2012 WL 1655720
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Adriana LOPEZ
v.
ACE CASH EXPRESS, INC., et al.
Adriana Lopez
v.
Ace Cash Express, Inc., et al.

Nos. LA CV11–04611 JAK (JCx), LA CV11–07116 JAK (JCx). | May 4, 2012.

Opinion

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION (LA CV11–04611, Dkt. 9); DEFENDANT'S MOTION TO COMPEL ARBITRATION (LA CV11–07116, Dkt. 19); PLAINTIFF'S MOTION TO REMAND (LA CV11–07116, Dkt. 17); DEFENDANT'S MOTION TO CONSOLIDATE (LA CV11–04611, Dkt. 24)

JOHN A. KRONSTADT, District Judge.

***1** Andrea Keifer, Deputy Clerk.

I. *Introduction*

Plaintiff Adriana Lopez has brought two actions against her employer, Defendant Ace Cash Express, alleging various claims arising from her employment. Plaintiff alleges that Defendant violated California law by providing inadequate meal and rest periods, Cal. Labor Code § 226.7, providing inadequate overtime compensation, Cal. Labor Code § 1194, not reimbursing work-related expenses, Cal. Labor Code § 2802, not paying employees in a timely fashion, Cal. Labor Code § 203, not keeping adequate records regarding employee pay, Cal. Labor Code § 226, collecting unlawful deductions from employees' wages, Cal. Labor Code § 221, and by engaging in unfair business practices, Cal. Bus. & Prof.Code § 17200.

In the first action, *Lopez v. Ace Cash Express, Inc.*, LA CV11–04611 (*"Lopez I"*), Plaintiff brought claims on behalf of a putative class of Defendant's employees. Plaintiff originally sued in Los Angeles Superior Court, but Defendant removed to this Court on the basis of jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). Plaintiff moved to remand the case because the amount in controversy was insufficient under CAFA, but the Court denied Plaintiff's motion. *Lopez I*, Dkt. 21. Defendant has moved to compel arbitration in *Lopez I.* Dkt. 9.

In the second action, *Lopez v. Ace Cash Express, Inc.*, LA CV11–07116 (*"Lopez II"*), Plaintiff sued Defendant pursuant to the California Private Attorney General Act of 2004 ("PAGA"), Cal. Labor Code § 2698 *et seq.*, for similar violations of the California Labor Code. Plaintiff brought her PAGA claim as a representative action "on behalf of herself and other current or former employees" of Defendant. Compl. ¶ 16, Dkt. 1–1. Plaintiff originally sued in Los Angeles Superior Court, but Defendant removed the action to federal court pursuant to 28 U.S.C. § 1332(a), claiming diversity jurisdiction. In *Lopez II*, Plaintiff has moved to remand the action to state court, Dkt. 17, and Defendant has moved to compel arbitration, Dkt. 19.

Defendant has moved to consolidate *Lopez I* and *Lopez II*. *Lopez I*, Dkt. 24.

The Court heard oral argument in these matters on September 19, 2011, *Lopez I*, Dkt. 21, and December 5, 2011, *Lopez I*, Dkt. 32, and requested supplemental briefing. The Court took the matters under submission. This Order follows.

For the reasons explained below, the Court GRANTS Defendant's motion to compel bilateral arbitration in *Lopez I.* Dkt. 9. The Court DENIES Plaintiff's motion to remand in *Lopez II.* Dkt. 17. The Court stays Defendant's motion to compel arbitration in *Lopez II*, Dkt. 19, pending the outcome of arbitration in *Lopez I.* The Court DENIES Defendant's motion to consolidate. *Lopez I*, Dkt. 24.

