SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Brian C. Walsh Presiding

JeeJee Vizconde, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2150

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Thank you.

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies and required forms for the court's appointment by stipulation of privately-retained court reporters.

- In light of the Shelter-in-Place Order in this County due to COVID-19, all appearances MUST be by CourtCall, unless otherwise authorized by the Court. If any party wants a Court Reporter, the appropriate form must be submitted and the Reporter must be reporting remotely (i.e., not in the courtroom).
- There will be a Public Access Line so that interested members of the public can listen in. That number is 888-808-6929, access #: 2752612.
- As ordered by the Presiding Judge of the Court, if the court permits someone to appear in person for the hearing, that person must observe appropriate social distancing protocols and wear a face covering, unless otherwise authorized by the Court.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while listening in on the Public Access Line.

LAW AND MOTION TENTATIVE RULINGS
DATE: AUGUST 21, 2020 TIME: 9 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
(SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV331651	Sanchez v. A&S Painting & Plastering, Inc.	CLICK ON LINE 1 FOR RULING.
LINE 2	19CV352332	Geenen v. Houzz, Inc.	CLICK ON LINE 2 FOR RULING.
LINE 3			
LINE 4			
LINE 5			
LINE 6			

Calendar Line 1

Case Name: *Francisco Zendejas Sanchez v. A & S Painting & Plastering, Inc., et al.*
Case No.: 18CV331651

This is a putative class and Private Attorneys General Act ("PAGA") action on behalf of employees of defendant A & S Painting & Plastering, Inc., alleging wage statement violations. The parties have reached a settlement, which the Court preliminarily approved in an order filed on December 17, 2019. The factual and procedural background of the action and the Court's analysis of the settlement and settlement class are set forth in that order.

Before the Court is plaintiff's motion for final approval of the settlement and for approval of his attorney fees, costs, and service awards. Plaintiff's motion is unopposed.

I. Legal Standards for Approving a Class Action/PAGA Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

In general, the most important factor is the strength of plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.) Still, the list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)

counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.*, *supra,* 168 Cal.App.4th at p. 130.)

Finally, Labor Code section 2699, subdivision (l) provides that "[t]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court (Marshall's of CA, LLC)* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) "[T]here is no requirement that the Court certify a PAGA claim for representative treatment" as in a class action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *5.) "[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Id.* at *13.) The settlement must be reasonable in light of the potential verdict value (see *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict]); however, it may be substantially discounted given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial (see *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9).

II. Terms and Administration of the Settlement

The non-reversionary gross settlement amount is $90,000, to be paid in monthly installments due to defendant's financial condition. Attorney fees of up to $30,000.00 (one-third of the gross settlement), litigation costs not to exceed $20,000, and administration costs of approximately $5,850 will be paid from the gross settlement. $5,000 will be allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named plaintiff will also seek an enhancement award of $5,000.

Defendant will fund the settlement with an initial payment of $25,000, and, beginning within 60 days of the effective date of the settlement, twelve monthly payments of $5,416.67. The administrator shall disburse these funds pursuant to the settlement within 15 calendar days of full funding. The net settlement will be distributed to individual class members pro rata based on their wage statements issued during the class period. At preliminary approval, the average payment was estimated to be approximately $122.92 to each of 240 class members. Class members will not be required to submit a claim to receive their payments. Settlement awards will be allocated 100 percent to penalties. Funds associated with checks uncashed after 180 days will be distributed to Legal Aid at Work.

Class members who do not opt out of the settlement will release "any and all individual and class claims, debts, liabilities, demands, obligations, penalties, guarantees, court/legal costs, expenses, attorneys' fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, that are alleged in, or that could have been alleged in, Plaintiffs' notice letter to the LWDA (submitted on or about April 30, 2018), the Complaint (filed July 16, 2018), arising out of wage statements furnished by Defendant to its employees."

The notice process has now been completed. There were no objections to the settlement or requests for exclusion from the class. Of 181 notice packets, 13 were re-mailed to updated addresses, and 2 were ultimately undeliverable. The administrator estimates that the average payment to class members will be $214.20, with a maximum payment of $733.02.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to plaintiff's claims, and that the PAGA settlement is genuine and meaningful. It finds no reason to deviate from these findings now, especially considering that there are no objections. The Court consequently finds that the settlement is fair and reasonable for purposes of final approval.

