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**SACV 18-1007 JGB (KKx)**	Date	January 21, 2020
Title	***Carlos Rivas v. Coverall North America, Inc.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) DENYING Defendant's Motion to Compel Arbitration (Dkt. No. 65); and (2) SETTING the Hearing on the Motion for Summary Judgment (Dkt. No. 59) for January 27, 2020 at 9 a.m. (IN CHAMBERS)**

Before the Court is Coverall North America's ("Defendant") motion to compel arbitration ("Motion," Dkt. No. 65) and Carlos Rivas's ("Plaintiff") motion for summary judgment ("MSJ," Dkt. No. 59). The Court determines the Motion is appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court DENIES the Motion. The Court SETS the hearing on the MSJ for January 27, 2020 at 9 a.m.

I. BACKGROUND

On June 7, 2018, Plaintiff filed a complaint on behalf of himself and other similarly situated cleaning workers, alleging various labor violations stemming from Defendant's alleged misclassification of those cleaning workers as independent contractors. ("Complaint," Dkt. No. 1 ¶ 1.) Defendant moved to dismiss the complaint on January 18, 2019. ("MTD," Dkt No. 22.) On February 28, 2019, the Court granted the MTD in part and granted Plaintiff leave to amend. (Dkt. No. 32.) Plaintiff filed a first amended complaint on March 29, 2019. ("FAC," Dkt. No. 39.) Like the initial complaint, the FAC alleges labor violations arising from Defendant's conduct, and seeks civil penalties under section 2699 of the Private Attorney General Act ("PAGA") of 2004. (Id. ¶ 27.)

On April 12, 2019, Defendant filed an answer to the FAC, which contained a counterclaim seeking a declaratory judgment that, "[i]f Plaintiff is deemed an employee rather than an independent contractor, . . . the Franchise Agreement between Plaintiff and Coverall is void under the doctrines of impracticability of performance, frustration of purpose, and/or mutual mistake." ("Answer," Dkt. No. 41 ¶ 52.) On May 17, 2019, Plaintiff filed a motion to dismiss the counterclaim, arguing that the counterclaim is not ripe for review and should be dismissed as retaliatory. (Dkt. No. 51.) On July 12, 2019, the Court denied Plaintiff's motion to dismiss. (Dkt. No. 58.)

On November 18, 2019, Defendant filed the Motion. (See Motion.) In support of the Motion, Defendant filed three declarations (Dkt. Nos. 65-2–4), including a declaration attaching a contractual agreement between the parties ("Franchise Agreement," Dkt. No. 65-3). On November 25, 2019, Plaintiff opposed the Motion. ("Opposition," Dkt. No. 68.) On December 30, 2019 Defendant replied. ("Reply," Dkt. No. 75.)

II. LEGAL STANDARD

The Federal Arbitration Act (the "FAA") provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA establishes a general policy favoring arbitration agreements. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008) ("Section 2 of the FAA creates a policy favoring enforcement of agreements to arbitrate."). Its principal purpose is to "ensure that private arbitration agreements are enforced according to their terms." Concepcion, 563 U.S. at 334 (citing Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989) (internal quotation marks omitted)). "Arbitration is a matter of contract, and the [FAA] requires courts to honor parties' expectations." Id. at 351.

Under the FAA, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such an arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. Id. If such a showing is made, the district court shall also stay the proceedings pending resolution of the arbitration at the request of one of the parties bound to arbitrate. Id. § 3. To determine whether to compel arbitration, a district court's involvement 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." Cox, 533 F.3d at 1119 (quoting Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)). A party seeking to compel arbitration under the FAA bears the burden of making this showing. Id.