II. *Factual Background*

Defendant operates 212 stores in California. Defendant employed Plaintiff as a "Center Manager" from 2005 through 2010. Upon beginning employment, Plaintiff agreed to Defendant's Employee Dispute Resolution Program ("EDRP"). The EDRP describes Defendant's policy for dispute resolution: employees are to first address any problems with their immediate supervisor, then bring their claims before Defendant's "Review

Conference," and then submit to binding arbitration. Caldwell Decl., Exh. A, *Lopez II*, Dkt. 19–2. The arbitration clauses in the EDRP require both Defendant and its employees to submit "all legal claims or controversies that [they] may have against the other" to binding arbitration. *Id.* at p. 3. The American Arbitration Association ("AAA") is to appoint the arbitrator and administer the arbitration in accordance with its National Rules. *Id.* The arbitrator is empowered "to award ... monetary damages and any other relief that could be ordered in court." *Id.* Defendant is "responsible for the payment of the daily or hourly fee of the Arbitrator, any administrative fees charged by the AAA, and the cost of the location for the hearing." *Id.* at p. 4. The employee and Defendant "will pay other costs incurred," including their own costs for an attorney or representative. *Id.* The arbitrator is empowered to award attorney's fees where a party prevails on a statutory claim that provides for such fees, or if the parties have a written agreement providing for such fees. *Id.* The EDRP makes no express mention of whether arbitration can occur in a class-wide manner or in a representative manner under PAGA, or whether arbitration must occur in a bilateral manner.

III. *Analysis*

A. Motion to Remand in *Lopez II*

1. *Legal Standard*

a) PAGA

***2** In *Lopez II*, Plaintiff has sued Defendant under PAGA for various alleged violations of the California Labor Code. Compl. ¶¶ 14–17, Dkt. 1–1. PAGA allows an "aggrieved employee" to sue an employer "on behalf of himself or herself and other current or former employees." Cal. Labor Code § 2699(a). The California Labor and Workforce Development Agency ("LWDA") receives 75% of the plaintiff's recovery, and the aggrieved employees receive the remaining 25%. *Id.* at 2699(i). The California Legislature enacted PAGA to ensure compliance with the Labor Code:

> The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Arias v. Superior Court, 46 Cal.4th 969, 980 (2009). A private plaintiff suing under PAGA acts as a "proxy or agent of the state's labor law enforcement agencies," "essentially bringing a law enforcement action designed to protect the public." *Id.* at 986. The "employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the" LWDA. *Id.* "The employee plaintiff may bring the action only after giving written notice to both the employer and the" LWDA, and only if the LWDA decides not to pursue an enforcement action. *Id.; see also* Cal. Labor Code § 2699.3(a).[1]

Representative PAGA actions are distinct from class actions. Representative PAGA actions may, but need not, be brought as class actions. *Arias*, 46 Cal.4th at 981. Unlike a class action, nonparty employees need not be given notice of the action or be afforded any opportunity to be heard. *Id.* at 987. A judgment in a PAGA action "is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." *Id.* at 985.

b) Amount in Controversy

Plaintiff claims the amount in controversy in her PAGA action is less than $75,000, and consequently, that this Court lacks jurisdiction under 28 U.S.C. § 1332(a) to hear her claim. Indeed, Plaintiff pleaded in *Lopez II* that the amount in controversy is less than $75,000. Compl. ¶ 4, Dkt. 1–1. When a complaint affirmatively alleges that the amount in controversy is less than the jurisdictional threshold, the party seeking removal must establish with "legal certainty" that the jurisdictional amount is met. *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir.2010). Thus, Defendant must demonstrate with legal certainty that the amount in controversy exceeds $75,000 in order to support removal.

