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AMERICAN ARBITRATION ASSOCIATION
FRESNO REGION

FILEMON COLORES, an individual,

Complainant,

vs.

RAY MOLES FARMS, INC., a California
corporation; and DOES 1 through 100,

Respondents.

Case No.: _____

DEMAND FOR ARBITRATION:

- (1) **MINIMUM WAGE VIOLATIONS (LABOR CODE §§ 1182.12, 1194, 1194.2, AND 1197);**
- (2) **FAILURE TO PAY ALL OVERTIME WAGES (LABOR CODE §§ 204, 510, 551, 552, 558, 1194, AND 1198);**
- (3) **MEAL PERIOD VIOLATIONS (LABOR CODE §§ 226.7, 512);**
- (4) **REST PERIOD VIOLATIONS (LABOR CODE §§ 226.2, 226.7, AND 516);**
- (5) **FAILURE TO PROVIDE ACCURATE, ITEMIZED WAGE STATEMENTS (LABOR CODE § 226 *et seq.*);**
- (6) **WAITING TIME PENALTIES (LABOR CODE §§ 201-203);**
- (7) **UNFAIR COMPETITION (BUS & PROF CODE § 17200 *et seq.*); AND**
- (8) **CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT FOR COMPLAINANT'S INDIVIDUAL CLAIMS ONLY (LABOR CODE § 2698 *e seq.*).**

**DEMAND FOR JURY TRIAL
UNLIMITED CIVIL CASE**

1 Complainant Filemon Colores (“Complainant”), hereby brings this Demand for
2 Arbitration (“Demand”) against Ray Moles Farms, Inc., a California corporation; and, DOES 1
3 to 100, inclusive (collectively “Respondents”), and on information and belief alleges as follows:

4 **JURISDICTION**

5 1. Complainant, brings this Demand for Arbitration for recovery of unpaid wages
6 and penalties under California Business & Professions Code § 17200 *et. seq.*, Labor Code §§ 201-
7 203, 226.2, 226.7, 510, 512, 516, 558, 1182.12, 1194, 1194.2, 1197, 1198, 2698 *et seq.*; and
8 Industrial Welfare Commission Wage Order 14 (“Wage Order 14”), in addition to seeking
9 declaratory relief and restitution. AAA has jurisdiction over Respondents’ violations of the
10 California Labor Code as a result of an arbitration agreement entered into by the Parties. The
11 arbitration specifically encompasses, “Any and all past, present and future disputes between you
12 (the Employee), and the Employer (and/or its agents, supervisors, officers and owners) [including
13 but not limited to disputes about your job application process, your employment, and your
14 compensation, and all disputes related to, resulting from, or arising out of the employment
15 relationship]...”

16 2. Jurisdiction is further proper pursuant to *Filemon Colores v. Ray Moles Farms,*
17 *Inc.*, United States District Court for the Eastern District of California, Case No. 1:21-cv-00101-
18 JLT-BAM, order that Complainant’s individual claims, including the individual component of
19 Claimant’s individual PAGA claim be compelled to arbitration on March 31, 2023. The Order is
20 attached hereto as **Exhibit A**. The case was originally filed as a class action on November 23,
21 2016, in Tulare County Superior Court, Case No. VCU285177. Respondent subsequently
22 removed the case to Federal Court. The PAGA case, Case No. VCU285947 was originally filed
23 in Tulare County Superior Court on February 12, 2021. Respondent subsequently removed the
24 case to Federal Court. On April 23, 2021, the two cases were consolidated.

25 **VENUE**

26 3. Venue is proper in Fresno because Complainant resides in the greater Fresno area
27 and worked in the greater Fresno area throughout the duration of his employment with
28 Respondents. Venue is also proper in Fresno because the arbitration agreement specifically states

1 that “Any and all past, present and future disputes between you (the Employee) and the
2 Employer...shall be solely and exclusively resolved by final and binding arbitration on an
3 individual basis before a neutral retired judge, conducted under the provisions of the Federal
4 Arbitration Act in Fresno, California.” One or more of the Respondents, transact business, have
5 agent(s) within the greater Fresno area, and/or otherwise are found within the greater Fresno area.

6 **PARTIES**

7 4. Complainant is an individual over the age of eighteen (18). At all relevant times
8 herein, Complainant was and currently is, a California resident. During the four years immediately
9 preceding the filing of the Demand in this action and within the statute of limitations periods
10 applicable to each cause of action pled herein, Complainant was employed by Respondents as a
11 non-exempt employee. Complainant was, and is, a victim of Respondents’ policies and/or
12 practices complained of herein, lost money and/or property, and has been deprived of the rights
13 guaranteed by Labor Code §§ 201-203, 226.2, 226.7, 510, 512, 516, 558, 1182.12, 1194,
14 1194.2, 1197, 1198, 2698 *et seq.*; California Business and Professions Code § 17200 *et seq.*, and
15 Wage Order 14, which sets employment standards for Agricultural Occupations.

16 5. Complainant is informed and believes, and based thereon alleges, that during the
17 time period of November 23, 2016, four years prior to the lawsuit entitled *Filemon Colores v. Ray*
18 *Moles Farms, Inc.*, filed on November 23, 2016, in Tulare County Superior Court, Case No.
19 285177, and continuing to the present, Respondents employed Complainant in Fresno County and
20 the state of California and, therefore were (and are) doing business in Fresno County and the State
21 of California. The claims alleged in this Demand pertain to the time period starting in November
22 23, 2016, as all claims were properly alleged in the originally filed action, filed on November 23,
23 2016, which were tolled on an individual and PAGA representative basis.

24 6. Complainant does not know the true names or capacities, whether individual,
25 partner, or corporate, of the Respondents sued herein as DOES 1 to 100, inclusive, and for that
26 reason, said Respondents are sued under such fictitious names, and Complainant will seek leave
27 to amend this Demand when such true names and capacities are discovered. Complainant is
28 informed, and believes, and based thereon alleges, that each of said fictitious Respondents,

whether individual, partners, or corporate, were responsible in some manner for the acts and omissions alleged herein, and proximately caused Complainant to be subject to the unlawful employment practices, wrongs, injuries and damages complained of herein.

7. Complainant is informed, and believes, and thereon alleges, that at all times mentioned herein, Respondents were and are the employers of Complainant.

8. At all times herein mentioned, each of said Respondents participated in the doing of the acts hereinafter alleged to have been done by the named Respondents; and furthermore, the Respondents, and each of them, were the agents, servants, and employees of each and every one of the other Respondents, as well as the agents of all Respondents, and at all times herein mentioned were acting within the course and scope of said agency and employment. Respondents, and each of them, approved of, condoned, and/or otherwise ratified each and every one of the acts or omissions complained of herein.

9. At all times mentioned herein, Respondents, and each of them, were members of and engaged in a joint venture, partnership, and common enterprise, and acting within the course and scope of and in pursuance of said joint venture, partnership, and common enterprise. Further, Complainant alleges that all Respondents were joint employers for all purposes of Complainant.