III. Attorney Fees, Costs, and Incentive Award

Plaintiff seeks a fee award of $30,000, or one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff also provides a lodestar figure of $93,525, based on 124.7 hours spent on the case by counsel with billing rates of $750 per hour, resulting in a negative multiplier. As a cross-check, the lodestar supports the percentage fee requested, particularly given the lack of objections to the attorney fee request. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

Plaintiff's counsel also request $6,629.67 in costs, well below the estimate provided at preliminary approval. Plaintiff's costs appear reasonable based on the summaries provided and are approved. The $5,850 in administrative costs are also approved.

Finally, plaintiff requests a service award of $5,000. To support his request, he submitted a declaration describing his efforts on the case. The Court finds that the class representative is entitled to an enhancement award and the amount requested is reasonable.

IV. Order and Judgment

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's motion for final approval is GRANTED. The following class is certified for settlement purposes:

All current and former California employees who received a wage statement from Defendant at any time during the period of time from July 16, 2017, through November 11, 2019.

No individuals have opted out of the settlement.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **November 5, 2021 at 10:00 A.M.** in Department 1. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order and judgment.

COVID-19 LAW AND MOTION HEARING PROCEDURES

Pursuant to the Judicial Council's Emergency Rule 3(a)(1) and (3), all law and motion hearings will be conducted remotely through CourtCall until further notice. Please see the General Order re: COVID-19 Emergency Order Regarding Complex Civil Actions, and in particular sections 7 and 10, available at http://www.scscourt.org/general_info/news_media/newspdfs/GENERALORDER_RECOVID-19_EMERGENCY_ORDER_REGARDING_COMPLEXCIVILACTION.pdf. If a party gives notice that a tentative ruling will be contested, any party seeking to participate in the hearing should contact CourtCall.

Public access to remote hearings is available on a listen-only line by calling 888-808-6929 (access code 2752612).

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating in a remote hearing or listening in on a public access line. No court order has been issued which would allow recording of any portion of this motion calendar.

The court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's July 24, 2017 Policy Regarding Privately Retained Court

Reporters. The court reporter will participate remotely and will not be present in the courtroom.

- oo0oo -

Calendar Line 2

Case Name: *Caitlin Geenen v. Houzz, Inc., et al.*
Case No.: 19CV352332

This is a putative class and Private Attorneys General Act ("PAGA") action alleging wage and hour violations by defendant Houzz, Inc. Before the Court is Houzz's motion to compel arbitration of plaintiff's individual claims, dismiss her putative class claims, and stay these proceedings in their entirety. Plaintiff opposes Houzz's motion.

I. Allegations of the Operative Complaint

As alleged in the operative complaint, defendant sells home renovation and design products and services and does business throughout California, including in Santa Clara County. (Class Action Complaint, ¶ 4.) Plaintiff was employed by Houzz as a non-exempt employee from August 10, 2015 through December 6, 2018. (*Id.* at ¶¶ 7–8.) She alleges that she and other putative class members were not paid at least the minimum wage for all hours worked; were not paid the correct rates for overtime hours because defendant failed to include bonuses, incentive pay, and other forms of remuneration in calculating their pay rates; did not receive required meal and rest breaks or receive required compensation for missed breaks; did not receive their final paychecks when due, and did not receive all wages owed in their final paychecks; did not receive complete and accurate wage statements; were not reimbursed for business expenses including use of their cell phones and home internet for work purposes, home office expenses, utility charges, and other expenses arising from Houzz's work-from-home policies and practices; and deducted "voluntary benefits" like gym membership fees and pet insurance from wages without proper authorization. (*Id.*, ¶¶ 11–18.)

