Related Cases:

Guzman, et al. v. J & G Berry Farms, LLC	23CV00929
Millan, et al. v. J & G Berry Farms, LLC	23CV04341

PROPOSED TENTATIVE

Three separate cases have been filed against defendant J & G Berry Farms, LLC (defendant), all related cases. In Case No. 23CV00929 (hereafter, *Guzman*), which is a class action/representative suit, plaintiffs advance five causes of action, based on wage and hour law and unfair business act violations. On September 6, 2023, Judge Staffel granted defendant's motion to compel arbitration, and stayed the matter. On January 3, 2024, this court denied defendant's motion to consolidate *Guzman* with Case No. 23CV04341 (hereafter, *Millan*) without prejudice, for at that time *Millan* was assigned to Judge Rigali. *Millan* was eventually transferred to this court. In *Millan*, also a class action/representative suit, plaintiffs advance six causes of action for wage and hour and unfair business act violations. In *Millan*, on March 6, 2024, in a signed order filed on March 18, 2024, this court granted defendant's motion to compel arbitration, and stayed the matter. At this time, both Guzman and Millan have been sent to arbitration, and both actions have been stayed. A CMC in scheduled in both for May 13, 2025.

The present case (Case No.24CV00275), filed on January 18, 2024, identifies 64 named plaintiffs on behalf of themselves and those similarly situated (meaning it is also a class/representative action),[1] alleging five causes of action against defendant for wage and hour and unfair business practices violations. Notices of related cases to the two above-mentioned cases have been filed. Defendant filed a general denial on March 27, 2024.

[1] The named plaintiffs are as follows (based on the caption in the operative pleading): CELERINO HILARIO GARCIA;ROSALINA SEBASTIAN PAZ; SEBASTIAN CRUZ HERNANDEZ;ANGEL SERAPIO HERNANDEZ; HERMINIO SANTOS SANCHEZ; JERONIMO HERNANDEZ SERAPIO;MANUELA ORTIZ SANTOS; URIEL SEBASTIAN SANTOS; ELVIA MUNOZ CORTEZ; MARCELINO RUIZ SANCHEZ; RUFINA VEGAS HERNANDEZ; SANTOS BRAVO AVILA; BERNARDINO LUJAN DIAZ; BERNARDINA RUIZ LOPEZ; CARMELA PINEDA LUCAS; CIRILO BRAVO AVILA; DANIEL BRAVO AVILA; DOMINGO PEREZ PEREZ; ELEUTERIO PEREA MATAMOROS; FIDEL PEREA PINEDA; FRANCISCO NAVA CHAVEZ; GRISELDA LOPEZ BRAVO; HERMES LOPEZ PERALTA; JULIA RUIZ LOPEZ; JULIANA PEREA MATAMOROS; LUIS FERNANDO HERNANDEZ; MARICELA PEREA LOPEZ; SALOMON GARCIA PEREA; SAUL BRAVO PEREA; SERGIO LOPEZ BRAVO; VULFRANO PEREA PINEDA; ZEFERINA RODRIGUEZ DOMINGUEZ; ARCADIA HERNANDEZ; AURELIO SALAZAR GUZMAN; CIPRIANA RAMIREZ TELLO; DOMINGO VASQUEZ RAMIREZ; FIDEL BASURTO VASQUEZ; FRANCISCO DIAZ MATAMOROS; RANDULFO ORTIZ; VICTOR PEREA MATAMOROS; BERNADINA LOPEZ VASQUEZ; GLORIA TORRES VEGAS; SEBASTIANA TORRES VEGA; VICTORINA VEGA CRUZ; REGINA RAMÓN AGUSTIN; **RAMIRO LOPEZ DE LA CRUZ**; **ROGELIO LOPEZ GARCIA**; **RUTILIO VELÁZQUEZ GONZALEZ**; HERMINIO MARTÍNEZ HERRERA; ROSALVA SANCHEZ CAYETANO; SILVESTRE MARTINEZ HERRERA; ANA LUCIA DE JESUS REYES; CLAUDIO HERRERA VILLANUEVA; TIMOTEO DE JESUS REYES; YESSICA DE JESUS REYES; ZOILA NAVA NAVA; ANGEL SERAPIO MORA; NICOLAS MORA; ANTONIO ZEFERINO MORELOS; LORENZO ZEFERINO MORELOS; PABLO ZEFERINO MORELOS; RUTILIO GONZALEZ ZEFERINO; SABINA ZEFERINO MORELOS; and VALENTINA HERNANDEZ SOLARIO. (The highlighted names have been dismissed as plaintiffs.)