GENERAL FACTUAL ALLEGATIONS

10. Respondents are in the agricultural business and employ seasonal farm labor employees to harvest agricultural goods. Complainant worked for Respondents as a non-exempt farm labor employee on a seasonal basis from approximately January 2016 until approximately February 2, 2020 performing various tasks which varied depending on the season. Complainant worked under two separate compensation structures. Between the months of December and February, Complainant was compensated on a piece rate basis at a rate of 36 cents per vine/stump when pruning the vineyards and 12 cents per vine/stump when tying the vineyards. Furthermore, between the months of August and September, Complainant was also paid on a piece rate basis for work performed picking and cutting grapes. During the spring season, Complainant was paid on an hourly basis at a rate of \$12.00 per hour to sucker the vines. On information and belief, Complainant alleges that Respondents did not employ any actual timekeeping practices when he

1 performed piece work and at no point was Complainant made to confirm or sign off on his hours
2 worked. Respondents have not boarded or lodged Complainant during his employment.

3 11. During the seasons where Complainant performed piece work for Respondents,
4 Complainant was generally tasked with working Monday-Saturday from 6:30 a.m. until 4:30
5 p.m., and often as late as 5:00 p.m. On Sundays, Complainant would be made to work from 6:30
6 a.m. until 12:30 p.m. Throughout Complainant's employment, Respondents' foreperson failed
7 to record the hours Complainant worked. Complainant was not paid an hourly minimum wage if
8 his earned piece-rate compensation did not exceed his minimum wages earned in a pay period
9 pursuant to Wage Order 14.

10 12. During the seasons where Complainant performed hourly work for Respondents,
11 Complainant was generally tasked with working from 6:00 a.m. until 4:00 p.m. and on Sundays
12 from 6:00 a.m. until 12:00 p.m.

13 13. Despite the fact that Complainant was regularly tasked with working seven days a
14 week, Respondents as a matter of practice and policy failed to pay him the proper overtime rate
15 on his seventh day worked, or pay him daily overtime. Upon information and belief, Respondents
16 did not pay any overtime hours to Complainant at any time regardless of whether he was
17 performing work on a piece rate or hourly basis.

18 14. Complainant was not authorized to take all legally required rest periods regardless
19 of whether they were working on a piece-rate or hourly basis. On those occasions where
20 Complainant performed piece work for Respondents, Respondents routinely failed to pay the
21 correct regular rate for rest and recovery periods. Rather, Respondents would pay Complainant
22 at a rate of \$2.17 per hour for rest and recovery periods, far below the legal minimum wage, when
23 he worked on a piece rate basis. For example, on Complainant's pay stub dated January 13, 2020,
24 he was paid for 26 hours at a rate \$2.17 per hour for rest breaks, which strays far from the
25 obligations imposed on Respondents to provide paid rest periods at the regular rate of pay.
26 Furthermore, on a number of pay periods where Complainant performed piece work, Respondents
27 would not provide any compensation whatsoever for rest and recovery time. For example, on
28 Complainant's pay stub dated January 7, 2020, Complainant was not provided any rest period

1 compensation whatsoever despite having clearly performed piece work exclusively during this
2 time frame. Despite Respondents' failure to authorize and permit Complainant to take all lawful
3 paid rest periods, due to their uniform and unlawful practices, Respondents never provided
4 Complainant with an hour of pay at his regular rate for each rest period violation as required by
5 Labor Code § 226.7. Upon information and belief, during at least a portion of the class period,
6 Respondents maintained no payroll code or another mechanism for the payment of rest period
7 premiums in the event Complainant was not authorized to take lawful rest periods.

8 15. Respondents have failed to accurately record and compensate Complainant for
9 non-productive time. *See Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36
10 (holding that a piece-rate compensation structure that does not separately compensate employees
11 for non-productive time violates California minimum wage laws). Complainant was required to
12 perform work duties and activities that were not directly compensated on a piece-rate basis.
13 Specifically, for example, Complainant would be made to travel between fields on an almost daily
14 basis and was in no manner compensated for this time. Furthermore, on those occasions where
15 the weather conditions did not immediately permit Complainant to commence work, he would
16 have to wait for the conditions to improve before he was permitted to begin his shift. At no point
17 did Respondents ever provide any sort of compensation to Complainant for this time.
18 Furthermore, Respondents also failed to compensate Complainant for time spent sharpening his
19 pruning shears, which would take Complainant around 45 minutes per day on the days that he
20 was made to do so. Additionally, Complainant was not compensated for bathroom and water
21 breaks, waiting in lines, and/or other mandatory duties that were not directly compensated on a
22 piece-rate basis. Complainant alleges that all this wait time constitutes unproductive worktime
23 which must be compensated under California law. Accordingly, Complainant estimates that he
24 worked at least an additional 1.5 hours per shift of non-productive time. However, as evidenced
25 by Complainant's check numbered 18443, 18526, and 18865 (representing the time frame
26 between December 25, 2019 and January 28, 2020), Respondents did not provide any sort of
27 compensation for non-productive time. Complainant alleges that Respondents have not
28 accurately tracked and compensated employees' non-productive time in compliance with Labor

1 Code § 226.2.

2 16. Respondents have also failed to record employees' total hours worked each
3 workday accurately. Specifically, Respondents' forepersons did not record the hours worked in
4 any fashion apparent to Complainant when he was performing piece rate work. Complainant
5 never formally clocked in or clocked out during his shifts and was never provided any sort of
6 timecard reflecting the hours he worked. Rather, Respondents tracked Complainant's piece rate
7 compensation exclusively while failing to record the actual number of hours worked in any
8 manner. As a result, Respondents failed to ensure that Complainant was being paid at least the
9 minimum wage for all hours actually worked, and failed to ensure that Complainant received
10 proper overtime wages for all overtime hours worked, in compliance with Wage Order 14.

11 17. Respondents further failed to pay Complainant all overtime wages, because
12 Complainant frequently worked seven days in a row and was not at any point provided any
13 overtime compensation for his work performed on Sundays, entitling him to at least 6.0 hour of
14 overtime pay per week pursuant to Wage Order 14.

15 18. Respondents also did not provide Complainant with a legally compliant first meal
16 period when he worked shifts in excess of 6.0 hours. Complainant would be instructed by the
17 foreperson to finish his meals and return to work no later than fifteen minutes after first being
18 released for a meal period. There was rarely, if ever, any formal meal period provided to
19 Complainant outside of an instruction to hurry up and eat so he could get back to work.
20 Complainant was not informed by Respondents of his legal right to take duty-free uninterrupted
21 meal periods before the conclusion of his fifth hour of work pursuant to Labor Code Section 512.
22 Complainant estimates that he never took more than fifteen minutes for a meal period.
23 Respondents were not only aware of, but actively encouraged this practice. Respondents also
24 failed to provide second meal periods when Complainant worked shifts in excess of 10.0 hours.
25 Upon information and belief, Respondents' forepersons did not accurately record meal periods in
26 any manner. Despite Respondents' failure to provide Complainant with all lawful meal periods
27 due to their uniform and unlawful practices, Respondents never provided Complainant with an
28 hour of pay at his regular rate for each meal period violation as required by Labor Code § 226.7.

19. As a result of Respondents' failure to accurately compensate Complainant for non-productive time, failure to pay all minimum and overtime wages, and failure to provide all required meal periods and authorize all rest periods or pay premium pay in lieu thereof, Respondents have maintained inaccurate payroll records, failed to timely pay all wages owed to Complainant at the time of their separation, and issued inaccurate wage statements. Moreover, Respondents issued facially deficient wage statements do not comply with wage statement requirements for piece-rate workers because they do not state the "total hours" of rest and recovery time. For example, Complainant's wage statement numbered 19151 states that Respondent worked 8.0 "breaks" compensated at a rate of \$2.17 per break. This is not the proper way to list the payment for "breaks" or "rest and recovery" as Labor Code Section 226.2 makes clear rest and recovery pay needs to be identified by the hours of rest and recovery time worked. *See* Labor Code Section 226.2(2)(A) ("the itemized statement required by subdivision (a) of Section 226 shall.... separately state ... (A) The **total hours of compensable rest and recovery periods**") (emphasis added.).