III. DISCUSSION

Defendant's Motion seeks to compel Plaintiff to arbitration on an individual basis. (See Motion.) Plaintiff argues that Defendant cannot compel individual arbitration because Plaintiff's only claim is a PAGA claim under section 2699, which he argues is inherently representative in nature. (Opposition at 4–6.) Plaintiff further argues that his PAGA claim cannot be waived under California public policy. (Id. at 8–14.) Defendant counters that the California public policy Plaintiff relies on has been overruled by recent Supreme Court precedent. (Motion at 8–14.) For reasons discussed fully below, the Court agrees with Plaintiff that Defendant may not compel individual arbitration of his representative PAGA claim.

A. Clear Agreement to Arbitrate

The threshold question in a motion to compel arbitration is whether a valid contract to arbitrate exists. Clark v. Beauty Sys. Grp., LLC, 2019 WL 4148180, at *2 (C.D. Cal. Apr. 25, 2019). "In determining whether a valid contract to arbitrate exists, a court applies state law principles of contract formation." Id. Under California law, "[a] contract to arbitrate will not be inferred absent a 'clear agreement.'" Davis v. Nordstrom, Inc., 755 F.3d 1089, 1092 (9th Cir. 2014). Here, the parties each signed the Franchise Agreement which expressly states that "all controversies, disputes or claims between Coverall… and [Plaintiff]… shall be submitted promptly for arbitration." (Franchise Agreement at 24.) Plaintiff does not dispute that the Franchise Agreement constitutes a clear agreement to arbitrate. Accordingly, the Court finds that there is a valid contract to arbitrate between the parties.

B. Scope of the Agreement

In addition to establishing a valid arbitration agreement, Defendant "must also demonstrate that the Agreement encompasses the dispute at issue." Campos v. DXP Enterprises, Inc., 2018 WL 3617885, at *5 (C.D. Cal. Mar. 14, 2018) (citing Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)). Section 21.A of the Franchise Agreement reads, in pertinent part:

> "[A]ll controversies, disputes or claims between Coverall… and [Plaintiff]… arising out of or related to the relationship of the parties, this Agreement or the validity of this Agreement, any related agreement between the parties, and/or any specification, standard or operating procedure of Coverall… shall be submitted promptly for arbitration."

(Franchise Agreement at 24.) The Franchise Agreement goes on to specify that:

> "Franchisee and Coverall agree that arbitration shall be conducted on an individual, not a class wide basis, which restriction shall be enforceable to the fullest extent permitted by law. An arbitration between Coverall and Franchisee shall not be consolidated with any other proceeding between Coverall and any other

> Franchisee. Only Coverall… and [Plaintiff]… may be parties to any arbitration proceeding[.]"

(Id. at 25.)

1. The Dispute at Issue is Covered by the Franchise Agreement

The Franchise Agreement clearly encompasses the dispute at issue. The Franchise Agreement is explicit that "all controversies, disputes or claims between Coverall… and [Plaintiff]… arising out of or related to… this Agreement… shall be submitted promptly for arbitration." (Id. at 24 (emphasis added).) Plaintiff's sole claim in the Complaint is a PAGA claim arising out of his employment with Defendant. (See FAC.) Plaintiff's employment was directly pursuant to the Franchise Agreement. (Id. ¶¶ 7–8, 20.) Thus, the dispute is clearly subject to arbitration under the Franchise Agreement.

2. The Franchise Agreement Does Not Permit Representative Arbitration

The question remains whether the Agreement's mandate that "arbitration shall be conducted on an individual… basis" prohibits arbitration of Plaintiff's claim on a representative basis.[1] (Franchise Agreement at 25); see also Cal. Lab. Code § 2699(a) (requiring that claims be brought on behalf of the "aggrieved employee… and other current or former employees"). The Court finds that Section 21.A of the Agreement prohibits representative arbitration. The section's mandate that arbitration "shall be conducted on an individual, not a class wide basis" does not precisely address the issue of representative claims, which — despite a number of similarities — are legally and functionally distinct from class action claims. Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 435–36 (9th Cir. 2015). However, the remainder of the section makes clear that arbitration "shall not be consolidated with any other proceeding" between Defendant and any other Franchisee and that "[o]nly Coverall… and [Plaintiff]… may be parties to any arbitration proceeding[.]" (Franchise Agreement at 25.) This is inconsistent with the inherent nature of representative actions, which permit one party to bring a claim on behalf of other parties and the state. See Romo v. CBRE Grp., Inc., 2018 WL 4802152, at *5 (C.D. Cal. Oct. 3, 2018) (finding that agreement that required all claims be arbitrated in plaintiff's "individual capacity" prohibited representative arbitration of PAGA claim). The Court thus finds that the Franchise Agreement does not permit representative arbitration.