***3** In general, under the "anti-aggregation principle," multiple plaintiffs who assert "separate and distinct" claims in a lawsuit may not aggregate their claims to meet the amount-in-controversy requirement. *Synder v. Harris*, 394 U.S. 332, 335 (1969). However, there are exceptions to the anti-aggregation principle, including the "common and undivided interest" exception. Thus, "when several plaintiffs unite to enforce a single title or right, in which

they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Troy Bank of Troy, Ind. v. G.A. Whitehead & Co.*, 222 U.S. 39, 40–41 (1911). "[T]he character of the interest asserted depends on the source of plaintiffs' claims. If the claims are derived from rights that they hold in group status, then the claims are common and undivided. If not, the claims are separate and distinct." *Eagle v. AT & T*, 769 F.2d 541, 546 (9th Cir.1985). A claim is common and undivided where "neither [party] can enforce [the claim] in the absence of the other." *Troy Bank*, 222 U.S. at 41. Where claims are "asserted by individuals but [involve] questions of fact and law common to the group," there will not be a common and undivided interest, but where the claims can "only be asserted by pluralistic entities as such," there will be a common and undivided interest. *Potrero Hill Cmty. Action Comm. v. Hous. Auth. of City & County of S.F.*, 410 F.2d 974, 977 (9th Cir.1969).

The Ninth Circuit has not expressly addressed the issue whether a PAGA plaintiff may aggregate the claims of all aggrieved employees to meet the amount-in-controversy threshold for purposes of diversity jurisdiction. California district courts are divided on this issue. *Compare Urbino v. Orkin Servs. of Cal., Inc.*, No. 11–06456, 2011 WL 4595249 (C.D.Cal. Oct. 5, 2011) (holding that PAGA claims may be aggregated), *and Thomas v. Aetna Health of Cal., Inc.*, No. 10–01906, 2011 WL 2173715 (E.D. Cal. June 2, 2011) (holding the same, in confirming magistrate judge's findings and recommendations), *with Pulera v. TW Constr. Co.*, No. 08–00275, 2008 WL 3863489 (E.D.Cal. Aug. 19, 2008) (holding PAGA claims not subject to aggregation), *and Zator v. Sprint/United Mgmt. Co.*, No. 09–2577, 2011 WL 1157527 (S.D.Cal. Mar. 29, 2011) (same).

Although the decisions of *Urbino* and *Thomas* are not binding on this Court, the Court finds them persuasive. Thus, for the reasons described below, an aggrieved employee's claims are common and undivided with those employees on whose representative behalf he sues.

An aggrieved employee does not sue under PAGA to vindicate his individual interest. Rather, "a PAGA action is essentially a representative action brought by a group of aggrieved employees on behalf of the State." *Urbino*, 2011 WL 4595249, at *6. An aggrieved employee does not sue on his or her own behalf, but rather, recovers through "a civil action brought by an aggrieved employee on behalf of himself or herself *and* other current or former employees." Cal. Labor Code § 2699(a) (italics added). Damages are awarded not to the individual plaintiff but to the aggrieved employees as a whole. *See id.* at (i) ("civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency ... 25 percent to the aggrieved *employees*) (italics added). "The statute therefore contemplates a common group action with civil penalties being awarded to the entire group." *Urbino*, 2011 WL 4595249, at *6. Under PAGA, "any direct financial benefit to those harmed by the employer's unlawful conduct is ancillary to the primary object" of the aggrieved employee's claim, namely, to act as a proxy for the LWDA and recover on its behalf, and on behalf of all aggrieved employees. *Arias*, 46 Cal.4th at 987 n. 7. Thus, "a PAGA action is essentially a law enforcement action designed to benefit the public, not to compensate aggrieved employees." *Urbino*, 2011 WL 4595249, at *7.

***4** The *Thomas* court persuasively analogized a representative PAGA action to a minority shareholder's derivative suit. Thus, in a derivative action, "the corporation sustains the primary injury; injury to the shareholders is only indirect"; "[a]s a result, the shareholders step into the shoes of the corporation and assert its interests—they have no individual right to recovery." 2011 WL 2173715, at *17. The Ninth Circuit in *Eagle v. AT & T* found that such a shareholder suit represented a common and undivided interest. 769 F.2d at 547. A representative PAGA action is similar to a shareholder suit, in that the aggrieved employees as a whole sustain the injury, and the PAGA plaintiff steps into the shoes of those employees and the LWDA to seek a remedy as a result of the alleged violations that led to the claimed injuries. The PAGA plaintiff has no individual right to recovery.