FIRST CAUSE OF ACTION

MINIMUM WAGE VIOLATIONS

(AGAINST ALL RESPONDENTS)

20. Complainant re-alleges and incorporates by reference all previous paragraphs.

21. Wage Order 14, § 4 and California Labor Code §§ 1197 and 1182.12 establish the right of employees to be paid minimum wages for all hours worked in amounts set by state law. Labor Code §§ 1194(a) and 1194.2(a) provide that an employee who has not been paid the legal minimum wage as required by Labor Code § 1197 may recover the unpaid balance together with attorneys' fees and costs of suit, as well as liquidated damages in an amount equal to the unpaid wages and interest accrued thereon. At all relevant times herein, Respondents failed to conform their pay practices to the requirements of the law by failing to pay Complainant for all hours actually worked including, but not limited to, all hours he were subject to the control of Respondents and/or suffered or permitted to work under the California Labor Code and Wage Order 14.

1 22. California Labor Code § 1198 makes unlawful the employment of an employee
2 under conditions that the IWC prohibits. California Labor Code §§ 1194(a) and 1194.2(a) provide
3 that an employer who has failed to pay its employees the legal minimum wage is liable to pay
4 those employees the balance of the unpaid wages as well as liquidated damages in an amount
5 equal to the wages due and interest thereon.

6 23. As a direct and proximate result of Respondents' unlawful conduct as alleged
7 herein, Complainant has sustained economic damages, including but not limited to, unpaid wages
8 and lost interest in an amount to be established at trial, and they are entitled to recover economic
9 and statutory damages and penalties and other appropriate relief as a result of Respondents'
10 violations of the California Labor Code and Wage Order 14.

11 24. Respondents' practice and uniform administration of corporate policy regarding
12 illegal employee compensation is unlawful and creates an entitlement to recovery by Complainant
13 in a civil action for the unpaid amount of minimum wages, liquidated damages, including interest
14 thereon, statutory penalties, and attorneys' fees and costs of suit according to California Labor
15 Code §§ 204, 558, 1194, *et seq.*, 1197, 1198 and Code of Civil Procedure § 1021.5.

16 **SECOND CAUSE OF ACTION**

17 **FAILURE TO PAY ALL OVERTIME WAGE**

18 **(AGAINST AL RESPONDENTS)**

19 25. Complainant re-alleges and incorporates by reference all previous paragraphs.

20 26. This cause of action is brought pursuant to Labor Code §§ 204, 510, 558, 1194,
21 and 1198, which provide that non-exempt employees are entitled to overtime wages for all
22 overtime hours worked, and provide a private right of action for the failure to pay all overtime
23 compensation for overtime work performed.

24 27. At all times relevant herein, Respondents were required to properly compensate
25 Complainant for all overtime hours worked pursuant to California Labor Code § 1194 and Wage
26 Order 14. Wage Order 14, § 3 requires an employer to pay overtime wages when an employee's
27 hours worked cross certain thresholds or meet certain criteria set forth in the Wage Order.

28 28. At all times relevant herein, Respondents caused Complainant to work overtime

1 hours but did not compensate Complainant at one and one-half times their regular rate of pay for
2 such hours.

3 29. The foregoing policies and practices are unlawful and create entitlement to
4 recovery by Complainant in a civil action for the unpaid amount of overtime premiums owing,
5 including interest thereon, statutory and civil penalties, and attorneys' fees and costs of suit
6 according to California Labor Code §§ 204, 510, 558, 1194, and 1198, Wage Order 14, and Code
7 of Civil Procedure § 1021.5.

8 **THIRD CAUSE OF ACTION**

9 **MEAL PERIOD VIOLATIONS**

10 **(AGAINST ALL RESPONDENTS)**

11 30. Complainant re-alleges and incorporates by reference all previous paragraphs.

12 31. Complainant is informed and believes, and based thereon alleges, that
13 Respondents failed in their affirmative obligation to provide all of their non-exempt employees
14 in California, including Complainant, with all legally compliant meal periods in accordance with
15 the mandates of the California Labor Code and Wage Order 14, § 11. Despite Respondents'
16 violations, Respondents did not pay an additional hour of pay to Complainant at his regular rate
17 of compensation, in accordance with California Labor Code §§ 226.7, and 512.

18 32. As a result, Respondents are responsible for paying premium compensation for
19 meal period violations including interest thereon, as well as statutory penalties, civil penalties,
20 and costs of suit, pursuant to Labor Code §§ 226.7, 512, and 558, Wage Order 14, and Civil Code
21 §§ 3287(b) and 3289.

22 **FOURTH CAUSE OF ACTION**

23 **REST PERIOD VIOLATIONS**

24 **(AGAINST ALL RESPONDENTS)**

25 33. Complainant re-alleges and incorporates by reference all previous paragraphs.

26 34. Wage Order 14, § 12 and California Labor Code §§ 226.2, 226.7 and 516 establish
27 the right of employees to be authorized and permitted to take a paid rest period of at least ten (10)
28 minutes net rest time for each four (4) hour period worked, or major fraction thereof.

35. As alleged herein, Respondents failed to authorize and permit Complainant to take all legally compliant rest periods.

36. The foregoing violations create an entitlement to recovery by Complainant in a civil action for the unpaid rest period wages and the amount of rest period premiums owing, including interest thereon, as well as statutory penalties, civil penalties, and costs of suit according to California Labor Code §§226.2, 226.7, 516, 558, and Civil Code §§ 3287(b) and 3289.

FIFTH CAUSE OF ACTION

WAGE STATEMENT VIOLATIONS

(AGAINST ALL RESPONDENTS)

37. Complainant re-alleges and incorporates by reference all previous paragraphs.

38. Complainant is informed and believes, and based thereon alleges, that Respondents knowingly and intentionally, as a matter of uniform practice and policy, failed to furnish Complainant with accurate, itemized wage statements that included, among other requirements, accurate total gross wages earned, meal and rest period premiums, and total net wages earned in violation of Labor Code §226 *et seq.*

39. Respondents' failure to furnish Complainant with complete and accurate, itemized wage statements resulted in actual injury, as said failures led to, among other things, the non-payment of all of his meal and rest period premiums, and deprived him of the information necessary to identify discrepancies in Respondents' reported data.

40. Respondents' failures created an entitlement to Complainant in a civil action for damages and/or penalties pursuant to Labor Code § 226, including statutory penalties civil penalties, reasonable attorneys' fees, and costs according to suit pursuant to Labor Code § 226 *et seq.*

SIXTH CAUSE OF ACTION

WAITING TIME PENALTIES

(AGAINST ALL RESPONDENTS)

41. Complainant re-alleges and incorporates by reference all previous paragraphs.

42. This cause of action is brought pursuant to Labor Code §§ 201-203, which require

1 an employer to pay all wages immediately at the time of termination of employment in the event
2 the employer discharges the employee or the employee provides at least 72 hours of notice of
3 his/her intent to quit. In the event the employee provides less than 72 hours of notice of his/her
4 intent to quit, said employee's wages become due and payable not later than 72 hours upon said
5 employee's last date of employment.