Based on these allegations, plaintiff brings claims for (1) failure to pay regular wages in violation of Labor Code sections 204, 218, 1194, and 1194.2; (2) failure to pay overtime wages in violation of Labor Code sections 510 and 1194; (3) meal and rest period violations under Labor Code section 226.7, 512, and 516; (4) failure to provide accurate itemized wage statements in violation of Labor Code section 226; (5) waiting time penalties under Labor Code sections 201–203; (6) unauthorized deductions from wages in violation of Labor Code sections 204 and 221; (7) failure to reimburse business expenses in violation of Labor Code section 2802; (8) unfair business practices in violation of Business & Professions Code section 17200 et seq.; and (9) penalties under PAGA.

II. Legal Standard

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.) Here, as further discussed below, the parties' agreement expressly provides for the application of the procedural provisions of the California Arbitration Act ("CAA").

The CAA provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to

compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal v. Great Western Fin'l Securities Corp.*, *supra,* 14 Cal.4th at p. 413.)

If the court orders arbitration "of a controversy which is an issue involved in [the] action or proceeding pending before [it], the court … shall, upon motion of a party …, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.) "If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." (*Ibid.*)

III. Analysis

Houzz moves to compel arbitration of plaintiff's first through eighth causes of action on an individual basis and to stay her ninth cause of action under PAGA. It urges that plaintiff voluntarily executed an arbitration agreement when she began her employment, which is enforceable, not unconscionable, and does not allow for arbitration of class claims. It further contends that any dispute plaintiff may raise concerning arbitrability must be submitted to the arbitrator.

Plaintiff responds that arbitrability is for the Court to decide. She further urges that the parties' agreement is expressly governed by California law rather than the FAA, and she accordingly has the right to proceed on at least some of her wage and hour claims in court on a classwide basis pursuant to Labor Code section 229. Finally, she contends that her PAGA claim, at a minimum, should proceed, even if some of her claims are subject to arbitration.

A. Existence and Scope of Agreement to Arbitrate

Plaintiff does not dispute that she executed the arbitration agreement upon which defendant's motion is based or that her non-PAGA claims are covered by the agreement, and Houzz meets its burden of proof on these issues.

Houzz submits a declaration by its Vice President of Finance, William S. Veazey, who states that he is familiar with Houzz's employment policies and practices as part of his job duties. He declares that Houzz maintains a practice of entering into an arbitration provision with its employees, which is set forth under a separate major heading within the Houzz Proprietary Information and Inventions Assignment Agreement ("PIIA") and is referenced in the standard Houzz offer letter. Houzz maintains each employee's signed offer letter and PIIA in the employee's personnel file, and plaintiff's is attached to and authenticated by Mr. Veazey's declaration. When hiring new employees, Houzz provides them opportunities to ask questions about or request modifications to the arbitration provision, and all applicants who

receive an offer are given at least 48 hours to consider the terms of employment, ask any remaining questions, and negotiate for any desired changes.

Paragraph 10 of the PIIA attached to Mr. Veazey's declaration is entitled "Arbitration and Equitable Relief." It states that Houzz promises to arbitrate "all employment-related disputes," and that the employee signatory similarly agrees that "any and all controversies, claims, or disputes with anyone (including the Company …) arising out of, relating to, or resulting from my employment with the Company or the termination of my employment … will be subject to binding arbitration under the arbitration rules set forth in California Code of Civil Procedure Section 1280 through 1294.2, including Section 1283.05 (the "Rules") and under California Law." The provision expressly encompasses "any statutory claims under state or federal law," including "the California Labor Code." The PIIA was executed by plaintiff under her prior name.

Houzz thus meets its initial burden to show that plaintiff's claims—with the exception of her PAGA claim, which is discussed below—are subject to arbitration.

B. Delegation of Arbitrability Determination

Houzz contends that any disputes raised by plaintiff regarding arbitrability must be submitted to the arbitrator pursuant to the parties' agreement and the incorporated American Arbitration Association ("AAA") rules for the resolution of employment disputes.

The question of whether the parties agreed to arbitrate a particular dispute is generally to be decided by the court. (*AT & T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 649.) The parties may, however, agree to submit the arbitrability question itself to arbitration. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943.) Courts should find that the parties agreed to arbitrate arbitrability only where there is clear and unmistakable evidence that they did so, resolving any ambiguity in favor of a finding that the issue is for the court to determine. (*Id.* at pp. 944–945.) "[A] contract's silence or *ambiguity* about the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard." (*Hartley v. Superior Court* (*Monex Deposit Co.)* (2011) 196 Cal.App.4th 1249, 1254, italics original.)