> While the lack of potential for multiple individual suits does not, by itself, turn a PAGA claim into one that is common and undivided among the group of aggrieved employees, it indicates that the aggrieved employees' right to recover penalties comes from a single source and the penalties recovered are akin to a unitary res to which aggrieved employees are claiming a right.

Thomas, 2011 WL 2173715, at * 17. The fact that the aggrieved employees receive 25% of the recovery, and LWDA the remaining 75%, "only highlights the primary public focus of a PAGA action," *Urbino*, 2011 WL 4595249, at *8, because it emphasizes that the PAGA plaintiff acts as the LWDA's proxy. That the shareholders in *Eagle* received only a pro rata share of the total recovery did not make their claims separate and distinct, because it "is proper to aggregate the value of jointly held rights when several plaintiffs sue to enforce a common

and undivided interest which is separate and distinct as between themselves." 769 F.2d at 547 n. 4. Thus, that the employees in a PAGA action receive only a percentage of the recovery does not make their claims separate and distinct.

The Court finds *Pulera,* 2008 WL 3863489, and *Zator,* 2011 WL 1157527, less persuasive. The *Pulera* court noted that either the representative PAGA plaintiff or the LWDA could bring an action to enforce the California Labor Code, 2008 WL 3863489, at *4, thereby reasoning that it was not the case that parties could not enforce the claim in the absence of one another. However, the *Pulera* court did not address the fact that the PAGA plaintiff does so as the LWDA's proxy. Moreover, all aggrieved employees and the LWDA recover from the PAGA plaintiff's action, and are bound by that action. "[T]he statute therefore contemplates a common group action with civil penalties being awarded to the entire group." *Urbino,* 2011 WL 4595249, at *6. Because of this group recovery, the parties do bring their claim only with one another. Although either the PAGA plaintiff or the LWDA can bring the action, both are bound by the outcome of the action, and only one of them can bring an action. Similarly, *Zator* did not address the issue of whether there is a common and undivided interest, and relied on the law governing class-action PAGA actions, *see* 2011 WL 1157527, at *10–11, which is not controlling in the present case because different rules govern aggregation in the class action context.

***5** Because the source of a PAGA plaintiff's claim is his interest in acting as the LWDA's proxy on behalf of all aggrieved employees, and because recovery is for all aggrieved employees and all are bound by the judgment, a PAGA plaintiff's claim comprises the common and undivided interest of all aggrieved employees. Thus, it is an exception to the anti-aggregation principle, and all the aggrieved employees' claims may be aggregated to meet the jurisdictional threshold.

2. *Application*

Defendants have established with legal certainty that Plaintiff's claims, when aggregated with those of all aggrieved employees on whose representative behalf she sues, will exceed the amount-in-controversy requirement of $75,000. Thus, Defendants have demonstrated that the amount in controversy is met.

Plaintiff claims violations of California Labor Code § 226.7, which mandates that employers provide meal and rest periods. Under PAGA, penalties for meal and rest period violations are $50 for the first violation and $100 for each subsequent violation. Cal. Labor Code § 558(a). Defendant has presented evidence, Caldwell Decl. ¶ 7, Dkt. 4, which Plaintiff has not controverted, that Defendant operates 212 stores in California, and that at least once per month, Defendant staffed a single employee alone in each store, giving rise to the alleged meal and rest period violations. Assuming, conservatively, that these were all initial violations, this would amount to penalties of $127,200 for one year (212 stores x $50 x 12 months).

Moreover, Plaintiff claims violations of California Labor Code § 226, which penalizes employers for inaccurate wage statements. Plaintiff bases these claims on allegedly inaccurate wage statements issued for pay periods related to each alleged meal and rest violation. These violations trigger civil penalties of $100 for the first violation and $200 for each subsequent violation. Cal. Labor Code § 2699(f)(2). Plaintiff argues that such violations occurred each pay period for a year, for 26 pay periods. Assuming again that these were all initial violations and that there was one violation per store per month, this would result in potential penalties of $254,400 for one year (212 stores x $100 x 12 months).