On calendar today is defendant's motion to compel arbitration in *Garcia, et al. v. J & G Berry Farms, LLC* (Case No. 24CV00275), filed on October 9, 2024. Defendant does not wish to compel all 64 named plaintiffs to arbitration at this time. It is moving to compel only 40 named plaintiffs to arbitration, broken down into five distinct groups involving the timing and nature of the arbitration agreements (all attached as Exhibits 1 to 40), as follows: 1) Exhibit A, which is the English translation of the same Spanish arbitration agreement signed by 29 of the named plaintiffs (Exhibits 1-17, 19-24, 26-31); 2) Exhibit B, which is the English translation of the same Spanish arbitration agreement signed by 3 of the named plaintiffs (Exhibits 32 to 34); 3) Exhibit C, which is the English translation of the same Spanish arbitration agreement signed by 5 of the named plaintiffs (Exhibits 35-36, 38-40); 4) Exhibit D, which is the English translation of the same Spanish arbitration agreement signed by 1 named plaintiff (Exhibit 37); and 5) Exhibit E, which is the English translation of the same Spanish arbitration agreement signed by 2 of the named plaintiffs (Exhibits 18 and 25). (29 + 3 + 5 + 1 + 2 = 40 named plaintiffs.[2]) Most arbitration agreements were signed in 2022, with a few signed in 2023 and/or 2024. Defendant contends that as to these 40 plaintiffs, the agreements are similar to the arbitration agreements at issue in Guzman and Millan, and thus, should be enforced. Defendant has filed a memorandum of points and authorities, a declaration from Hilda Salto with copies of all 40 arbitration agreements in Spanish; a declaration from Sharilyn Payne, with certified English translations of the arbitration agreements above; a declaration from attorney Lindsey Berg-James, detailing the significant meet and confer efforts made by her to avoid a third motion to compel arbitration; and a request for judicial notice. Plaintiffs filed opposition, and defendant filed a reply on December 11, 2024.

The court will first address defendant's request for judicial notice and plaintiff's evidentiary objections; outline the relevant legal principles that frame the issues before the court; explain the arguments and evidence offered by both sides; and then address the merits. The court will finish with a summary of its conclusions.

A) Defendant's Request for Judicial Notice and Plaintiff's Evidentiary Objections

[2] Unfortunately, defendant's numbers in its briefing do not match. In its introduction, defendant seems to reference 41 plaintiffs, not 40 (claiming 29 as to Exhibit A, and 2 as to Exhibit E, but then claiming there are 10 plaintiffs in associated with Exhibits B (3), C (5), D(1), when there are only 9 (B – 3, C- 5, and D -1). The court will treat the request as involving 40, not 41, named plaintiffs. Defendant contends 17 of the remaining 24 named plaintiffs not subject to the current motion to compel "signed a different agreement," and defendant will "move to compel arbitration in a subsequent motion." The remaining 7 plaintiffs "either did not work during the statutory period or were never employed by [defendant] and [defendant] has no employment records for them . . . ." It appears plaintiffs have dismissed three named plaintiffs from this case, for the court signed an order on August 23, 2024, filed on August 26, 2024, dismissing plaintiffs Rutilio Velasquez Gonzalez, Rogelio Lopez Garcia, and Ramiro Lopez De La Cruz as parties, leaving 61 named plaintiffs. The court has highlighted the dismissed plaintiffs in footnote 1, *ante.* Accordingly, there are 21 named plaintiffs as of this writing not subject to arbitration.

Defendant asks the court to take judicial notice of the following documents: 1) the complaint filed in this matter; 2) the order after hearing granting defendant's motion to compel arbitration in Case No. 23CV00929 (*Guzman*); 3) the complaint in Case No. 23CV0431(*Millan*); and 4) the order granting defendant's motion to compel arbitration in Case No. 23CV0431 (*Millan*). As there is no opposition, the court grants the request.

Plaintiff has advanced eight (8) evidentiary objections to paragraphs in the declaration of Liane Katzenstein Ly, defense counsel. The court overrules objections 2 and 8. Ms. Katzenstein Ly declares she can make the challenged statements from her own personal knowledge, and would be able to competently testify about them; there is no reason she cannot testify whether claimants chose not to pursue their claims at issue in Objections 2 and 8. The court overrules the third (3), fourth (4), fifth (5), and sixth (6) objections based on relevance; the court finds the statements at issue are relevant, even if at times they involve counsel's opinion about gamesmanship (Objection 7), as she likely has personal knowledge about this. The court sustains defendant's first objection, to the effect Ms. Katzenstein Ly declares in paragraph 8 that defendants, during arbitration in *Millan*, engaged in an "intimidation campaign" against plaintiffs at a number of plaintiffs' homes; despite declarant's claim that she has personal knowledge of these events, it seems most likely she does not (as matter of context and common sense), and thus it would be improper for her testify.

B) Legal Background

Code of Civil Procedure section 1281.2 provides that a court "shall order the petitioner and the respondent to arbitrate a controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that (a) the right to compel arbitration has been waived by the petitioner . . . ." As our high court has explained, whether the arbitration is governed by the Federal Arbitration Act (FAA) or the California Arbitration Act (CAA), "when a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc.,] § 1281.2, subds. (a) & (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal* v. *Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413,; see also *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951. 972-976 [opposing party has burden to show a defense, such as waiver, by a preponderance of evidence].) The prevailing view is that the burden of proving both the existence of a valid arbitration agreement and whether the dispute at issue is covered by the arbitration clause is

placed on the moving party. (*Trinity v. Life Ins. Co. of North American* (2022) 78 Cal.App.5th 1111, 1120; *Nixon v. AmeriHome Mortgage Co., LLC* (2021) 67 Cal.App.5th 934, 946; *San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 683 ; *Larian v. Larian* (2004) 123 Cal.App.4th 751, 760; but cf. *Aanderudi v. Superior Court* (2017) 13 Cal.App.5th 880, 890 ["It is the party opposing arbitration who bears the burden to show the arbitration provision cannot be interpreted to cover the claims in the complaint"].) The court is persuaded by the prevailing view as it is consistent with statements made by our high court in both *Rosenthal* and *Engalla* and will therefore follow it.