3. Plaintiff's PAGA Claim is Not Individually Arbitrable and Thus Outside the Scope of the Agreement

Next, the Court examines whether Plaintiff's claim is arbitrable on an individual basis. Plaintiff brings a claim for civil penalties under section 2699(f) of PAGA. (See FAC.) Section 2699(a) directs that all civil penalty claims brought under the section are alleged on behalf of "an

[1] Defendant concedes that the Court, not an arbitrator, should decide whether Plaintiff's claim is arbitrable on an individual rather than representative basis. (Motion at 6–8.)

aggrieved employee… and other current or former employees." Cal. Lab. Code § 2699(a) (emphasis added); see also Quevedo v. Macy's, Inc., 798 F. Supp. 2d 1122, 1141 (C.D. Cal. 2011) ("[T]he PAGA… allows an aggrieved employee to bring a civil action 'on behalf of himself or herself *and* other current or former employees,' not on behalf of himself *or* other employees.") (emphasis in original). Thus, section 2699 requires that PAGA claims for civil penalties must be brought on behalf of other aggrieved employees. Id. For that reason, other district courts within the Ninth Circuit have almost universally held that claims for civil penalties under PAGA fall outside the scope of arbitration agreements mandating individual arbitration. See, e.g., Itkoff v. ABC Phones of N. Carolina, Inc., 2018 WL 6242158, at *5 (C.D. Cal. Oct. 11, 2018) ("[B]ecause the Arbitration Agreement excludes 'representative' or 'private attorney general' claims, Plaintiff's PAGA claim, which is categorically representative, is not subject to arbitration, and it shall remain pending in this judicial forum."); Romo, 2018 WL 4802152, at *5 (C.D. Cal. Oct. 3, 2018) ("Claims for 'civil penalties' brought under PAGA are categorically representative. Thus, to the extent Plaintiff's PAGA claim seeks civil penalties, it is outside the scope of the arbitration agreement, which requires all claims to be brought 'in the party's individual capacity.'") (internal citations omitted); Campos, 2018 WL 3617885, at *5 ("However, Plaintiffs contend that their PAGA claim is outside the scope of the Agreement because it is a representative action… California case law is clear that PAGA actions are categorically representative, not individual…. Therefore, Plaintiffs' PAGA claim is outside the scope of the Arbitration Agreement[.]") (internal citations omitted).[2] Because Plaintiff's PAGA claim is necessarily representative, it falls outside of the scope of the Franchise Agreement, which requires all claims to be arbitrated "on an individual… basis[.]" (Franchise Agreement at 25.)

The parties engage in spirited debate over recent Supreme Court cases and their impact on the holdings in Sakkab, 803 F.3d at 425 and Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 385 (2014). Defendant maintains that both cases were overruled and no longer apply; Plaintiff contends that both cases remain binding precedent. (Motion at 17); (Opposition at 10.) In Iskanian, the California Supreme Court held that waivers of representative PAGA claims were unenforceable in light of PAGA's stated purpose of "penalizing and deterring employers who violate California's labor laws." Iskanian, 59 Cal. 4th at 385. In Sakkab, the Ninth Circuit held that the Iskanian rule prohibiting representative PAGA waivers was not preempted by the FAA because the policy did not evince hostility towards arbitration or otherwise undermine the purpose of the FAA. Sakkab, 803 F.3d at 434.