To support its argument that the parties delegated arbitrability to the arbitrator, Houzz first cites language in the arbitration provision stating that "any and all controversies" arising out of plaintiff's employment, "including any breach of this Agreement, will be subject to binding arbitration …." As discussed above, the "Agreement" is the larger PIIA in which the arbitration provision is found. This language is ambiguous at best, and does not clearly and unmistakably delegate the arbitrability question. (Cf. *Aanderud v. Superior Court (Vivint Solar Developer, LLC)* (2017) 13 Cal.App.5th 880, 892 [provision stating the parties agree to arbitrate all disputes regarding "the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5 [the "Arbitration of Disputes" section]" was a clear delegation of arbitrability].)

Houzz also contends that the arbitration provision expressly incorporates the AAA's national rules for the resolution of employment disputes, which in turn provide that arbitrability is to be decided by the arbitrator. However, the provision does not expressly

incorporate any AAA rules; rather, it merely states that any arbitration will be administered by the AAA and "the neutral arbitrator will be selected in a manner consistent with its national rules for the resolution of employment disputes." The provision goes on to state that "the arbitrator will administer and conduct any arbitration in a manner consistent with the [CAA] and … to the extent the AAA's national rules for arbitration conflict with the [CAA], the [CAA] will take precedence." While several cases cited by Houzz hold that a contract that expressly incorporates AAA rules thereby incorporates aspects of those rules providing that the arbitrator will determine arbitrability, there is no such express incorporation here. Moreover, there is conflict among the California authorities on this point. The Court finds persuasive the reasoning of *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, which held that merely referencing the AAA and other rules was not a clear and unmistakable delegation of the arbitrability issue. (See also *Tompkins v. 23andMe, Inc.* (N.D. Cal., June 25, 2014, No. 5:13-CV-05682-LHK) 2014 WL 2903752, at *12, *aff'd* (9th Cir. 2016) 840 F.3d 1016 [following *Ajamian*].)[1]

For these reasons, the Court must evaluate plaintiff's arguments regarding arbitrability.

C. Applicability of the FAA and Labor Code Section 229

In opposition to defendant's motion, plaintiff urges that her first, second, and sixth causes of action, at a minimum, are not subject to arbitration in light of Labor Code section 229, which provides that "[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." Section 229 encompasses claims for unpaid wages under the provisions of the article in which it is found, namely, "article 1 of division 2,

[1] *Ajamian* reasoned that, because "[t]here are many reasons for stating that the arbitration will proceed by particular rules" and arbitrability is typically for the courts to determine, merely referencing a lengthy, separate document that establishes a different procedure is not "clear and unmistakable evidence" of the parties' intent regarding this specific issue. (*Ajamian v. CantorCO2e, L.P.*, *supra,* 203 Cal.App.4th at p. 790.) Critically, the court noted that even were a party to thoroughly review the AAA rules at issue in that case, Rule 7(a), like the rule cited by Houzz here,

> merely states that the arbitrator shall have "the power" to determine issues of its own jurisdiction, including the existence, scope and validity of the arbitration agreement. This tells the reader almost nothing, since a court *also* has power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so, particularly if litigation has already been commenced.

(*Ibid.*, italics original.) In circumstances where an action begins as arbitration or where judicial review is never sought, the arbitrator must necessarily determine his or her own jurisdiction. On the other hand, where—as here—claims are simultaneously filed in court, nothing in the AAA rules forbids the court from determining arbitrability as it normally would. *Ajamian* emphasized that

> we must be mindful of what the United States Supreme Court has emphasized unflinchingly for decades: notwithstanding the public policy favoring arbitration, arbitration can be imposed only as to issues the parties agreed to arbitrate; given the slim likelihood that the parties actually contemplated who would determine threshold enforceability issues, as well as the default presumption that such issues would be determined by the court, those threshold issues must be decided by the court absent *clear and unmistakable* proof to the contrary.