California law, like the FAA, reflects a strong policy favoring arbitration. Further, a party opposing arbitration has the burden of proving any defense, such as waiver. But as our high court has recently explained, "California policy, like federal policy, puts arbitration agreements on equal footing with other types of contracts. Accordingly, under California law, as under federal law, a court should apply the same principles that apply to other contracts to determine whether the party seeking to enforce an arbitration agreement has waived the right to do so." (*Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 569, citing *Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, 418 [rejecting specific prejudice rule for waiver when arbitration is governed by the FAA].) There is no arbitration-specific prejudice requirement regarding the waiver analysis for arbitration. (*Ibid*.) Because Code of Civil Procedure section 1281.2 sets out an exception to the general rule that courts must enforce a written arbitration agreement when the right to compel arbitration has been waived by the petitioner; and because the statute does not define what it means to waive the right to arbitrate, courts should look to generally applicable law to supply that meaning. (*Quach, supra*, at p. 578 [the statute is most naturally read as directing courts to apply generally applicable law in determining whether the right to compel arbitration has been waived].)

Our high court in *Quach* was more specific about this topic: "To establish waiver under generally applicable contract law, the party opposing enforcement of a contractual agreement must *prove by clear and convincing evidence* that the waiving party *knew of the contractual right* and *intentionally relinquished or abandoned it*. [Citation.] Under the clear and convincing evidence standard, the proponent of a fact must show that it is 'highly probable' the fact is true. [Citation.] The waiving party's knowledge of the right may be 'actual or constructive.' [Citation.] Its intentional relinquishment or abandonment of the right may be proved by evidence of words expressing an intent to relinquish the right or of conduct that is so inconsistent with an intent to enforce the contractual right as to lead a reasonable factfinder to conclude that the party had abandoned it. [Citation.] [¶] *The waiver inquiry is exclusively focused on the waiving party's words or conduct;* neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party's subjective evaluation of the waiving party's intent is relevant." To establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm resulting from the waiving party's conduct. (*Quach, supra,* 16 Cal.5th at p. 585, emphasis added.)

As noted, "intentional relinquishment" can be demonstrated based on "conduct that is so inconsistent with an intent to enforce the contractual right as to lead a reasonable factfinder to conclude that the party abandoned it." In determining whether there has been a waiver, our high court indicated the court should focus actions of the party seeking to compel arbitration, looking to "undue delay" and "gamesmanship" as factors in this calculus. (*Quach, supra*, 16 Cal.4th at p. 587.)

The facts and conclusions reached in *Quach* are illustrative of how courts should approach the issue of waiver in a post-*Quach* world, and thus the facts in *Quach* will be detailed. Our high court, after finding that specific prejudice is not required, as noted above, found the record before it demonstrated by clear and convincing evidence that defendant Commerce Club knew of its contractual right to arbitrate and, further, that "by its words and conduct also demonstrate[d] by clear and convincing evidence its intentional abandonment of the right to arbitrate. Indeed, on this record, Commerce Club's position, if accepted, would surely create undue delay and gamesmanship going forward. Rather than moving to compel arbitration at the outset of the case, Commerce Club answered the complaint and propounded discovery requests, suggesting it did not intend to seek arbitration. Although Commerce Club asserted in its answer that Quach should be compelled to arbitrate, its counsel did not otherwise raise the issue with Quach's counsel or with the court. Instead, it ***affirmatively indicated*** its preference for a jury trial and actively pursued discovery. On Commerce Club's initial case management conference statement, filed about three months after Quach filed his complaint, Commerce Club requested a jury trial, left the check box for indicating it was 'willing to participate' in arbitration blank, and represented that the only motion it intended to file was a "dispositive motion.' After the case management conference, Commerce Club posted jury fees. In the following months, despite the disruptions caused by the COVID-19 pandemic, Commerce Club actively engaged in discovery, taking Quach's deposition for a full day, and corresponding with Quach's counsel about discovery disputes. It was not until 13 months after Quach filed his complaint that Commerce Club first sought to enforce its right to compel arbitration. This evidence of Commerce Club's words and conduct shows that Commerce Club chose not to exercise its right to compel arbitration and to instead defend itself against Quach's claims in court." (*Quach, supra*, at pp. 586-587, emphasis added.)

The *Quach* court then went on as follows: "This conclusion is not undermined by Commerce Club's assertion that it did not move to compel arbitration 'on the eve of trial,' that discovery it conducted was minimal,' that it did not gain information about this case that it could not have gotten in arbitration, and that Quach has not litigated the merits of the claims. [Citation.] The record in this case shows that, being fully aware of its right to compel arbitration, Commerce Club chose not to do so for 13 months, ***affirmatively indicated*** its intent to pursue a jury trial rather than arbitration, and actively engaged in discovery — words and conduct markedly inconsistent with an intent to arbitrate. Accordingly, we conclude Commerce Club waived its right to arbitrate the dispute. [Citation omitted.]" (*Id.* at p. 567. Emphasis added.)

C) Arguments and Evidence Offered by Both Sides

Defendant argues, based on the five categories of documents, coupled with the English translations of each arbitration document signed in Spanish, that each of the 40 named plaintiffs at issue signed an arbitration agreement; further, it contends that individual claims advanced for each plaintiff in their respective arbitration agreements are governed or covered by the arbitration clause. It therefore claims it has met its burden to show, as required per Code of Civil Procedure under section 1281.2, that a contractual arbitration agreement exists and that the causes of action must be arbitrated. It also contends that the each of the 40 agreements contain an express class action waiver. Defendant also observes that the arbitration agreements here (all five categories), involving the 2022 and 2023 arbitration agreements, have already been enforced in both *Guzman* and *Millan*; further, the 2024 arbitration agreements at issue are nearly identical to the 2023 arbitration agreements, and the 2021 arbitration agreements "are also not substantively different to the agreements already enforced by this Court" in *Guzman* and *Millan*.