Here, however, the Franchise Agreement does not require Plaintiff to waive or release any of his claims. Instead, the Franchise Agreement requires Plaintiff to arbitrate his claims in a

[2] Only one court appears to have deviated from the norm. See Quevedo, 798 F. Supp. 2d at 1142. While Defendant urges the Court to follow Quevedo's lead, the Court declines to do so. Quevedo based its rationale on the belief that representative arbitration is functionally and legally indistinct from class arbitration, and thus may not be forced on contracting parties without frustrating the purpose of the FAA. Id.; see also Concepcion, 131 S. Ct. at 1753. As discussed infra, the Ninth Circuit in Sakkab, 803 F.3d at 425 later considered and rejected identical logic. Sakkab, 803 F.3d at 434–37. As a result, Quevedo is unpersuasive.

manner inconsistent with the inherent nature of PAGA claims. (Franchise Agreement at 25.) Additionally, the Franchise Agreement is silent as to whether claims that are not arbitrable are waived. Thus, it is unclear if Sakkab or Iskanian are applicable at all. Sakkab, 803 F.3d at 434; McComack v. Marriott Ownership Resorts, Inc., 2018 WL 4242098, at *4 (S.D. Cal. Sept. 5, 2018) ("*Iskanian* 'expresse[d] no preference regarding whether individual PAGA claims are litigated or arbitrated,' and provided only that representative PAGA claims may not be waived outright.") (quoting Sakkab, 803 F.3d at 434). The more logical interpretation of the Franchise Agreement is that Section 21.A does not extend to exclusively representative claims. Under this interpretation, Plaintiff's PAGA claim is excluded from the Agreement and Defendant cannot compel arbitration irrespective of Sakkab or Iskanian.

On the other hand, Section 21.A might be interpreted as an implied waiver because it requires that "all claims… shall be submitted… for arbitration." (Arbitration Agreement at 24.) Perhaps this implies that no claim that arises between the parties may be litigated, even if the claim is not arbitrable. Assuming this interpretation, the Iskanian rule would render such a waiver unenforceable. See Iskanian, 59 Cal. 4th at 383. But contrary to Defendant's urging, the Ninth Circuit has held that the FAA does not preempt California's public policy prohibiting waivers of representative PAGA claims. See Sakkab, 803 F.3d at 434. Moreover, the recent holdings in Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) and Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) did not overrule Sakkab. As a general matter, stare decisis requires adherence to binding precedent unless "the relevant court of last resort... undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (emphasis added).

In Epic Systems, the Supreme Court held that contract defenses that "attacked (only) the individualized nature of arbitration proceedings" are preempted by the FAA and unenforceable — a principle established years prior to Sakkab. Epic Systems, 138 S. Ct. at 1623 (citing Concepcion, 131 S. Ct. at 1740) (emphasis added). Indeed, the axiom that a contract may not be rendered unenforceable "just because it requires bilateral arbitration" was well-known to the Sakkab court. Epic Systems, 138 S. Ct. at 1623 (emphasis omitted). In fact, the Sakkab court weighed and rejected the argument that the Iskanian rule impermissibly targeted bilateral arbitration agreements.[3] Sakkab, 803 F.3d at 434 ("The Iskanian rule does not prohibit the

[3] Defendant's contention that the Iskanian rule is not generally-applicable and actually arbitration-specific is misplaced. (Reply at 5.) In making its argument, Defendant largely relies on the Ninth Circuit's opinion in Bradley v. Harris Research, 275 F.3d 884, 890 (9th Cir. 2001) — a case that predates Sakkab by fourteen years. Putting this fact to the side, Defendant's argument is untenable. Bradley held only that a state contract defense that applied just to certain types of contracts was not "generally applicable." Bradley, 275 F.3d at 890. It said nothing about whether a defense that applied only to certain types of claims is not "generally applicable." The Iskanian rule applies to all contracts that purport to waive a party's right to bring a representative PAGA claim — the rule does not limit itself to just contracts with forum selection clauses like the rule in Bradley. Id.; see also Sakkab, 803 F.3d at 432 ("At minimum, then, [generally applicability] requires that a state contract defense place arbitration agreements on equal footing