6 43. Respondents failed to timely pay Complainant all final wages due to him at the
7 time of his separation including, among other things, unpaid amounts for rest and recovery
8 periods and non-productive time, underpaid overtime and minimum wages owed, and meal and
9 rest period premium wages, in violation of the requirements of Labor Code §§ 201-203.
10 Respondents' failure to pay all final wages was willful within the meaning of Labor Code § 203.

11 44. Respondents' willful failure to timely pay Complainant his earned wages upon
12 separation from employment results in a continued payment of wages up to thirty (30) days from
13 the time the wages were due. Therefore, Complainant is entitled to compensation pursuant to
14 Labor Code § 203, plus reasonable attorneys' fees and costs of suit.

15 **SEVENTH CAUSE OF ACTION**

16 **UNFAIR COMPETITION**

17 **(AGAINST ALL RESPONDENTS)**

18 45. Complainant re-alleges and incorporates by reference all previous paragraphs.

19 46. Respondents have engaged and continue to engage in unfair and/or unlawful
20 business practices in California in violation of California Business and Professions Code § 17200
21 *et seq.*, by failing to pay Complainant all overtime and minimum wages, failing to provide all
22 required meal periods, failing to authorize and permit all required rest periods, failing to pay
23 meal and rest period premium wage payments, , failing to furnish accurate wage statements, and
24 willfully failing to timely pay Complainant all final wages upon separation of employment.

25 47. Respondents' utilization of these unfair and/or unlawful business practices
26 deprived Complainant of compensation to which he is legally entitled, constitutes unfair and/or
27 unlawful competition, and provides an unfair advantage over Respondents' competitors who
28 have been and/or are currently employing workers and attempting to do so in honest compliance

1 with applicable wage and hour laws.

2 48. Because Complainant is a victim of Respondents' unfair and/or unlawful conduct
3 alleged herein, Complainant seeks full restitution of monies, as necessary and according to proof,
4 to restore any and all monies withheld, acquired and/or converted by Respondents pursuant to
5 Business and Professions Code §§ 17203 and 17208.

6 49. The acts complained of herein occurred within the last four years immediately
7 preceding the filing of the instant Arbitration.

8 50. Complainant was compelled to retain the services of counsel to file this demand
9 for arbitration to protect his interests, to obtain restitution and injunctive relief, and to enforce
10 important rights affecting the public interest. Complainant has thereby incurred the financial
11 burden of attorneys' fees and costs, which he is entitled to recover under Code of Civil Procedure
12 § 1021.5.

13 **EIGHTH CAUSE OF ACTION**
14 **PRIVATE ATTORNEYS GENERAL ACT**
15 **(AGAINST ALL RESPONDENTS)**

16 51. Complainant re-alleges and incorporates by reference all prior paragraphs as
17 though fully set forth herein.

18 52. Respondents have committed several Labor Code violations against Complainant.
19 Complainant, an "aggrieved employee" within the meaning of Labor Code § 2698 et seq., acting
20 on behalf of himself, brings this demand for arbitration against Respondents to recover the civil
21 penalties due to Complainant, and the State of California according to proof pursuant to Labor
22 Code § 558 and § 2699 (a) and (f) including, but not limited to: (1) \$100.00 for each initial
23 violation for each failure to pay Complainant and \$200 for each subsequent violation or willful
24 or intentional violation pursuant to Labor Code § 210 for each failure to pay Complainant, plus
25 25% of the amount unlawfully withheld; (2) \$50.00 for each initial violation and \$100 for each
26 subsequent violation pursuant to Labor Code § 558 per pay period; (3) \$100.00 for each initial
27 violation and \$250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per pay
28 period; (4) \$250.00 for each initial violation and \$1,000.00 for each subsequent violation

pursuant to Labor Code § 226.3 per pay period; and/or (5) \$100.00 for each initial violation and \$200 for each subsequent violation per pay period for those violations of the Labor Code for which no civil penalty is specifically provided, based on the following Labor Code violations:

- a. Failing to pay minimum wages for all hours worked to Complainant, in violation of Labor Code §§ 558, 1182.12, 1194, 1194.2, 1197, and 1198;
- b. Failing to pay Complainant all earned overtime compensation in violation of Labor Code §§ 204, 510, 558, 1194, and 1198;
- c. Failing to provide all legally required meal periods, and failure to pay meal period premium wages, to Complainant at the regular rate of compensation in violation of Labor Code §§ 226.7, 512, 558, and 1198;
- d. Failing to authorize and permit all legally required rest periods, and failure to pay rest period premium wages, to Complainant at the regular rate of compensation in violation of Labor Code §§ 226.7, 516, 558, and 1198;
- e. Failing to furnish Complainant with complete, accurate, itemized wage statements in violation of Labor Code § 226;
- f. Failing to timely pay all final wages and compensation earned by Complainant at the time of separation in violation of Labor Code §§ 201, 202, and 203;
- g. Failing to pay Complainant all earned wages at least twice during each calendar month in violation of Labor Code § 204;
- h. Failing to compensate Complainant at least once every week on a business day designated in advance and including all wages earned up to and including the fourth day before such payday in violation of Labor Code § 205; and
- i. Failing to maintain accurate records on behalf of Complainant in violation of Labor Code § 1174.

53. On November 20, 2020, and on November 29, 2021, Complainant notified Respondents via certified mail, and notified the California Labor and Workforce Development Agency (“LWDA”) via its website, of Respondents’ violations of the California Labor Code and Complainant’s intent to bring a claim for civil penalties under California Labor Code § 2698 et seq. with respect to violations of the California Labor Code identified in Paragraph 51 (a)-(i).

Now that sixty-five days have passed from Complainant's notifying Respondents and the LWDA of these violations, and the LWDA has not provided notice that it intends to investigate the violations, Complainant has exhausted his administrative requirements for bringing a claim under the Private Attorneys General Act with respect to these violations.

54. Complainant was compelled to retain the services of counsel to file this demand for arbitration to protect his interests and to assess and collect the civil penalties owed by Respondents. Complainant has thereby incurred attorneys' fees and costs, which he is entitled to receive under California Labor Code § 2699(g).

55. This cause of action is limited to Complainant's individual PAGA claim, which the Court in *Filemon Colores v. Ray Moles Farms, Inc.*, United States District Court for the Eastern District of California, Case No. 1:21-cv-00101-JLT-BAM, ordered compelled to arbitration on March 31, 2023.

PRAYER

WHEREFORE, Complainant prays for judgment for himself against Respondents, as follows:

1. Upon the First Cause of Action, for payment of minimum wages, liquidated damages, and penalties according to proof pursuant to Labor Code §§ 1182.12, 1194, 1194.2, and 1197;

2. Upon the Second Cause of Action, for compensatory, consequential, general, and special damages according to proof pursuant to Labor Code §§ 204, 510, 558, 1194, and 1198;

3. Upon the Third Cause of Action, for compensatory, consequential, general and special damages according to proof pursuant to Labor Code §§ 226.7, 512, and 558;

4. Upon the Fourth Cause of Action, for compensatory, consequential, general and special damages according to proof pursuant to Labor Code §§ 226.7, 516, and 558;

5. Upon the Fifth Cause of Action, for statutory penalties pursuant to Labor Code § 226, *et seq.*;

6. Upon the Sixth Cause of Action, for statutory waiting time penalties pursuant to Labor Code § 201-203;

7. Upon the Seventh Cause of Action, for restitution to Complainant of all money and/or property unlawfully acquired by Respondents by means of any acts or practices declared by this Arbiter to be in violation of Business and Professions Code § 17200 *et seq.*;

