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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS O'CONNOR, et al.,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 13-cv-03826-EMC

**ORDER CONDITIONALLY
GRANTING IN PART AND DENYING
IN PART DEFENDANT'S MOTION TO
STAY**

Docket No. 411

For the reasons stated herein, the Court **DENIES** Uber's request for a complete stay. Trial for both certified subclasses scheduled for June 20, 2016 will proceed; however the Court will conditionally stay an entry of judgment as to the December 9, 2015 subclass while appeal of the matters at issue are pending.

I. INTRODUCTION

On December 9, 2015, this Court certified a supplemental subclass of drivers who had signed the 2014 and 2015 contracts, but had not opted out of the arbitration agreement (hereafter, December 9, 2015 subclass). Docket No. 395 (Supp. Class Order). In certifying this class, the Court found that the arbitration agreements in the 2014 and 2015 contracts were unenforceable because they contained an illegal, non-severable Private Attorney General Act (PAGA) waiver. *Id.* at Section II.B.3. The Court also denied Uber's motion to compel arbitration of absent class members in the original class of drivers certified on September 1, 2015 (hereafter, September 1, 2015 class). Uber has appealed this Court's orders certifying the supplemental class and denying Uber's motion to compel arbitration of absent class members to the Ninth Circuit. *See* Ninth Circuit Case No. 15-17420.

Currently pending before the Court is Uber's motion to stay all proceedings pending

1 appeal. Docket No. 411 (Mot.). Uber’s motion came on for hearing before the Court on
 2 December 17, 2015. For the reasons set forth below, the Court **CONDITIONALLY GRANTS**
 3 **IN PART AND DENIES IN PART** Uber’s motion to stay.

4 **II. DISCUSSION**

5 A. Legal Standard

6 Whether to issue a stay pending appeal is “an exercise of judicial discretion . . . to be
 7 guided by sound legal principles.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *see also Guifu*
 8 *Li v. A Perfect Franchise, Inc.*, No. 10-cv-1189-LHK, 2011 WL 2293221, at *2 (N.D. Cal. Jun. 8,
 9 2011). In determining whether a stay should issue, the Court considers four factors:

10 (1) whether the stay applicant has made a strong showing that he is
 11 likely to succeed on the merits; (2) whether the applicant will be
 12 irreparably injured absent a stay; (3) whether issuance of the stay
 will substantially injure the other parties interested in the
 proceeding; and (4) whether the public interest favors a stay.

13 *In re Carrier IQ Consumer Privacy Litig.*, No. C-12-md-2330 EMC, 2014 WL 2922726, at *1
 14 (N.D. Cal. Jun. 13, 2014) (citations omitted); *see also Leiva-Perez v. Holder*, 40 F.3d 962 (9th Cir.
 15 2011).

16 B. Likelihood of Success on the Merits

17 To satisfy this first factor, although the moving party need not show that “success on
 18 appeal is more likely than not,” *Guifu Li*, 2011 WL 2293221, at *3 (citation omitted), it must make
 19 a “strong showing” on the merits. *Morse v. Servicemaster Global Holdings, Inc.*, No. C-10-628-
 20 SI, 2013 WL 123610, at *2 (N.D. Cal. Jan. 8, 2013) (citing *Leiva-Perez*, 640 F.3d at 964). In the
 21 alternative, the moving party can show that its appeal raises “serious legal questions” even if the
 22 moving party has only a minimal chance of prevailing on these questions. *See In re Carrier IQ*,
 23 2014 WL 2922726, at *1; *Mohamed v. Uber Techs., Inc.*, No. C-14-5200-EMC, 2015 WL
 24 4483990, at *2 (N.D. Cal. July 22, 2015). However, if only this lesser showing is made, the
 25 appellant must further demonstrate that the balance of the hardships absent a stay tips “sharply” in
 26 its favor. *See Morse*, 2013 WL 123610, at *1-2 (explaining that a party seeking a stay pending
 27 appeal must either: (1) make a strong showing it is likely to succeed on the merits and show it will
 28 be irreparably harmed absent a stay, or (2) demonstrate that its appeal presents a serious question

1 on the merits and the balance of hardships tilts sharply in its favor); *see also* *Leiva-Perez*, 640 F.3d
2 at 964.

3 While the Ninth Circuit has not exhaustively explained or defined what makes a question
4 “serious,” other district courts have suggested that “[f]or a legal question to be ‘serious,’ it must be
5 a ‘question going to the merits so serious, substantial, difficult and doubtful, as to make the issues
6 ripe for litigation and deserving of more deliberate investigation.” *Guifu Li*, 2011 WL 2293221, at
7 *3 (quoting *Walmer v. United States DOD*, 52 F.3d 851, 854 (10th Cir. 1995); *see also* *Morse*,
8 2013 WL 123610, at *3 (a serious legal issue or substantial case is “one that raises genuine
9 matters of first impression within the Ninth Circuit, or which may “otherwise address a pressing
10 legal issue which urges that the Ninth Circuit hear the case”).