(*Id.* at p. 790, italics original.)

part I, chapter 1 of the Labor Code, encompassing sections 200 through 244." (*Lane v. Francis Capital Management LLC*, *supra,* 224 Cal.App.4th at p. 684.) As plaintiff appears to concede, section 229 does not apply to her third, fourth, fifth, seventh, eighth, or ninth causes of action for meal and rest period violations, wage statement violations, penalties, and violations of other statutory provisions. (See *ibid.* [claims for failure to provide meal or rest breaks, waiting time penalties, and wage statement violations are not subject to section 229].) It also does not apply to her second cause of action for failure to pay overtime, which arises under Labor Code sections 510 and 1194. (See *id.* at pp. 680, 684 [section 229 does not apply to cause of action for overtime violations, because it "d[id] not assert claims under sections 200 through 244 of the Labor Code"].) Still, plaintiff is correct that, on its face, section 229 applies to her claims for unpaid wages under the relevant Labor Code provisions, alleged in her first cause of action and arguably in her sixth cause of action.

However, Houzz correctly urges that the FAA governs the parties' arbitration agreement. Under the FAA, arbitration provisions may not be invalidated "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* (2011) 563 U.S. 333, 339; see also *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962 [discussing *Concepcion*].) Labor Code section 229 is among the defenses preempted by the FAA, which plaintiff does not dispute as a general proposition. (See *Perry v. Thomas* (1987) 482 U.S. 483 [the FAA preempts Labor Code section 229].) Plaintiff also does not challenge Houzz's evidentiary showing that the FAA applies to the agreement at issue here.[2] Still, plaintiff urges that because the arbitration provision states that employment-related disputes between the parties "will be subject to binding arbitration under the arbitration rules set forth in California Code of Civil Procedure Section 1280 through 1294.2 … and under California Law," the FAA does not apply to the parties' agreement.[3] In effect, plaintiff argues that the parties "opted out" of the FAA entirely through this language.

This argument must fail for two reasons. First, while plaintiff is correct that "parties are free to enter into contracts ***providing for arbitration under rules established by state law*** rather than under rules established by the FAA," the FAA unequivocally " 'pre-empts state laws ***which require a judicial forum*** for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " (*Wolsey, Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1209, emphases added, quoting *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.,* 489 U.S. 468, 478–479.) Labor Code section 229 is clearly such a pre-empted law, and the parties cannot "opt out" of the FAA in the manner urged by plaintiff. (See *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account* (3d Cir. 2010) 618 F.3d 277, 288–289 ["though the FAA allows parties to choose state-law arbitration standards, they cannot 'opt out' of the FAA" entirely; enforcement of an agreement to use state rules and procedures is "not because the agreements cease being subject to the FAA," but "because the FAA permits parties to specify by contract the rules under which

[2] "The FAA applies to any 'contract evidencing a transaction involving commerce' that contains an arbitration provision." (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 238, quoting 9 U.S.C. § 2.) Here, Houzz submits evidence showing the nature of its business and the scope of plaintiff's work, which both have a substantial relationship to interstate commerce, satisfying its burden to show the FAA applies. (See *Carbajal v. CWPSC, Inc.*, *supra,* 245 Cal.App.4th at pp. 238–241.)

[3] The PIIA as a whole also contains a California choice-of-law provision at paragraph 11.

arbitration will be conducted"; enforcement is "not because the parties have chosen to be governed by state rather than federal law," but "because *federal law* requires that the court enforce the terms of the agreement"], italics original, internal citation and quotations omitted].)[4]

Plaintiff's argument is also incorrect as a matter of contractual interpretation, as held in *Bravo v. RADC Enterprises, Inc.* (2019) 33 Cal.App.5th 920. Pursuant to *Bravo*, the Court is bound to read the parties' specific agreement to arbitrate employment-related disputes, including claims under the Labor Code, to mean what it says, notwithstanding the existence of Labor Code section 229. Interpreting an arbitration agreement in light of a California choice-of-law provision, *Bravo* explained that