8. Upon the Eighth Cause of Action, (1) \$100.00 for each initial violation for each failure to pay each employee and \$200 for each subsequent violation or willful or intentional violation pursuant to Labor Code § 210 for each failure to pay Complainant, plus 25% of the amount unlawfully withheld; (2) \$50.00 for each initial violation and \$100 for each subsequent violation pursuant to Labor Code § 558 per pay period; (3) \$100.00 for each initial violation and \$250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per pay period; (4) \$250.00 for each initial violation and \$1,000.00 for each subsequent violation pursuant to Labor Code § 226.3 per pay period; and/or (5) \$100.00 for each initial violation and \$200 for each subsequent violation per pay period for the violations of the Labor Code Sections cited in Labor Code § 2699.5;

9. Prejudgment interest on all due and unpaid wages pursuant to California Labor Code § 218.6 and Civil Code §§ 3287 and 3289;

10. On all causes of action, for attorneys' fees and costs as provided by Code of Civil Procedure § 1021.5 and all other applicable statutes; and

11. For such other and further relief the Arbiter may deem just and proper.

Dated: May 19, 2023

Respectfully submitted,
STANBURY BROWN LAW, PC

By: 
Daniel J. Brown
Jessica Flores
Attorneys for Complainant

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FILEMON COLORES, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

v.

RAY MOLES FARMS, INC., a California
Corporation; and DOES 1 through 100,

Defendant.

RAY MOLES FARMS, INC., a California
Corporation,

Cross-Complainant,

v.

FILEMON COLORES, as an individual on
behalf of all others similarly situated,

Cross-Defendants.

Case No. 1:21cv-00101-JLT-BAM
(Consolidated with 1:21-cv-00467-JLT-BAM)

ORDER GRANTING IN PART
DEFENDANT'S MOTION TO COMPEL
ARBITRATION AND DISMISSING
PLAINTIFF'S FIRST SEVEN CAUSES OF
ACTION WITHOUT PREJUDICE; DENYING
PLAINTIFF'S MOTION TO STRIKE; AND
STAYING REMAINING MOTIONS

(Docs. 15, 21, 35, 38, 44)

Filemon Colores brings suit on behalf of himself and similarly situated individuals alleging that Ray Moles Farms, Inc. ("Ray Moles") engaged in several violations of the California Labor Code and Business and Professional Code. (Doc. 1 at 12–29). Ray Moles contends that Colores's individual claims must be arbitrated. (Doc. 21-1 at 8–18.) Colores

counters that Ray Moles has waived its right to arbitrate. (Doc. 25.) For the reasons below, Defendant Ray Moles’s Motion to Compel Arbitration is **GRANTED IN PART**. The claims compelled to arbitration are **DISMISSED WITHOUT PREJUDICE**. The claims not compelled to arbitration, as well as all pending motions regarding those claims, will be **STAYED** pending the California Supreme Court’s decision in *Adolph v. Uber Technologies, Inc.*, No. G059860, 2022 WL 1073583 (Cal. Ct. App., Apr. 11, 2022), review granted (Cal. July 20, 2022).

BACKGROUND

Filemon Colores was a non-exempt farm labor employee who worked for Ray Moles on a seasonal basis from approximately January 2016 to February 2, 2020. Ray Moles employed workers like Colores to harvest agricultural commodities in the state of California, including Tulare County. (Doc. 1 at 13–14, ¶¶ 3–4.) During different time periods, Colores was paid either hourly or on a piece rate basis for his work at Ray Moles vineyards. (Doc. 1 at 15, ¶ 9.)

Colores originally filed this suit as a class action in November 2020 in the Tulare County Superior Court, alleging violations of California’s Labor Code and Unfair Competition Law. (Doc. 1 at 12–29.) According to Colores, Ray Moles failed to: (1) comply with minimum wage requirements; (2) pay overtime wages; (3) provide proper meal periods; (4) provide proper rest periods; (5) provide compliant itemized wage statements; (6) pay wages due at termination; and (7) comply with California’s Unfair Competition Law. (*Id.*) Ray Moles removed the action to this Court on January 25, 2021 on the basis of the Class Action Fairness Act and immediately filed an answer. (Doc. 1 at 2; Doc 4.) These first seven claims constitute Colores’s “non-PAGA” claims.

Colores later filed a related claim (“the PAGA claim”) against Ray Moles under the California Private Attorneys General Act (“PAGA”), California Labor Code §§ 2698, et seq., which Ray Moles removed to this Court and consolidated with the present case. (Doc. 10; *see also Colores v. Ray Moles Farms, Inc.*, No. 1:21-cv-467-NONE-SAB at Doc. 1.) In May 2021, Ray Moles filed: an answer to the consolidated claims; a counterclaim for injunctive and declaratory relief on the grounds that PAGA violates both the California and federal

1 Constitutions (Docs. 12, 13); and a Motion for Judgment on the Pleadings or, in the alternative,
2 Partial Summary Judgment, which argued for dismissal of all Colores's claims with prejudice for
3 failure to state a claim upon which relief could be granted. (*See* Doc. 15-1.)

4 The parties then agreed to attend mediation on November 2, 2021. Colores propounded
5 "informal mediation requests" which asked for employees' timekeeping and payroll data, as well
6 as wage and hour policies, employee handbooks, and Colores's own personnel file. (Doc. 25-1
7 at 31, Ex. J.). Colores alleges that, despite the upcoming mediation, Ray Moles did not respond
8 to any communications from May 2021 through August 2021. (Doc. 25-1 at ¶ 23.)

9 Colores alleges that Ray Moles did not bring the arbitration agreement (the "Agreement")
10 to his attention until September 27, 2021. (Doc. 25-1 at ¶ 24.) As early as September 30, 2021,
11 Colores claims that Ray Moles indicated a forthcoming motion to compel if Colores "did not
12 agree by October 5, 2021 to stipulate to arbitrate his claims." (Doc. 25-1 at ¶ 24.) And, indeed,
13 Ray Moles moved to compel arbitration on October 6, 2021. (Doc. 21.) The motion to compel
14 included a copy of the Agreement that Colores signed when he was first hired by Ray Moles,
15 dated December 5, 2016. (Doc. 21-2.) The Agreement provides that:

16 Any and all past, present and future disputes between you (the
17 Employee) and the Employer (and/or its agents, supervisors,
18 officers and owners) [including but not limited to disputes about your
19 job application process, your employment, and your compensation, and
20 all disputes related to, resulting from, or arising out of the employment
21 relationship] shall be solely and exclusively resolved by final and
22 arbitration on an individual basis before a neutral retired judge,
23 conducted under the provisions of the Federal Arbitration Act in
24 Fresno, California. Class action lawsuits, and class action
25 arbitrations, and any combining of individual proceedings, without
26 the written consent of all the parties, are waived and shall not be
27 allowed.

28 (Doc. 21-2 at 2.)

Based on the Agreement, Ray Moles seeks to compel arbitration of all of Colores's non-
PAGA claims (causes of action 1-7), as well as the individual portion of Colores's PAGA claim.
Colores opposed the motion to compel on November 2, 2021, arguing Ray Moles waived its
right to arbitration by "engaging in almost 12 months of active and prolonged litigation." (Doc.

25 at 9.) Ray Moles filed its Reply on November 9, 2021. (Doc. 28.)¹ Both parties submitted supplemental briefing in March 2023 at the Court’s request. (Docs. 60, 61, 62.)