This would leave, so it would appear, the fifth cause of action for violation of the Business & Professions Code section 17200 (a UCL violation), which is not subject to arbitration, pursuant to *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 951-952, should plaintiff request public injunctive relief (even though the parties fail to acknowledge this law in their briefing). (See, *Kramer v. Coinbase, Inc.* (2024) 105 Cal.App.5th 741, 744 [a request for public injunctive relief under, *inter alia*, the California Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.; UCL) is not subject to arbitration]; see *Maldonado v. Fast Auto Loans, Inc.* (2021) 60 Cal.App.5th 710, 725 ["We conclude Lender's arguments the FAA preempts the *McGill* rule lacks merit, and there is no basis to stay this appeal"].) "The arbitrability of UCL claims depends on the type of relief plaintiff seeks. Our Supreme Court [has concluded] that UCL claims for restitution 'are fully arbitrable' [citation], but claims for public injunctive relief cannot be arbitrated. [Citation.] If a plaintiff's UCL cause of action includes both arbitrable and inarbitrable claims, such as a request for restitution and a request for public injunctive relief, the trial court must sever the cause of action, order the arbitrable portion to arbitration, and stay the inarbitrable portion pending the completion of arbitration." (*Clifford v. Quest Software Inc.* (2019) 38 Cal.App.5th 745, 750, citing *McGill, supra*, 2 Cal.5th at p. 966; *Vaughn v. Tesla, Inc.* (2023) 87 Cal.App.5th 208, 226.)[3]

Plaintiffs in opposition do not contest ***any*** of this. They do not claim defendant has failed to present prima facie evidence to show that each of the 40 named plaintiffs signed an arbitration agreement; nor do they contend that defendant has failed to show that the disputes raised in the operative pleading are not covered by the arbitration agreement. Further, they do not contend that the arbitration agreements fail to contain a class action waiver, which is enforceable under

[3] Plaintiff in the fifth cause of action asks for "injunctive relief, restitution, and other appropriate equitable relief." (¶ 63.) That means under *McGill* and *Clifford*, the court will have to sever the causes of action requesting injunctive relief (inarbitrable) from the causes of action requesting restitution (arbitrable), and order the arbitrable portion to arbitration, while staying the inarbitrable portion pending completion of arbitration.

the FAA. (See, e.g., *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 961 ["We are compelled by these rulings to reverse the trial court's order denying the petition for arbitration on the ground that employer-imposed class action waivers are unenforceable because they limit employees' ability to vindicate statutory employee protections,"].) Finally, they do not challenge the observations made above that part of the UCL cause of action involving restitution should be sent to arbitration, while that portion involving public injunctive relief should remain before this court, with the action stayed pending resolution of the arbitration.

They instead raise two different issues. First, they claim defendant waived its right to compel arbitration under *Quach* and progeny. Second, they contend that even if the court finds defendant did not waive its right to compel arbitration, the court should not order to arbitration any representative actions under PAGA as to two named defendants based on the 2021 arbitration agreement – Randulfo Ortiz and Saul Bravo Perea. The second issue will be discussed at the end of this order.

As for waiver, plaintiffs' argue defendant engaged in an "extremely unreasonable delay" in filing the motion. "Here, Defendant waited nearly eight months after this Action was filed to produce any arbitration agreements and nearly nine months to file its Motion." Plaintiff bolstered this claim by noting that defendant was aware "as early April 2023 that it had a significant number of employees seeking to pursue wage and hour claims against defendant. [Fn. Omitted.] In the [*Guzman*] matter, [defendant] appeared to have the arbitration agreements of the named plaintiffs in that case at the ready, within one month of filing the complaint. [Citation.] In the *Millan* action, Defendant once again had these arbitration agreements readily available and filed its Motion to Compel within three months of the filing that Action. [Citation.] [¶] Defendant has not provided any reason for the delay to produce the arbitration agreements in this case. It took eight months from the filing of this Action and repeated requests from Plaintiff's counsel to obtain copies of only some of the arbitration agreements. Defendant has even conceded that it is withholding the alleged agreements for 17 Plaintiffs that signed a 'different agreement.' It also intends to bring a subsequent motion to compel arbitration of this 'different agreement,' but had never previously informed Plaintiffs' counsel of this 'different agreement.' It also intends to bring a subsequent motion to compel arbitration of this 'different agreement' but did not state a reason as to why it did not include this agreement of those Plaintiffs in its instant Motion. [Defendant] has not given a single reason, much less a valid reason, for the delay – because there is none . . . ." "Defendant has now lost any contractual right to arbitrate through its extremely unreasonable delay. Defendant forced Plaintiffs to file the instant Action to preserve their rights and to toll the statute of limitations on their claims." This is detailed in the declaration of Ms. Liane Katzenstein Ly, along with the exhibits attached thereto. Plaintiff relies on cases in which courts have found an unreasonable delay in filing a motion to compel arbitration after the complaint was filed. (*Garcia v. Haralambos Beverage Co.* (2021) 59 Cal.App.5th 534, 543 [complaint filed Nov. 11, 2016, and motion to compel filed on Nov. 20, 2018]; *Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 338 [plaintiff filed

complaint Dec. 19, 2008, and defendant filed motion to compel arbitration on July 2, 2009]; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4the 980, 996 [motion to compel arbitration filed 10 months after complaint filed].) Plaintiff also cites two cases for the proposition that defendant has failed to provide a reasonable explanation for the delay in providing the arbitration agreements. (See, e.g., *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 969 [all courts have found the absence of a reasonable explanation for delay is a significant factor weighing in favor or finding waiver]; *Garcia, supra*, 59 Cal.App.5th at p. 543.)