These violations alone would trigger penalties of $381,600 ($127,200 + $254,400). Even if the Court considered only the recovery by aggrieved employees, and not the 75% recovery that the LWDA receives, this would amount to $95,400. This exceeds the $75,000 jurisdictional threshold. Further, this amount does not take into account the many other California Labor Code violations that Plaintiff alleges, *see* Compl. ¶ 16, nor attorney's fees, which may also be counted toward the amount in controversy, *see* Cal. Labor Code § 2699 (authorizing attorney's fees and costs in a representative PAGA action); *Galt G/S v. JSS Scandinavia,* 142 F.3d 1150, 1156 (9th Cir.1998) ("[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy.").

***6** Plaintiff does not dispute Defendant's calculations, even though those calculations yield an amount in controversy even greater than the conservative estimates adopted here. Plaintiff only disputes the legal question whether the Court can aggregate the aggrieved employees' claims. Because Plaintiff's legal analysis regarding aggregation is unpersuasive to the Court, and because Plaintiff has not challenged Defendant's factual contentions regarding the amount in controversy, the Court finds that Defendant has met its burden to show the amount in controversy with legal certainty.

Thus, the amount in controversy exceeds $75,000. Accordingly, the Court DENIES Plaintiff's motion to remand *Lopez II*.

B. Motion to Compel Arbitration in *Lopez I*

Defendant seeks to compel bilateral arbitration based on the EDRP's arbitration clause. Plaintiff opposes arbitration and argues: (i) the arbitration agreement in the EDRP is unconscionable and unenforceable; and (ii) even if the arbitration clause were enforceable, Plaintiff can be compelled to participate only in class-wide, not bilateral, arbitration. The Court considers these arguments in this sequence.

1. *Unconscionability*

a) Legal Standard

A contract or provision within it will be deemed unenforceable due to unconscionability only if it is both procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000); *see also Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 963 (9th Cir.2012) (applying the *Armendariz* unconscionability analysis in federal court). This standard applies to arbitration agreements. *Id.* The party opposing arbitration has "the burden of proving the arbitration provision is unconscionable." *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group*, 197 Cal.App. 4th 1146, 1158 (2011).

"An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." *Marinez v. Master Protection Corp.*, 118 Cal.App. 4th 107, 114 (2004). An arbitration agreement that manifests a lack of mutuality—that requires only one party to arbitrate—is substantively unconscionable. *Wisdom v. AccentCare, Inc.*, No. C065744, 2012 Cal.App. LEXIS 1, at *13 (Jan. 3, 2012). Similarly, an arbitration agreement that "contains harsh terms that are one-sided in favor" of one party is also substantively unconscionable. *Sanchez v. Valencia Holding Co., LLC*, No. B228027, 2011 WL 5865694, at *6 (Nov. 23, 2011). "Substantive unconscionability addresses the impact of the term [or contract] itself, such as whether the provision is so harsh or oppressive that it should not be enforced." *Mission Viejo*, 197 Cal.App. 4th at 1158.

> To be [substantively conscionable], at minimum the arbitration agreement must require a neutral arbitrator, sufficient discovery, and a written decision adequate enough to allow judicial review. Further, it must include all remedies available in a judicial action and the employee may not be required to pay unreasonable costs or fees.

***7** *Wherry v. Award, Inc.*, 192 Cal.App. 4th 1242, 1248 (2011).

b) Application

Plaintiff argues that the EDRP was a contract of adhesion because she had no choice but to agree to it as a condition of her employment. As a result, she contends that it was procedurally unconscionable. However, the Court need not reach this argument, because Plaintiff has not met her burden to establish that the EDRP arbitration clause is substantively unconscionable.