After the motion to compel was filed, the Court received several motions related to Ray Moles’s counterclaim challenging the constitutionality of PAGA. Specifically, Colores filed a motion to dismiss Ray Moles’s counterclaim, (Doc. 35), and the California Attorney General requested leave to intervene in defense of PAGA. (Doc. 44.) These motions, still pending, are addressed by this Order.

LEGAL STANDARDS

A written provision in any contract evidencing a transaction involving commerce to settle a dispute by arbitration is subject to the Federal Arbitration Act (“FAA”). 9 U.S.C. § 2. The FAA confers on the parties involved the right to obtain an order directing that arbitration proceed in the manner provided for in a contract between them. 9 U.S.C. § 4. In deciding a motion to compel arbitration, the court is “limited to determining (1) whether a valid agreement to arbitrate exists [within the contract] and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Boardman v. Pacific Seafood Group*, 822 F.3d 1011, 1017 (9th Cir. 2016) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (brackets in original)).

Because there is an “emphatic federal policy in favor of arbitral dispute resolution,” *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 631 (1985), “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 626 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983)). The federal policy in favor of arbitration is “about treating arbitration contracts like all other[contracts]”; “the FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules.” *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). As such, the right

¹ Colores requests that the Court strike Ray Moles’s Reply on the basis that it is over the permitted length and included “new” information about whether Ray Moles met and conferred with Colores before filing the motion to compel. Because the Court’s analysis and decision on the motion to compel do not rely on the allegedly “new” information, the motion to strike is **DENIED** as **MOOT**.

1 to arbitration, like other contractual rights, can be waived. Courts apply ordinary state-law
 2 principles governing contracts to determine whether to invalidate or enforce an arbitration
 3 agreement. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (quoting *First*
 4 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

5 ANALYSIS

6 Ray Moles contends that the Court must compel arbitration because Colores agreed, in a
 7 binding and enforceable arbitration agreement, to arbitrate his individual claims and waive the
 8 right to bring a class claim. (Doc. 21 at 12.) By its terms, the Agreement covers “any and all”
 9 disputes between employee and employer, including “disputes about . . . compensation, and all
 10 disputes related to, resulting from, or arising out of the employment relationship”. (Doc. 21-2 at
 11 2.) Colores does not dispute that he signed the Agreement. However, the parties disagree as to
 12 (1) whether Ray Moles waived its right to arbitration in this suit by acting inconsistently with
 13 that right and, if Ray Moles has not waived arbitration rights, (2) the extent to which Colores’s
 14 claims—especially his PAGA claims—can be compelled to arbitration. Because the issue of
 15 waiver would be determinative, the Court addresses it first.

16 A. Waiver

17 Colores argues that although he signed an arbitration agreement which may apply to his
 18 claims, Ray Moles waived its right to arbitrate by engaging in behavior inconsistent with that
 19 right. (Doc. 25.) Previously, parties in the Ninth Circuit arguing that their opponent waived the
 20 right to arbitrate bore “the heavy burden of demonstrating” that their opponent “(1) [had]
 21 knowledge of an existing right to compel arbitration”; committed “(2) intentional acts
 22 inconsistent with that existing right; and (3) [caused] prejudice to the person opposing arbitration
 23 from such inconsistent acts.” *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457 (9th Cir. 2023) (citing
 24 *Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 939 (9th Cir.
 25 2019). The Supreme Court eliminated the prejudice requirement in *Morgan v. Sundance, Inc.*,
 26 142 S.Ct. 1708 (2022), leaving the “knowledge” and “inconsistent acts” requirements in place.
 27 *Morgan* also lessened the burden on the party asserting waiver; it is no longer “heavy”.
 28 *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1014–15 (9th Cir. 2023). Therefore, to

1 demonstrate waiver, Colores now bears the ordinary burden of showing only that Ray Moles (1)
2 had knowledge of the right to arbitrate and (2) intentionally acted inconsistently with that right.
3 The Ninth Circuit’s “body of caselaw . . . applying these two elements remains good law
4 following *Morgan*”. *Hill*, 59 F.4th at 460.

5 Ray Moles does not contest that it had knowledge of its right to compel arbitration, so the
6 remaining issue is whether Ray Moles waived its right to arbitration by engaging in litigation
7 conduct that is inconsistent with such a right. “Under California law, factors that may be
8 considered to determine whether arbitration has been waived include: whether “the litigation
9 machinery has been substantially invoked”; whether the parties were “well into the preparation
10 of a lawsuit” before the applicable party served notice of intent to arbitrate; whether arbitration
11 was sought close to the trial date or otherwise delayed for a long period; and whether important
12 “intervening steps,” such as taking advantage of judicial discovery procedures not available in
13 arbitration, took place before the intent to compel arbitration was made clear. *St. Agnes Med.*
14 *Center v. PacifiCare of California*, 31 Cal.4th 1187, 1196 (2003); *see also Cox v. Ocean View*
15 *Hotel Corp.*, 533 F.3d 1114, 1124 (9th Cir. 2008).

16 When evaluating waiver, courts in this circuit generally consider “the totality of the
17 parties’ actions,” and ask, “whether a party’s actions indicate a conscious decision to seek
18 judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right
19 to arbitrate.” *Newirth*, 931 F.3d at 941 (9th Cir. 2019) (cleaned up) (abrogated on other
20 grounds). “A party’s extended silence and delay in moving for arbitration may indicate a
21 ‘conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable
22 claims.’” *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) (quoting *Van Ness Townhouses*
23 *v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988)). Additionally, the “inconsistent acts”
24 element is satisfied “when a party chooses to delay his right to compel arbitration by actively
25 litigating his case to take advantage of being in federal court.” *Martin*, 829 F.3d at 1125. Taking
26 strategic advantage of being in court includes actions such as conducting discovery and seeking
27 a judicial judgment on the merits of an issue. *Martin*, 829 F.3d at 1125.

28 Colores argues that Ray Moles waived its right to arbitrate by removing this suit to

1 federal court, filing motions to dismiss that seek rulings on the merits of Colores’s claims,
2 stipulating to the continuation of Mandatory Scheduling Conferences, filing a counterclaim, and
3 agreeing to mediation on a class basis. (Doc. 25 at 2–3.) Colores further complains that Ray
4 Moles took most of these actions before informing Colores, on September 27, 2021, about the
5 existence of the Agreement. (Doc 25 at 3.) Ray Moles counters that it raised arbitration as a
6 defense to Colores’s claims in its Answers. (Doc. 28 at 5, *see also* Doc. 4 at 6, ¶ 20.) Ray
7 Moles also claims that it provided and discussed the Agreement with Colores in communications
8 throughout the litigation.

9 Colores is correct that Ray Moles’s mere mention of arbitration in its Answers is “not
10 enough to defeat a claim of waiver.” *Martin*, 829 F.3d at 1125 (“A statement by a party that it
11 has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver.”).
12 Colores is also correct that Ray Moles sought a decision on the merits of this action in its motion
13 to dismiss (Doc. 15), an action which may be inconsistent with the right to arbitrate. *Martin*, 829
14 F.3d at 1125. However, even without a “heavy” burden, Colores fails to demonstrate that Ray
15 Moles waived its right to arbitrate under the totality of the circumstances.