D) Merits

Before addressing the merits of defendant's petition to compel arbitration, the court makes some preliminary observations that will help frame the issues before it. First, this court is not going to revisit the merits of the court's decision to compel arbitration in *Guzman* and *Millan.* Second, the court is not going to address any evidence offered to support prejudice, a factor our high court per *Quach* recently concluded is not relevant to the present inquiry. Accordingly, the court will not address any claim that plaintiff Sabrina Zeferino Morelos's actions are time-barred due to defendant's so-called delay in presenting arbitration agreements. Nor is the court going to consider the merits of defendant's decision to essentially bifurcate the motion to compel procedure in this case -- the first, now, which involves 40 plaintiffs, and the second, later, which will involve the remaining 21. The court will explore the merits of the present motion under the relevant test crafted by our high court in *Quach;* any future motion will be assessed separately (if one is filed).[4]

With these qualifications made, the court finds that defendant has met its obligations under section Code of Civil Procedure 1281.2, subdivision (a), by showing that the 40 plaintiffs at issue signed a binding arbitration agreement; further, the court also finds that all five causes of action are covered by all arbitration agreements. The court finds that plaintiffs have waived a right to present a class action lawsuit. The court also finds, under existing authority (although not addressed by either party), that the injunctive relief portion of the UCL cause of action (the fifth cause of action) must remain with this court, while the restitution portion is arbitrable.

The lingering issue for the court to determine is whether defendant waived its right to compel contractual arbitration. In this regard plaintiff has failed to identify or apply all of the standards that our high court in *Quach* concluded must be examined (even though plaintiffs cite to *Quach* on p. 8 of their opposition). (*Quach*, *supra*, 16 Cal.5th at p. 584 ["to establish waiver under generally applicable law, the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party knew of the contractual right and

[4] In making this determination, the court leaves open the possibility that defendant may waive the right to arbitrate as to any future motion to compel arbitration as to the remaining 21 plaintiffs. The parties should be aware of the import of Code of Civil Procedure section 1281.4, which imbues the court with the authority to stay a court matter pending arbitration, which may come to pass if the court denies any future motion to compel arbitration. Of course, the court does not have to resolve any of these issues (and does not at this time); they are identified only for clarity.

intentionally relinquished it"].) Plaintiff does not mention the clear and convincing standard it must met (i.e., that it is "highly probable" the fact is true); fails to address the knowledge requirement in its briefing; and never mentions the gateway element of "intentional relinquishment" – of which delay and inconsistent behavior are factors to consider. (See, e.g., *Chan v. Panera, LLC* (C.D. Cal., Sept. 3, 2024, No. 2:23-CV-04194-JLS-AJR) 2024 WL 4137332, at *2 [discussing *Quach*, and noting that for purposes of "intentional relinquishing" requirement, the court examines whether defendant substantially delayed filing the motion to compel arbitration, and whether defendants engaged in extensive litigation conduct that was inconsistent with the intent to arbitration].) The ***only*** factor plaintiff discusses involves defendant's alleged failure to disclose the arbitration agreements[5] through discovery or discovery-like requests – there is otherwise no mention of defendant's actions during the litigation, such as propounded discovery requests, representations contained in CMC statements filed with the court, representations made to the court and/or opposing counsel about defendant's intent to pursue a motion to compel arbitration after the complaint was filed, all factors *Quach* found relevant in this calculus.

In any event, on the merits, the court determines that the evidence before the court shows by clear and convincing that defendant knew of the arbitration agreements from the outset of this litigation (if not before). The court also finds, however, that plaintiffs have failed to show *by clear and convincing evidence* (a high probability that the facts are true) that defendant "intentionally relinquished" its right to compel arbitration, under the standard mandated by our high court, for the following reasons.

While this lawsuit was filed on January 18, 2024, and this present motion was filed on October 9, 2024, some eight-and-half months later, defendant's litigation conduct between these dates points *exclusively in one direction* – its intent to file a motion to compel arbitration. Service acknowledgement was made on February 26, 2024; in defendant's general denial filed on March 27, 2024, it pleaded "arbitration" as an "affirmative defense." In its first Case Management Statement (CMC) filed with the court on June 17, 2024, while it indicated it wanted