The EDRP does not manifest a lack of mutuality. It binds both employee and employer to arbitration. Plaintiff has made no showing that she would not be entitled, under the AAA rules, to a neutral arbitrator, sufficient discovery, and a written decision. That Plaintiff must first present her claims to Defendant's HR department, before seeking arbitration, does not make the arbitration agreement unconscionable; Plaintiff cites no authority for the contrary position that she advances here. Moreover, Plaintiff is not seeking injunctive relief to enforce California's labor laws that serve the public interest. Consequently, her reliance on *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 316 (2000), is unpersuasive. *Cruz* held that such claims for injunctive relief cannot be arbitrated. In her class action, Plaintiff is seeking to redress past injury to herself and her co-workers by obtaining a monetary recovery. Such a recovery may be awarded in arbitration. Further, it has been determined that the FAA preempts *Cruz*. *Kilgore*, 673 F.3d at 965. Thus, Plaintiff's contention that she can receive the relief requested in this action only through litigation in court is unpersuasive. As the Supreme Court has explained in rejecting reasoning similar to that advanced here by Plaintiff: "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Plaintiff can obtain monetary relief in the arbitral forum, and thus does not require a judicial one. Accordingly, the arbitration clause is not substantively unconscionable.[2]

Thus, the arbitration agreement is not unconscionable, and is enforceable.

2. *Class–Wide Arbitration*

a) Legal Standard

"[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt–Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010).

> [C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

***8** *Id.* Thus, when an arbitration agreement is silent regarding the availability of class-wide arbitration, a court may not order, and thereby impose, class-wide arbitration on the parties. Instead, the parties may be compelled to participate in bilateral arbitration only.

b) Application

Because the EDRP is silent with regard to class-wide arbitration, the Court may not compel class-wide arbitration. The parties have agreed to participate only in bilateral arbitration. Accordingly, Plaintiff is required to participate in bilateral arbitration with Defendant.

Plaintiff argues that Defendant incorporated the AAA National Rules into the EDRP, and with them the Supplementary Rules of the AAA, which provide for class-wide arbitration. Through the incorporation of these rules, Plaintiff argues, Defendant consented to class-wide arbitration. The Court is not persuaded by this argument. Although Defendant concedes that it expressly incorporated the AAA National Rules into the EDRP, Defendant did not expressly incorporate the Supplementary Rules. Moreover, the Supplementary Rules with respect to class proceedings would apply only where there has been an express agreement to such a class proceeding. Further, whether or not Defendant incorporated the Supplementary Rules, a reasonable interpretation of those rules does not support the claim that they reflect a means by which a party has consented to class-wide arbitration: "In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." Yoon Decl. ¶ 5, Exh. B, p. 1, Rule 3, Dkt. 11–1. Thus, that Supplementary Rules exist which provide for class-wide arbitration does not reflect Defendant's agreement to class-wide arbitration. This analysis confirms that the EDRP is silent on class-wide arbitration. Under *Stolt–Nielsen*, this means that Defendant cannot be compelled to arbitrate on a class-wide basis.

For these reasons, the Court GRANTS Defendant's motion to compel bilateral arbitration in *Lopez I*.[3]

C. Motion to Compel Arbitration in *Lopez II*

The parties dispute whether Plaintiff may be compelled to arbitrate a claim brought under PAGA, whether PAGA claims are arbitrable, and whether Plaintiff's PAGA claims may be arbitrated in a bilateral manner, as opposed to in a representative capacity.