> the [California] choice-of-law clause does not remove any arbitration from this arbitration agreement. The first textual clue is the title: "ARBITRATION AGREEMENT." This agreement is for arbitration and not against it.
>
> The text of the agreement swiftly announces its objective: the parties will arbitrate "any and all disputes" arising from Bravo's employment, "including any claims brought by the Employee related to wages" under the California Labor Code. The main point of the deal was to arbitrate all employment disputes. The parties could not have intended to apply Labor Code section 229 to this contract because that section prohibits arbitrating wage claims and requires courts to disregard private agreements to arbitrate. (Lab. Code, § 229.) Applying this California law would contradict the parties' intent to arbitrate "any and all disputes," including claims "related to wages ...."
>
> Interpreting the choice-of-law provision to negate the purpose of the two-page agreement is incorrect. Readers must assume legal authors mean to draft texts that cohere. To assume otherwise departs from common sense and makes mischief. So we read documents to effectuate and harmonize all contract provisions. (E.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 63….) Bravo's interpretation of the choice-of-law provision in this agreement is untenable because it unnecessarily sets one clause in conflict with the rest of the agreement. (*Id.* at p. 64….)

(*Bravo v. RADC Enterprises, Inc.*, *supra,* 33 Cal.App.5th at pp. 922–923.) Reading the contract this way is also consistent with the FAA's preemption of state laws that require a judicial forum for the resolution of claims subject to an arbitration provision. (See *Wolsey, Ltd. v. Foodmaker, Inc.*, *supra,* 144 F.3d at p. 1209.)

Thus, Labor Code section 229 does not apply to any of plaintiff's claims, and its application would be preempted by the FAA if it did. With the exception of plaintiff's PAGA claim, discussed below, all of plaintiff's claims are subject to arbitration.

---

[4] *Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833 is not to the contrary. In that case, the FAA did not apply because the parties were subject to an exemption for transportation workers set forth in the FAA itself. The Court of Appeal confirmed that "[t]he FAA preempts Labor Code section 229, requiring enforcement of an arbitration agreement covering such a claim," but held that "***when only the [California Arbitration Act ("CAA")] applies***, an action under Labor Code section 229 may be maintained in court." (*Id.* at pp. 844–845, emphasis added.) Here, both the FAA and the CAA apply.

D. Putative Class Claims

Houzz contends that the parties' agreement does not provide for arbitration of class claims, and the Court should consequently compel arbitration of plaintiff's individual claims only and dismiss her class claims. Plaintiff's only response to this argument is that certain class claims may proceed under Labor Code section 229, an argument which must fail for the reasons already discussed.

As urged by Houzz, multiple Courts of Appeal have held that arbitration provisions with language analogous to the operative language here do not permit class arbitration, and a trial court should dismiss such claims and compel individual arbitration upon motion by the defendant. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court (Malone)* (2012) 205 Cal.App.4th 506, disapproved of on another ground by *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115.)

The Court will accordingly dismiss plaintiff's putative class claims and compel arbitration of her first eight causes of action on an individual basis.

E. The Ninth Cause of Action for PAGA Penalties

Finally, there is no dispute that the parties' arbitration agreement does not apply to plaintiff's PAGA claim, which is asserted in a representative capacity on behalf of the state. (See *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 621 [California Courts of Appeal "have uniformly held that an employee's predispute agreement to arbitrate PAGA claims is not enforceable without the state's consent"].) Houzz moves to stay this claim, citing Code of Civil Procedure section 1281.4, and plaintiff contends that the PAGA claim should not be stayed.

After the initial briefing in this matter was submitted, the Court of Appeal for the First District issued and subsequently certified for publication an opinion addressing a trial court's discretion to stay—or decline to stay—a PAGA claim pending arbitration of an employee's related individual claims: *Jarboe v. Hanlees Auto Group* (2020) 49 Cal.App.5th 830. The Court continued the hearing on this matter to enable the parties to address *Jarboe* in supplemental briefing, which has now been submitted and reviewed. Meanwhile, the Court of Appeal granted rehearing in *Jarboe*, vacated its original opinion, and issued a new published opinion, *Jarboe v. Hanlees Auto Group* (Cal. Ct. App., Aug. 14, 2020, No. A156411) --- Cal.Rptr.3d ----, 2020 WL 4744995. The new opinion in *Jarboe* is consistent with the original one with regard to a trial court's discretion to issue a stay. The Court therefore does not require any further briefing from the parties, and will consider their supplemental briefing in response to the original opinion in *Jarboe* in conjunction with the new opinion published by the Court of Appeal.