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[5] Plaintiff takes it step farther in its briefing, claiming it was prejudiced by defendant's "withholding the agreements," by depriving plaintiffs of "benefits and efficiencies of arbitration. The majority of Plaintiffs have already waited over a year and a half for their arbitration agreements, and a group of Plaintiffs still have not received theirs and have been unable to initiate their claims. Plaintiff has no choice but to file the instant Action to preserve their rights." Plaintiff's argument has two defects. First, it seemingly ignores *Quach*'s directive that the 'waiver inquiry is ***exclusively*** focused on the waiving party's words or conduct; neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party's subjective evaluation of the waiving party's intent is relevant." (*Quach, supra*, 16 Cal.5th at p. 585, emphasis added.) Second, the court is not convinced that plaintiffs were in fact prejudiced or impermissibly denied the benefits and efficiencies of arbitration. Not to belabor the point too much, but plaintiffs could have pursued arbitration themselves if they had desired. It also notes that plaintiffs' counsel (Kingsley Zmamet & Ky) is the same in all three actions (*Guzman, Millan*, and the present case), and has *vigorously* fought any and all requests by defendant to compel arbitration. Indeed, as noted in Ms. James-Berg's application, in a conversation with plaintiff's counsel, even after disclosure of the 40 arbitration agreements at issue here, "none of the plaintiffs would stipulate to arbitration . . . ." It rings a little hollow for plaintiffs to claim here that defendant's actions deprived plaintiffs of the "benefits and efficiencies" of arbitration considering these past actions.

a jury trial, no trial date was set, and it conditioned this jury trial request on the following: "N/A [the jury trial right is N/A] pending filing/outcome of Motion to Compel Arbitration and outcome of same." In the same vein and in the same CMC statement (Item 15), defendant noted that it had filed motions to compel arbitration in the *Guzman* and *Millan* cases, and, more significantly, it " further intends to file another Motion to Compel Arbitration" in the present matter. In Item 16 in the same CMC statement, as to discovery, it noted that the "discovery . . . [is] N/A, pending filing/outcome of Motion to Compel Arbitration." In Item 18 of defendant's CMC statement, the following attestation was made: "Each of the plaintiffs who worked for Defendant during the statutory period has an arbitration agreement with the company. Despite the results of the motions to compel in the first two class actions filed by plaintiffs' counsel, they will not voluntarily submit the matter to arbitration. Defendant will file a motion to compel arbitration in this case but seeks the court's guidance on the procedure considering the significant number of plaintiffs."

There is no evidence that any discovery has been exchanged, and no indication that discovery motions or informal discovery conferences have occurred that would suggest defendant planned to litigate the matter in this court. Further, at the July 2, 2024, CMC hearing, before this court, the minute order indicates that arbitration was a continuing and ongoing issue. Defense counsel requested the court's guidance on how to file a motion to compel arbitration *due to the large number of plaintiffs in this action*. The minute order goes to indicate the following observations made by the court. "The Court is inclined to allow one single motion to compel arbitration on the related matters," and the court ordered the parties to meet and confer. The arbitration motion was filed on October 9, 2024. Every single filing by defendant with and every single communication made by defendant to the court between January 18, 2024, and October 9, 2024, indicates defendant's intent to file a motion to compel arbitration, and its plan to do so, framed by this difficulty because while a class action lawsuit was filed, there were 64 named plaintiffs with individual claims. This case therefore stands in stark contrast to the evidence in *Quach* indicating defendant waived the right to compel arbitration, as detailed above.

Nor is the court persuaded by plaintiffs' claims that defendant's failure to disclose the arbitration agreements involving the named plaintiffs (all 64) evinces conduct that was inconsistent with the intent to arbitrate. In fairness to defendant, it did not know what arbitration agreements were specifically at issue ***in this lawsuit*** until the lawsuit was filed, meaning discussions between counsel prior to that date, while perhaps useful as background information, are of marginal relevance in determining the critical issue of intentional relinquishment.[6] After

[6] In this court's experience it is highly unusual to name as plaintiffs a large portion of the expected putative class. This case therefore stands in stark contrast to the naming designations in *Guzman* and *Millan*. In *Guzman,* there were only two named plaintiffs, while in in *Millan*, there were three It is not surprising therefore that defense counsel could more quickly file motions to compel arbitration in those cases but not here. Nor is it surprising that defense counsel would have a far greater difficulty securing, obtaining, and marshalling the arbitration agreements necessary to support a motion to compel arbitration for 64 named plaintiffs, in which defendant has the burden of proof, as opposed to the two plaintiffs in *Guzman* or the three plaintiffs in *Millan*. Plaintiffs fail to acknowledge the

the lawsuit was filed, on June 11, 2024, plaintiff's counsel asked for the arbitration agreements "in this case." In an email dated July 2, 2024, plaintiff's attorney Ms. Liane Katzenstein Ly emailed defense counsel (i.e., after defendant's CMC statement, and on the day of the court's CMC hearing), again indicating that "we'd like to request that you provide the arbitration agreements for our clients. Also, as ordered by the court, we are available to meet and confer on your motion to compel arbitration . . . ." (Exhibit 9 attached to Ms. Katzenstein Ly's declaration.) On August 2, 2024, defense counsel sent an email to plaintiff's counsel indicating it was having trouble finding any employment records for the names of at least six individuals named in the lawsuit (Angela Serapio Hernandez, Manuela Ortiz Santos, **Ramiro Lopez De La Cruz**, **Rogelio Lopez Garcia**, **Velasquez Gonzalez**, and Uriel Sebastien Santos.) (Exhibit 10 attached to Ms. Katzenstein Ly's declaration.) On August 23, 2024 (some two weeks before the motion to compel arbitration was filed), the court signed an order dismissing the three highlighted named plaintiffs. This evidence shows that defendant was not dilatory but simply struggling with the scope and format of the motion, which in large part was the reason for the delay and why defendant reached out to the court to determine the most viable way to present the motion to compel arbitration. Given the number of plaintiffs at issue, the problems with employment records, coupled with a desire to avoid the specter of another a third motion, the evidence does not suggest intentional relinquishment and thus waiver.