16 Colores points the Court to no case with truly comparable facts. Instead, he relies on
17 cases where the party seeking arbitration had either *received* a decision on the merits,
18 participated in discovery before filing their motion to compel, or otherwise evinced a clear intent
19 to proceed with the litigation. *See, e.g., Gile v. Dolgen California, LLC*, No. 5:20-CV-01863-
20 MCS-SP, 2021 WL 5830041 (C.D. Cal. Nov. 15, 2021), *aff’d*, No. 21-56311, 2022 WL
21 17248087 (9th Cir. Nov. 28, 2022) (finding waiver where defendant sought arbitration after
22 winning a motion to dismiss on the merits); *Hill*, 59 F.4th at 474 (defendant propounded
23 discovery before revealing an arbitration agreement); *Davis v. Shiekh Shoes, LLC*, 84
24 Cal.App.5th 956, 968 (2022) (defendant waited 17 months to compel arbitration after setting and
25 delaying a trial date); *McBurnie v. Acceptance Now, LLC*, No. 3:21-CV-01429-JD, 2022 WL
26 17342195 (N.D. Cal. Nov. 30, 2022) (defendant actively engaged in discovery, participated in
27 settlement discussions, and extended case deadlines “each time representing that they were
28 actively working to move the litigation forward.”); *Hoover v. Am. Income Life Ins. Co.*, 206

Cal.App. 4th 1193, 1205 (2012) (defendant “availed itself of discovery mechanisms like depositions not available in arbitration”); *Sobremonte v. Superior Ct. (Bank of Am. Nat. Tr. & Sav. Ass’n)*, 61 Cal. App. 4th 980, 980, *as modified* (Feb. 26, 1998) (defendant participated in five trial court hearings, including two status conferences, and extensive discovery). In fact, even where the party seeking arbitration has filed a motion to dismiss on the merits, the Ninth Circuit has not found waiver without prolonged delays and “significant additional litigation activity.” *United Specialty Ins. Co. v. Clean & Sober Media LLC*, No. 2:20-CV-02765-RGK-KS, 2021 WL 3623300, at *2 (C.D. Cal. Apr. 16, 2021) (discussing cases).

Courts have held that parties may participate in litigation without waiving their arbitral rights if their purpose in participation is to “avoid or frustrate the litigation rather than a strategic decision to actively litigate [and] forgo the right to compel arbitration.” *Newirth*, 931 F.3d at 941–42 (abrogated on other grounds) (internal citations omitted); *Chartwell Staffing Servs. v. Atl. Sols. Grp., Inc.*, 2020 WL 620294, at *9 (C.D. Cal. Jan. 9, 2020). In *Hansber*, for example, the court declined to find waiver where a defendant removed the case to federal court, filed a motion to dismiss (which was granted in part), filed an answer to an amended complaint, responded to plaintiff’s discovery requests, attempted to join other parties, and waited nearly two years before filing a motion not compel. *Hansber v. Ulta Beauty Cosms., LLC*, No. 121CV00022AWICDB, — F.Supp.3d —, —, 2022 WL 16836627, at *6 (E.D. Cal. Nov. 9, 2022). Ray Moles’s actions in this case are comparable to the *Hansber* defendant’s; its actions, while potentially dilatory, evince an intent to merely frustrate the litigation. As such, the Court finds that Ray Moles has not waived its right to arbitrate in this case.

B. Enforceability of the Agreement

Having found that Ray Moles did not waive its right to arbitrate the issues in this case, the Court now examines the validity of the Agreement and its applicability on Colores’s claims. “The basic role for courts under the FAA is to determine ‘(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.’” *Kilgore v. KeyBank Nat’l Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013).

///

1 **1. Non-PAGA Claims**

2 Colores does not dispute that he signed the Agreement or that the Agreement
3 encompasses his non-PAGA claims, the first seven causes of action in his complaint. As such,
4 the Court **GRANTS** Ray Moles’s motion to compel individual arbitration of Colores’s non-
5 PAGA claims. The non-PAGA claims are therefore **DISMISSED WITHOUT PREJUDICE**.
6 *California Lab. & Workforce Dev. Agency ex rel. Raymond v. CompuCom Sys., Inc.*, No.
7 221CV02327KJMKJN, 2023 WL 2466236, at *1 (E.D. Cal. Mar. 10, 2023) (indicating that the
8 court dismissed plaintiff’s individual and putative class wage and hour claims after compelling
9 arbitration as to the former).

10 **2. PAGA Claims**

11 As to Colores’s PAGA claims in his eighth cause of action, there remains significant
12 disagreement. Ray Moles does not dispute that the Agreement does not contain an explicit
13 waiver of PAGA claims; however, Ray Moles argues that the Agreement encompasses some of
14 Colores’s PAGA claims, which should appropriately be split into “individual” arbitrable claims
15 and “representative” non-arbitrable claims per the Supreme Court’s decision in *Viking River*
16 *Cruises v. Moriana*, — U.S. —, 142 S. Ct. 1906, 1923–26 (2022). (Doc. 21-1 at 18.)

17 The *Viking River* Court explained that PAGA actions are “representative” in two ways:
18 (1) “in that they are brought by employees acting as representatives—that is, as agents or
19 proxies—of the State”; and that (2) “they are predicated on code violations sustained by other
20 employees.” 142 S. Ct. at 1916. The Court further explained that “when the word
21 ‘representative’ is used in the second way, it makes sense to distinguish ‘individual’ PAGA
22 claims, which are premised on Labor Code violations actually sustained by the plaintiff, from
23 ‘representative’ (or perhaps quasi-representative) PAGA claims arising out of events involving
24 other employees.” *Id.*

25 Prior to *Viking River*, the California Supreme Court in *Iskanian v. CLS Transp. L.A.*,
26 LLC, 59 Cal. 4th 348, 383–84 (2014), mandated that “categorical waivers of PAGA standing are
27 contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims
28 and nonarbitrable ‘representative’ claims.” *Viking River*, 142 S. Ct. at 1916. *Viking River*

1 overturned the latter half of this rule on the grounds that *Iskanian*'s holding was preempted by
 2 the FAA "insofar as it precludes division of PAGA actions into individual and non-individual
 3 claims through an agreement to arbitrate." *Viking River*, 142 S. Ct. at 1923–26. However,
 4 *Viking River* left intact *Iskanian*'s holding that wholesale waivers of PAGA claims are invalid
 5 because they would impermissibly include waiver of a plaintiff's ability to bring agent/proxy
 6 representative claims. *Viking River*, 142 S. Ct. at 1924–25. "Thus, under *Viking River*, waivers
 7 of the right to assert representative PAGA claims on the state's behalf remain barred, but
 8 employees may waive the right to bring PAGA claims that are specifically premised on labor
 9 code violations they have personally suffered." *Hansber*, 2022 WL 16836627, at *6 (E.D. Cal.
 10 Nov. 9, 2022) (citing *Viking River*, 142 S. Ct. at 1923–26).

11 In supplemental briefing ordered by the Court as to *Viking River*'s impact on the pending
 12 motion, (Doc. 60), Colores argues that the Agreement constitutes a "wholesale" waiver of all his
 13 PAGA claims, though he cites no authority in support of his argument. The Supreme Court in
 14 *Viking River* found a wholesale waiver in an arbitration agreement that prohibited the plaintiff
 15 from bringing "any dispute as a class, collective, or representative action under PAGA." *Viking*
 16 *River*, 142 S. Ct. at 1911. Similarly, in *Potts v. Sirius XM Radio Inc.*, the court found a
 17 wholesale waiver in an arbitration agreement that did not specifically mention PAGA claims but
 18 that otherwise prohibited "representative action[s]." No. CV 21-9755-DMG (KSX), 2022 WL
 19 17098184, at *5 (C.D. Cal. Oct. 25, 2022).