Jarboe holds that the Court has discretion to enter or decline to enter a stay under the circumstances present here, pursuant to Code of Civil Procedure section 1281.4:

> … [T]he final paragraph of …section 1281.4 "specifically vests the trial court with authority to sever issues." (*Cook v. Superior Court of Los Angeles*

> *County* (1966) 240 Cal.App.2d 880, 887, 50 Cal.Rptr. 81.) "[W]hen there is a severance of arbitrable from inarbitrable claims, the trial court has the discretion to stay proceedings on the inarbitrable claims pending resolution of the arbitration. (Code. Civ. Proc., § 1281.4; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 714, 131 Cal.Rptr. 882, 552 P.2d 1178.)" (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 320, 133 Cal.Rptr.2d 58, 66 P.3d 1157.)

(*Jarboe v. Hanlees Auto Group*, *supra,* 2020 WL 4744995, at *9.) *Jarboe* held that the trial court did not abuse its discretion by declining to stay a PAGA claim pending the arbitration of an employee's individual wage and hour claims, explaining that despite the factual similarities between the claims,

> a PAGA claim "is not a dispute between an employer and an employee arising out of their contractual relationship." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386, 173 Cal.Rptr.3d 289, 327 P.3d 129 (*Iskanian*).) Instead, it is "a dispute between an employer and the state, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian*, at pp. 386–387, 173 Cal.Rptr.3d 289, 327 P.3d 129, italics omitted.) Requiring an employee to litigate a portion of a PAGA claim in a forum selected by the employer interferes with "the state's interests in enforcing the Labor Code." (*Iskanian*, at p. 383, 173 Cal.Rptr.3d 289, 327 P.3d 129.)

(*Jarboe v. Hanlees Auto Group*, *supra,* 2020 WL 4744995, at *9.)

Houzz contends that *Jarboe* conflicts with *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947 and urges the Court to follow that earlier opinion, which directed that a stay be entered in circumstances similar to those present here. (At p. 966 [directing the trial court to enter a stay where "the issues subject to litigation under the PAGA might overlap those that are subject to arbitration ...[,]" in order to "preserve the status quo until the arbitration is resolved" and protect "the arbitrator's jurisdiction to decide the issues that are subject to arbitration"].) However, the Court does not find any conflict between *Jarboe* and *Franco*. As *Jarboe* explained, "[w]hile the court directed entry of a stay in *Franco*, … Code of Civil Procedure section 1281.4 specifically vests the trial court with authority to sever issues [and limit the stay to those issues subject to arbitration]. … Nothing in *Franco* can be interpreted as restricting a court's discretion under these circumstances." (*Jarboe v. Hanlees Auto Group*, *supra,* 2020 WL 4744995, at *9.) To the extent there is any conflict between these opinions, the Court will follow *Jarboe*: *Franco* offers little reasoning in support of its direction that a stay be entered, does not address the representative nature of a PAGA claim in this context, and does not address a trial court's discretion pursuant to the final paragraph of section 1281.4.

Following the reasoning in *Jarboe*, the Court will sever plaintiff's PAGA claim from those subject to arbitration and will allow the PAGA claim to proceed in court. Notably, plaintiff has not yet initiated arbitration of her individual claims. Were the Court to stay this entire action, she might choose to abandon them in order to proceed with her PAGA claim. (See *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88 [discussing "plaintiffs'

recognized ability to bring stand-alone PAGA claims"].) However, effectively forcing a plaintiff to choose between pursuing individual and PAGA claims in this manner would create a disincentive to the prosecution of a PAGA action that would undermine "the statute's purpose to ensure effective code enforcement." (*Kim v. Reins International California, Inc.*, *supra,* 9 Cal.5th at p. 87 [depriving employees of the ability to prosecute PAGA claims by imposing an injury-based standing requirement is contrary to the statute's purpose; citing *Williams v. Superior Court (Marshalls of CA)* (2017) 3 Cal.5th 531 for the proposition that "[h]urdles that impede the effective prosecution of representative PAGA actions undermine the Legislature's objectives"].) The Court will not put plaintiff to that choice here.