Plaintiff contends that arbitration should not be compelled due to the inconsistent positions advanced by Defendant. Thus, Plaintiff asserts that Defendant has argued that: (i) for the purpose of determining the amount in controversy, the Court must assume that Plaintiff is bringing her PAGA claims in a representative capacity which, for purposes of analyzing federal jurisdiction, warrants the aggregation of the potential recovery of all Defendant's employees; and (ii) for the purpose of compelling arbitration in *Lopez II*, Plaintiff must be ordered to arbitrate in a bilateral manner, and not as a representative of Defendant's employees. The Court is not persuaded that the Defendant's presentation of these two arguments warrants some form of estoppel or that the positions are inconsistent. The jurisdictional analysis looks at the amount in controversy under Plaintiff's claims as they exist at the time of removal. *See Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir.2004). This does not affect the subsequent question whether Plaintiff may proceed in representative arbitration under the arbitration contract to which she agreed. *See Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir.1980) ("The general rule in diversity cases is that if the jurisdictional requisites are present when the action begins, subsequent events will not ordinarily defeat the district court's jurisdiction."). This Court had jurisdiction over Plaintiff's claims when the action was removed because, at that time, Plaintiff advanced claims for which she sought more than $75,000 in recovery. That following removal Plaintiff may be ordered to arbitrate bilaterally does not change the amount

that was in controversy at the time of removal.

***9** Accordingly, Defendant is not judicially estopped from arguing that Plaintiff's PAGA claims must be aggregated to determine the amount in controversy, but that Plaintiff cannot arbitrate her PAGA claims in a representative capacity. This is because

> a party generally will be judicially estopped to assert a certain position when: 1) the party's current position is clearly inconsistent with its earlier position, 2) the party was successful in persuading a court to accept its earlier position, and 3) the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Williams v. Boeing Co., 517 F.3d 1120, 1134 (9th Cir.2008). Defendant's positions are not clearly inconsistent. Moreover, Defendant will derive no unfair advantage from the Court adopting its arguments. It is not an unfair advantage for this Court to hear Plaintiff's claims, as opposed to the Los Angeles Superior Court, the court to which Plaintiff seeks remand.

Nonetheless, the result of Plaintiff's bilateral arbitration in *Lopez I* may have preclusive effect on any possible litigation or arbitration in *Lopez II*. Accordingly, the Court stays consideration of the motion to compel arbitration in *Lopez II* pending the outcome of the decision in the arbitration of *Lopez I*. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir.1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court."). Such a stay will permit the Court to reassess the issue of further non-representative arbitration of the PAGA claims in the context of the determinations made in the arbitration of *Lopez I*.

D. Motion to Consolidate *Lopez I* and *Lopez II*

1. *Legal Standard*

"If actions before the court involve a common question of law or fact, the court *may* ... consolidate the actions." FED. R. CIV. P. 42(a) (italics added). A district court has broad discretion to consolidate actions. *Pierce v. County of Orange*, 526 F.3d 1190, 1203 (9th Cir.2008). The court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. United States*, 743 F.2d 703, 704 (9th Cir.1984). "[C]onsolidation is permitted as a matter of convenience and economy in administration." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496 (1933).

2. *Application*

***10** Although *Lopez I* and *Lopez II* feature identical parties, and largely identical issues of law and fact, the Court finds that consolidation of the matters will not be more convenient, expeditious, or inexpensive, given that the Court has compelled bilateral arbitration in *Lopez I* and stayed the motion to compel arbitration in *Lopez II*.

Plaintiff argues that potential consolidation is an issue that must be left to the arbitrator should arbitration be compelled at the request of Defendant. However, none of the cases on which Plaintiff relies for this position supports it. *Howsam v. Dean Witter Reynolds, Inc.* stands for the proposition that a court may decide the "gateway dispute" over whether the parties are bound by a given arbitration clause, but that the arbitrator decides procedural questions within the arbitration. 537 U.S. 79, 84 (2002). Similarly, the court in *Yuen v. Superior Court* held that once two separate arbitration proceedings had already begun, the arbitrator was empowered to decide whether the parties' arbitration agreements permitted consolidation of the in-progress arbitration proceedings. 121 Cal.App. 4th 1133, 1135 (2004). The other cases on which Plaintiff relies also concern whether to consolidate proceedings within arbitration.[4] Thus, none of the cases on which Plaintiff relies involves the question before the Court: Whether to consolidate actions in the district court before arbitration has begun, where such consolidation may be warranted by Rule 42(a). Indeed, in *Ferguson v. Corinthian Colleges Inc.*, the court consolidated two cases with common questions of law and fact even though Defendants planned to move to compel arbitration of both. No. 11–0127, 2011 WL 1519352 (C.D.Cal. Apr. 15, 2011). In its decision to consolidate, the *Ferguson* court stated that subsequent motions to compel would have no bearing on consolidation of the cases. *Id.* at *2. In sum, although the consolidation of actions *under arbitration* may be a procedural question for an arbitrator to decide, there is no authority that consolidation of actions *that may*