arbitration of any type of claim."). "Put simply, [Sakkab and Iskanian explained that] PAGA waivers are invalid because they hurt California's interest in enforcing the Labor Code[,] not because of any reason that has anything to do with arbitration." Gonzales v. Emeritus Corp., 407 F. Supp. 3d 862, 868 (N.D. Cal. 2019). Thus, Epic Systems does not expand the preemptive scope of the FAA in any way that undermines the rationale in Sakkab.

Likewise, Varela is not clearly irreconcilable with Sakkab. In Varela, the Supreme Court held that the FAA preempted a California rule of contract interpretation that compelled class arbitration in the face of an ambiguous contract. Varela, 139 S. Ct. at 1417. According to the Court, class arbitration and individual arbitration are so "crucial[ly] differen[t]," that even general contract principles neutral towards arbitration could be preempted by the FAA if they compel class arbitration without the clear consent of the parties. Id. at 1416. The Court explained that neutral state contract rules that required class arbitration without party consent "interfere[e] with fundamental attributes of [individual] arbitration" by increasing its size, costliness, and complexity. Id. at 1418. Thus, the Court concluded that such neutral contract rules — even if generally applicable — were preempted by the FAA. Id. In Sakkab, however, the Ninth Circuit contemplated and held inapplicable the precise rationale utilized in Varela. The Sakkab court explained that distinct differences between representative PAGA actions and class actions meant that unlike the latter, the former "d[id] not diminish parties' freedom to select informal arbitration procedures" and did not entail the same procedural morass or inefficiency as class arbitration. Sakkab, 803 F.3d at 435. The Sakkab court reasoned that representative arbitration was not necessarily as slow, costly, or procedurally complex as class arbitration. Id. at 438–39. The Sakkab court thus held that representative arbitration does not "interfere[e] with fundamental attributes of [individual] arbitration" in the same way as class arbitration. Varela, 139 S. Ct. at 1418; Sakkab, 803 F.3d at 439. Accordingly, the Court's disfavoring of class arbitration in Varela did nothing to overrule Sakkab or the Iskanian rule because the Ninth Circuit has held that representative arbitration — unlike class arbitration — is not functionally incompatible with the aims of the FAA.

In sum, Sakkab addressed and rejected application of the principles elaborated in both Varela and Epic Systems. Aside from reviving arguments already addressed and rejected by the Ninth Circuit, Defendant has not shown Sakkab is clearly irreconcilable with Epic Systems or Varela. See Gonzales, 2019 WL 6255443, at *5–6 (rejecting defendant's argument that Epic Systems overruled Sakkab and the Iskanian rule). Consequently, whether the Iskanian rule applies or not, Defendant may not compel Plaintiff to individually arbitrate his representative PAGA claim. As a result, the Court DENIES Defendant's Motion.[4]

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with non-arbitration agreements…. The *Iskanian* rule complies with this requirement. The rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement."). Thus, Bradley is inapposite.

[4] Because the Court finds that Plaintiff's PAGA claim is outside the scope of the arbitration agreement, it need not address Plaintiff's effective vindication or waiver arguments. (Opposition at 14–21.)

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is DENIED. The hearing on the MSJ is SCHEDULED for January 27, 2020 at 9 a.m.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 6 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CARLOS RIVAS, in his capacity as Private Attorney General Representative,

Plaintiff-counter-defendant-Appellee,

v.

COVERALL NORTH AMERICA, INC.,

Defendant-counter-claimant-Appellant.

No. 20-55140

D.C. No.
8:18-cv-01007-JGB-KK
Central District of California,
Santa Ana

ORDER

Before: CALLAHAN and BUMATAY, Circuit Judges, and PRESNELL,* District Judge.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter. Fed. R. App. P. 35.

The petition is therefore DENIED.

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.