Assuming that plaintiff will now proceed to arbitrate her individual claims, the Court is not persuaded that an individual arbitration should delay the resolution of a PAGA action brought on behalf of the state for the benefit of the public and all of the other employees allegedly aggrieved by defendant's practices. While the Court respects an arbitrator's jurisdiction to decide issues subject to arbitration, it would be hard to imagine staying an action for penalties brought by the state while an individual aggrieved employee's related Labor Code claims are arbitrated. The Court finds no basis to treat a PAGA claim asserted by a representative employee differently in this regard, particularly given that the PAGA statute itself contemplates parallel litigation of PAGA and individual claims. (See *Kim v. Reins International California, Inc.*, *supra,* 9 Cal.5th at p. 88 [quoting Labor Code section 2699, subdivision (g)(1), which provides that "[n]othing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, *either separately or concurrently* with an action taken under this part," italics original].) Moreover, the nature of the PAGA statue is such that parallel actions against a single employer are common, even in court.[5] (See *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 873 ["PAGA's enforcement mechanism … permits the state to act through more than one employee with respect to a PAGA claim against a particular employer"].) The Court typically encourages the parties to coordinate proceedings in such parallel actions, whether formally or informally, rather than seek to cut off a particular action in its early stages via a stay. Here, given that the parties to this action and any arbitration would be the same, the parties have an even greater ability to coordinate the proceedings than they would in parallel cases filed by multiple plaintiffs.

For all these reasons, the Court declines to stay plaintiff's PAGA claim and will sever it from the individual claims subject to arbitration.

IV. Conclusion and Order

Houzz's motion is GRANTED IN PART as to the first through eighth causes of action. These claims shall be submitted to individual arbitration in accordance with the parties' agreement, and are stayed pending completion of arbitration. The putative class claims are dismissed.

---

[5] Indeed, Houzz notes that such a parallel action (*Bieger v. Houzz, Inc.* (Super Ct. Santa Clara County, No. 18CV325624)) has been filed in this Court. By agreement of the parties to that action, *Bieger* is stayed pending proceedings in arbitration.

In its supplemental brief, Houzz argues that this action should be stayed in favor of *Bieger*. However, this issue is beyond the scope of the instant motion and the supplemental briefing authorized by the Court. The Court expresses no opinion about it at this time.

The ninth cause of action for penalties under PAGA is severed from the other claims and shall proceed in this Court. Houzz's motion is DENIED insofar as it seeks a stay of this claim.

The Court will prepare the order.

COVID-19 LAW AND MOTION HEARING PROCEDURES

Pursuant to the Judicial Council's Emergency Rule 3(a)(1) and (3), all law and motion hearings will be conducted remotely through CourtCall until further notice. Please see the General Order re: COVID-19 Emergency Order Regarding Complex Civil Actions, and in particular sections 7 and 10, available at http://www.scscourt.org/general_info/news_media/newspdfs/GENERALORDER_RECOVID-19_EMERGENCY_ORDER_REGARDING_COMPLEXCIVILACTION.pdf. If a party gives notice that a tentative ruling will be contested, any party seeking to participate in the hearing should contact CourtCall.

Public access to remote hearings is available on a listen-only line by calling 888-808-6929 (access code 2752612).

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating in a remotec hearing or listening in on a public access line. No court order has been issued which would allow recording of any portion of this motion calendar.

The court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's July 24, 2017 Policy Regarding Privately Retained Court Reporters. The court reporter will participate remotely and will not be present in the courtroom.

- oo0oo -

Calendar Line 3

Case Name:
Case No.:

- oo0oo -

Calendar Line 4

Case Name:
Case No.:

- oo0oo -

Calendar Line 5

Case Name:
Case No.:

- oo0oo -

Calendar Line 6

Case Name:
Case No.:

- oo0oo -