be arbitrable is a question a district court cannot decide. Thus, the Court is not persuaded that it is without power to consolidate *Lopez I* and *Lopez II.*

Nonetheless, for the reasons described above, the Court DENIES Defendant's motion to consolidate *Lopez I* and *Lopez II.*

IV. *Conclusion*

For the above-explained reasons, the Court GRANTS Defendant's motion to compel bilateral arbitration in *Lopez I,* Dkt. 9, DENIES Plaintiff's motion to remand in *Lopez II,* Dkt. 17, stays Defendant's motion to compel arbitration in *Lopez II* pending the outcome of arbitration in *Lopez I,* Dkt. 19, and DENIES Defendant's motion to consolidate, Dkt. 24.

IT IS SO ORDERED.

Footnotes

1 It was for this reason that Plaintiff brought *Lopez I* and *Lopez II* as separate actions. At the time Plaintiff brought *Lopez I,* the LWDA had not yet declined to pursue an enforcement action. Consequently, Plaintiff could not have brought the PAGA claims in *Lopez II* in the same action as *Lopez I.* However, Plaintiff could have elected to seek to amend her complaint in *Lopez I* to add the PAGA claims in that action. Had that occurred, the issue with respect to the amount-in-controversy requirement, which is addressed in Section III.A.1.b., *infra,* would not have arisen.

2 This analysis applies only to arbitration of Plaintiff's class action claims in *Lopez I,* and should not be read as analyzing arbitration of Plaintiff's PAGA claims in *Lopez II.*

3 At a status conference on April 30, 2012, Plaintiff argued that, because Defendant could modify or amend the EDRP at will, without notice, the arbitration agreement was illusory and non-binding. In none of Plaintiff's earlier memoranda, *Lopez I,* Dkt. 11; *Lopez II,* Dkt. 19, or supplemental briefing, *Lopez I,* Dkt. 23, did Plaintiff make this argument; nor did Plaintiff raise it at the Court's previous two hearings on Defendant's motions to compel arbitration. Additionally, the EDRP contains no provision allowing Defendant to change or modify it without notice, and Plaintiff has identified no other document, policy or practice that would empower Defendant to do so. Thus, whatever the legal merits of Plaintiff's argument, it has no factual basis.

4 *Certain Underwriters at Lloyds v. Cravens Dargan & Co.*—an unpublished decision which is not precedential and may not be cited to this Court, *see* Ninth Circuit Rule 36–3—held that whether to conduct consolidated arbitration was a procedural matter for the arbitrator to decide. 197 Fed. App'x 645, 646 (9th Cir.2006); *see also Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union,* 321 F.3d 251, 252 (1st Cir.2003) (holding the same); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co .,* 489 F.3d 580, 582 (3d Cir.2007) (same); *Employers Ins. Co. of Wausau v. Century Indem. Co.,* 443 F.3d 573, 575 (7th Cir.2006) (same); *Clearwater Ins. Co. v. Granite State Ins. Co.,* No. 06–4472, 2006 WL 2827872 (N.D.Cal. Oct. 2, 2006) (same). *Dockser v. Schwartzberg* held that whether arbitration would be conducted by a single arbitrator or a three-person panel was a procedural question for the arbitrator to decide. 433 F.3d 421, 428 (4th Cir.2006). Thus, none of Plaintiff's cases holds that a district court may not consolidate cases before the parties are ordered to arbitration.