20 Here, the Agreement does not make any reference to PAGA claims or "representative"
 21 claims; it merely states that "all disputes related to, resulting from, or arising out of the
 22 employment relationship[] shall be solely and exclusively resolved by final and binding
 23 arbitration on an individual basis" and that "[c]lass action lawsuits, and class action arbitrations,
 24 and any combining of individual proceedings, without the written consent of all the parties, are
 25 waived and shall not be allowed." (Doc. 21-2 at 2.) It appears from this language that the
 26 waiver seeks to limit only those PAGA claims predicated on code violations sustained by other
 27 employees. See *Shams v. Revature LLC*, No. 22-CV-01745-NC, — F.Supp.3d —, —, —,
 28 2022 WL 3453068, at *2 (N.D. Cal. Aug. 17, 2022) (finding no wholesale waiver even in an

1 arbitration agreement waiving “private attorney general actions” because “the context of where
 2 ‘private attorney general’ appears makes clear that the waiver applies to non-individual
 3 representative actions, not [the employees] individual PAGA claims on behalf of the State.”); *see*
 4 *also Johnson v. Lowe’s Home Centers, LLC*, No. 221CV00087TLNJDP, — F.Supp.3d —, —
 5 —, 2022 WL 4387796, at *3–4 (E.D. Cal. Sept. 22, 2022). Because the Agreement does not
 6 prohibit Colores from bringing agent/proxy claims on behalf of the State, it is not an
 7 impermissible “wholesale” PAGA waiver, and Colores’s claims may be split into “individual”
 8 and “non-individual” or “representative” PAGA claims. The Court therefore concludes that Ray
 9 Moles is entitled to enforce the Agreement to the extent that it mandates arbitration of Colores’s
 10 individual PAGA claim.

11 As to Colores’s remaining, non-individual PAGA claim, the question remains whether
 12 Colores’s claim should be dismissed or stayed. The Supreme Court in *Viking River* dismissed
 13 such claims for lack of statutory standing after the plaintiff’s individual PAGA claim was
 14 compelled to arbitration. 142 S. Ct. at 1925. District courts in California have taken different
 15 approaches to the question, with some staying proceedings as to the non-individual PAGA
 16 claims, others ordering dismissal per *Viking River*, *see Dominguez v. Sonesta Intl. Hotels Corp.*,
 17 22-CV-03027-JCS, — F.Supp.3d —, —, 2023 WL 25707, at *6–7 (N.D. Cal. Jan. 3,
 18 2023) (discussing cases), and at least one court declining to follow *Viking River*’s standing
 19 analysis on the grounds that it is contrary to existing California law. *Shams*, 2022 WL 3453068,
 20 at *3. The Court finds the reasoning in *Dominguez* and *Martinez-Gonzalez*, as discussed in
 21 *Dhaliwal*, persuasive. *Dhaliwal v. Ace Hardware Corp.*, No. 222CV00446DADKJN, 2023 WL
 22 2555471 (E.D. Cal. Mar. 17, 2023) (citing *Dominguez*, 2023 WL 25707, and *Martinez-Gonzalez*
 23 *v. Elkhorn Packing Co., LLC*, No. 18-CV-05226-EMC, — F.Supp.3d —, —, 2022 WL
 24 10585178 (N.D. Cal. Oct. 18, 2022).)

25 As these courts emphasized, Justice Sotomayor’s concurrence in *Viking River* recognizes
 26 that the issue of statutory standing under PAGA is subject to clarification under state
 27 law. *Viking River*, 142 S. Ct. at 1925. (“Thus, the Court reasons, based on available guidance
 28 from California courts, that [Plaintiff] lacks ‘statutory standing’ under PAGA to litigate her

1 ‘nonindividual’ claims separately in state court. Of course, if this Court’s understanding of state
 2 law is wrong, California courts, in an appropriate case, will have the last word.”). Because of
 3 Justice Sotomayor’s qualification, the section of *Viking River* discussing standing obtained only
 4 “four unqualified votes.” *California Lab. & Workforce Dev. Agency*, 2023 WL 2466236, at *3.
 5 And the California Supreme Court has taken up the issue of statutory standing in the pending
 6 case *Adolph v. Uber Technologies, Inc.*, No. G059860, 2022 WL 1073583 (Cal. Ct. App., Apr.
 7 11, 2022), review granted (Cal. July 20, 2022).

8 Accordingly, as several other courts have done, the Court will **STAY** Colores’s
 9 representative PAGA claims—and all unresolved motions related to those claims—pending
 10 further legal developments. *See George v. Manheim Invs., Inc.*, 731 F. App’x 624, 627 (9th Cir.
 11 2018) (permitting the California district court to stay the case pending the resolution of a
 12 California Supreme Court decision that may inform the district court’s reasoning on a threshold
 13 issue).

14 **ORDER**

15 For the reasons stated above, the Court **ORDERS**:

- 16 1. Ray Moles’s Motion to Dismiss, (Doc. 15), is **STAYED**.
- 17 2. Ray Moles’s Motion to Compel Arbitration, (Doc. 21), is **GRANTED IN PART**
 18 as to Colores’s non-PAGA claims and as to his individual PAGA claims. The
 19 motion is **DENIED** to the extent that it seeks compelled arbitration of Colores’s
 20 representative PAGA claims.
- 21 3. Colores’s non-PAGA claims, his first seven causes of action in the complaint, are
 22 **DISMISSED WITHOUT PREJUDICE**.
- 23 4. Colores’s Motion to Dismiss Ray Moles’s counterclaim challenging PAGA’s
 24 constitutionality, (Doc. 35), is **STAYED**.
- 25 5. Colores’s Motion to Strike Ray Moles’s reply in support of its motion to compel,
 26 (Doc. 38), is **DENIED** as **MOOT**.
- 27 6. The California Attorney General’s Motion to Intervene, (Doc. 44), is **STAYED**.
- 28 7. The parties **SHALL**, within **30 days** of the California Supreme Court’s decision

1 in *Adolph*, file a status with the Court detailing their positions on any pending
2 motions affected by *Adolph*, taking into consideration the California Supreme
3 Court's decision. If necessary, the Court may order additional briefing at that
4 time.

5
6 IT IS SO ORDERED.

7 Dated: **March 30, 2023**


UNITED STATES DISTRICT JUDGE

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 2610 ½ Abbot Kinney Blvd. Venice, CA 90212

On May 19, 2023 I served the document listed below on the parties in this action as follows:

- **DEMAND FOR ARBITRATION**

- ☐ (BY MAIL) I placed such envelope on the above date, with postage fully prepaid, for deposit in the U.S. Postal Service at my place of business at Venice, California, following the ordinary business practices of my place of business. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mail with the U.S. Postal Service. Under that practice, such correspondence is deposited with the U.S. Postal Service the same day it is collected and processed in the ordinary course of business.
- ☐ (BY HAND DELIVERY) I delivered to an authorized courier or driver authorized by _____ to receive documents to be delivered on the same date.
- X (BY FEDERAL EXPRESS) I am readily familiar with the practice of collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.
- X By (CM/ECF/ELECTRONIC MAIL) I caused the attached document to be sent buy electronic mail to the below-described email address(es). My electronic services address is dbrown@stansburybrownlaw.com
- X (STATE) I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on May 19, 2023 at Venice, California.



Daniel

SERVICE LIST

- (i) Ray Moles Farms, Inc.
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