This last point is underscored by the first declaration submitted by Lindsey Berg-James, counsel for defendant, and the exhibits attached thereto. Ms. Berg-James declares that she made efforts to avoid a third motion to compel arbitration (after the *Guzman* and *Millan* motions were granted), beginning on April 5, 2024. In an email on the latter date, the following was urged: "To your comment about the third class action [i.e., this matter], the Plaintiffs in that case . . . all have arbitration agreements, at least the ones that [defendant] has record of being employees. . . . We would like to discuss how we may resolve the issues with the nine Plaintiffs above in an efficient manner. Also, in light of the rulings in the first two cases it does not make sense to do another round of motions to compel arbitration, which will only delay mediation." (Exhibit C attached Ms. Berg-James's declaration.) According to Ms. Berg-James., on July 9, 2024, counsel for both sides discussed on the telephone "how best to handle the motion to compel arbitration in the event Plaintiffs would not stipulate to arbitrate"; on August 5, 2024, defendant disclosed to plaintiff's counsel arbitration agreements for 35 named plaintiffs, and on August 20, 2024, it disclosed 5 arbitration agreements for the remaining named plaintiffs at issue here. (Ms. Berg-James' declaration, pp. 8-9.) And on August 20, 2024, in a conversation between counsel, plaintiffs indicated that even with the 40 arbitration agreements for the named plaintiffs at issue here, "none of the plaintiffs would stipulate to arbitration . . . ." (Ms. Berg-James' declaration, at p. 5.)

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significant administrative difficulties the naming designations engendered here; a problem underscored by the fact defendant apparently had difficulty determining the identities of the plaintiffs given the similarity in names of the plaintiffs.

Plaintiff's reliance on *Garcia v. Haralambos Beverage Co., supra*, 59 Cal.App.5th 534, a case which plaintiff seems to contend has factual similarities here, is misplaced. There, plaintiff's lawsuit was filed on November 11, 2016; defendant answered on March 15, 2017; in a November 2, 2017, joint status conference statement defendant indicated that that it was not intending to raise contractual arbitration, although it reserved the right to do so at later time, a point reiterated in the March 15, 2018, joint statement. On November 9, 2017, defendant agreed to participate in class-wide mediation, but again expressed no intent to arbitrate. On February 20, 2018, defendant agreed to a protective order to facilitate the production of class-wide information data; and on March 22, 2018, and April 24, 2018, plaintiffs propounded class-wide discovery. For the first time on June 29, 2018 (after it located the signed arbitration agreements in June 2018), defendant sent a letter demanding arbitration, stating its intention to file a motion to compel arbitration if plaintiff did not intend to agree to arbitrate by July 6, 2018. Even then defendant continued to engage in informal discovery conferences, and on August 14, 2018, was directed to complete the notice process for class certification by August 31, 2018. It continued to meet and confer to discuss discovery disputes, culminating in defendant's November 7, 2018, motion to compel further discovery responses. Defendant filed the motion to compel arbitration on November 20, 2018.

With these facts, the *Garcia* appellate court affirmed the trial court's denial of defendant's motion to compel based on waiver. "[S]ubstantial evidence supported a finding that the length of defendant's delay prior to filing its motion to compel arbitration and for a stay was unreasonable. Twenty-four months elapsed from the time defendant was served with Garcia's original complaint, on November 16, 2017, to when it filed its motion to compel arbitration, on November 20, 2018. Twenty months elapsed from the time it asserted arbitration as an affirmative defense in its answer on March 15, 2017, to when it filed its motion. Even excluding the nine-month period during which the action was stayed pending mediation, from June 23, 2017, to March 21, 2018, the delay was still unreasonably long. [Citation.]" Further, "defendant acted in a manner inconsistent with its right to arbitrate." It stated in two status conference statements that it did not intend to arbitrate; agreed to a protective order to facilitate the production of class-wide information; engaged in class-wide mediation; responded to plaintiffs' discovery requests, including requests for class-wide information; met and conferred with plaintiff on class-wide discovery disputes; participated in the class-wide *Belaire-West* notice process; and participated in an informal discovery conference regarding documents to the *Belaire-West* notice process. Further, even after June 2018 (the date the arbitration agreement was located), "defendant continued to meet and confer with plaintiffs regarding discovery and the *Belaire-West* notice process. Defendant also participated in an informal discovery conference on August 14, 2018, at which it was ordered by the court to produce certain materials by August 24, 2018. Defendant apparently did not comply with that order, which caused plaintiffs to file a motion to compel discovery and request attorney fees. It was only then that defendant, on November 20, 2018, nearly five months after locating the signed arbitration agreements, filed its motion to compel arbitration." (*Garcia , supra, at pp.* 543–544.)

Nothing similar occur here. Even if defendant was aware of the arbitration agreements before the lawsuit, it did not know the identity of the specifically named plaintiffs in this lawsuit until the lawsuit was filed with the 64 named plaintiffs. And it is clear that defendant struggled identifying the employment records of all plaintiffs during the following 7 months, until August 2024, when the arbitration agreements were disclosed. Defendant was obviously concerned about repeating the efforts in the other cases (with laudable efforts to avoid duplication). During all times, unlike the defendant in *Garcia*, defendant here consistently indicated that it was interested in and desired to pursue arbitration – there was no mixed messages conveyed, despite the approximate eight months between filing of the complaint and the filing of the motion to compel arbitration, a situation distinct from that presented in *Garcia*.

The court finds that the evidence before the court does not show by clear and convincing evidence that defendants intentionally relinquished their right to compel arbitration of the 40 named plaintiffs at issue in this matter. The court finds there was no substantial delay, given the complicated nature of the present lawsuit (in naming 64 named plaintiffs); it also finds that the defendant's litigation conduct was consistent with the intent to arbitrate. The court therefore grants the motion to compel arbitration

This requires the court to address plaintiff's second argument touched upon above. Plaintiff contends that even if the court compels the individual claims to arbitration, the plaintiffs who signed the 2021 arbitration agreements (i.e., Randulfo Ortiz, Exhibit 18 and Saul Bravo Perea, Exhibit 25, both part of the English translation contained in Exhibit E) should be allowed to advance a PAGA representative action in this court, because the waiver of their agreement does not include PAGA representative actions. Plaintiff is correct that their arbitration agreement does not include a waiver of a right to file a PAGA *representative* action involving non-individual claims[7] -- even though their individual claims for civil penalties are required to be sent to arbitration. (See, e.g., *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 657 [FAA allows waiver of right to litigate of individual PAGA claims in a court of law but does not preclude a state law from forbidding representative PAGA actions].) Further, in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, our high court concluded that an aggrieved employee who is required to arbitrate his or her individual PAGA claims still has standing to advance a PAGA representative action in a court of law. (*Id*. at p. 1114 ["Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA"].)

Despite the legal standards enunciated above, it is not entirely clear to the court whether this distinction is relevant, for it is not clear whether plaintiff is advancing a viable PAGA

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[7] Exhibit E, which contains the English translation of the 2021 arbitration agreement, contains Item 4, which reads as follows: "Employee expressly agrees to waive any right to participate in or file any class, representative or collective claim related to wages or other terms and conditions of employment in any forum, except representative claims filed under the Private Attorney General Act of 2024 . . . ."

representative action or not. In the fourth cause of action, which is the only cause of action that asks for civil penalties, plaintiffs allege an action "on behalf of themselves and the Proposed Class" (i.e., all nonexempt employees who are employed or have been employed as an hourly or piece-rate employee by defendant in the State of California who worked one or more pay periods four years prior to the filing of this action). ***If*** all named plaintiffs are part of the proposed class, then there is no representative action to advance. However, if there are other nonexempt employees who are not named parties (i.e., the "Proposed Class" is greater than the named plaintiffs), then a representative action can go forward. Simply put, ***if*** the named plaintiffs do not constitute the entirety of the proposed class, the court will permit the PAGA representative action to remain here and stay the action pending arbitration. ***If*** the named plaintiffs are the only member of the Proposed Class, then the complaint fails to advance a PAGA representative action, and there is nothing to keep here. Plaintiff should explain the intent of the language in the operative pleading to determine this issue.

Summary of Court's Conclusions:

- The court grants defendant's request for judicial notice.
- The court overrules plaintiff's Objection Nos. 2 to 8 but sustains plaintiff's Objection No. 1.
- The court grants the motion to compel arbitration, finding defendant has satisfied its burden of showing that all 40 plaintiffs at issue in the motion to compel arbitration signed an agreement that contains a binding arbitration clause, which covers all causes of action advanced. The court finds that plaintiff has not demonstrated by clear and convincing evidence that defendant waived his right to compel contractual arbitration. Each arbitration clause contains a class action waiver, which is enforceable.
- The court asks plaintiff to clarify whether the named plaintiffs are the entirety of the proposed representative class for purposes of any claimed PAGA representative action. If the answer is yes, there is no basis for a PAGA representative action, and thus, there is nothing to litigate in this court. If the answer is no, then as to plaintiffs Randulfo Ortiz and Saul Bravo Perea, the court will keep the representative cause of action here, direct the PAGA individual claims to arbitration, and stay the PAGA representative action. Plaintiff should clarify at the hearing the nature and scope of the proposed class vis a vis the named plaintiffs for this purpose.
- Finally, although not addressed by the parties, as to the fifth cause of action for UCL violation, the court directs that portion of the fifth cause of action that involves restitution to arbitration but orders that part of the fifth cause of action that involves injunctive relief to remain here. The court stays that part of the UCL cause of action that remains here pending the outcome in arbitration.

- For the record, this order does not impact the parties' ability to litigate the matter (and thus the ability to file additional motions) as to the remaining 21 plaintiffs that are not subject to arbitration as of this time; nor does this order preclude defendant from filing a motion to compel arbitration as to them in the future. This order should not be interpreted as resolving any issue of waiver that may be associated with defendant's future motion to compel arbitration. All issues in that regard will have to be resolved at the time the motion to compel arbitration (if filed) is heard on the merits.
- With that said, the court directs the parties to consider the following issue that may arise. No matter what happens regarding the remaining 21 plaintiffs (i.e., those that fall outside of today's motion to compel arbitration), the court may have to expand the limited stay imposed today in order to cover all claims involving all remaining plaintiffs, under the authority of Code of Civil Procedure section 1284.1, pending the outcome in arbitration in this case (and in *Guzman* and *Millan*). The court does not have to resolve these issues today, but simply reminds the parties that such authority exists and that this possibility remains.