11 Uber argues that it has “at least a ‘fair prospect’ of persuading the Ninth Circuit that the
12 PAGA waiver contained in Uber’s 2014 and 2015 arbitration agreements, even if unenforceable as
13 a matter of California public policy, can and must be severed so the remainder of the agreements
14 may be enforced.” Mot. at 5. First, Uber argues that the severability of arbitration agreements
15 under California law is an issue currently before the Supreme Court, as the Supreme Court has
16 granted certiorari in *MHN Government Services, Inc. v. Zaborowski* to address whether the Federal
17 Arbitration Act (FAA) “preempts California’s application of ‘one rule of contract severability to
18 contracts in general and a separate rule of contract severability to agreements to arbitrate,’ t[he]
19 latter of which disfavors arbitration by making it harder to sever unenforceable provisions that
20 would otherwise be severable under generally applicable California law.” *Id.* at 7. However, the
21 *Zaborowski* petition challenges the rule that “the existence of more than one invalid provision can
22 be read by a court to automatically indicate that the stronger party sought to use arbitration not
23 simply as an alternative to litigation, but as a tool to steamroll the weaker party.” *Zaborowski* Pet.
24 for Writ of Certiorari at 1-2, available at [http://www.scotusblog.com/wp-](http://www.scotusblog.com/wp-content/uploads/2015/08/cert-pet-as-filed.pdf)
25 [content/uploads/2015/08/cert-pet-as-filed.pdf](http://www.scotusblog.com/wp-content/uploads/2015/08/cert-pet-as-filed.pdf) (last accessed Dec. 18, 2015). With respect to the
26 2014 and 2015 contracts, the Court did not decline to sever because there was more than one
27 invalid provision. The Court’s analysis was based on the inability to sever because, *inter alia*, the
28 blanket PAGA waiver was inextricably intertwined with the remainder of the arbitration

1 agreement. Supp. Class Order at 10-11.

2 Second, Uber maintains that the Court incorrectly focused on a linguistic analysis in
3 determining whether specific words and phrases could be eliminated from the agreement to
4 accomplish severance. Mot. at 8. By only looking at whether a “formalistic, line-by-line editing
5 of the agreements” was possible, Uber contends that the Court failed to determine whether the
6 illegal portion of the contract could be restricted, as was done in other cases. *Id.* at 8-10 (citing
7 *Birbower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998); *Marathon*
8 *Ent., Inc. v. Blasi*, 42 Cal. 4th 974 (2008)). However, while this Court examined the feasibility of
9 linguistic severance, a proper analysis under California law, *see Zullo v. Superior Court*, 197 Cal.
10 App. 4th 477, 488 (holding unenforceable a contract where illegality could not be excised by
11 striking a single provision, but would instead require addition of terms), the Court did not focus
12 solely on linguistic severance. Instead, it found that in addition to not being linguistically
13 severable, the PAGA waiver was not merely collateral to the main purpose of the contract, which
14 was to require that *all* disputes (including PAGA representative claims) be directed to individual
15 arbitration, and that the arbitration clause was not a divisible contract. Supp. Class Order at 16-20.
16 The Court distinguished cases such as *Birbower* and *Marathon Entertainment*, both of which
17 involved divisible contracts where the illegal portion of the consideration was independent of the
18 legal consideration. Moreover, the Court concluded that equitable considerations did not favor
19 severance because the arbitration clause in the 2014 and 2015 agreements were misleading –
20 drivers are led to believe that all claims, including PAGA claims, could be heard only in
21 arbitration without exception. *See* Supp. Class Order at Section II.B.3.b.iii.

22 Third, Uber contends that the Court’s decision was contrary to both *Iskanian* and *Sakkab*
23 because both of those cases ultimately severed the PAGA waiver and sent the remainder of the
24 claims to arbitration. Mot. at 10-12. However, neither *Iskanian* nor *Sakkab* analyzed severability;
25 in fact, the Ninth Circuit specifically noted that the *Sakkab* plaintiff did *not* argue that the invalid
26 PAGA waiver rendered the entire agreement void, nor did the plaintiff ever dispute that he was
27 required to arbitrate the non-PAGA claims. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425,
28 440 (9th Cir. 2015); *see also Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014). A more

1 comparable decision is the California Court of Appeal’s decision in *Securitas Security Services*
2 *USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015), where the court found that an
3 arbitration agreement with a non-severable PAGA waiver was wholly unenforceable on public
4 policy grounds. *See* Supp. Class Order at 12.

5 Finally, Uber argues that there is an ongoing dispute as to whether the *Iskanian* rule is
6 preempted by the Federal Arbitration Act (FAA). Mot. at 12. The Court notes that the Ninth
7 Circuit’s decision in *Sakkab* held that *Iskanian* is not preempted by the FAA, and that earlier this
8 year, the Supreme Court has twice denied review in *Iskanian*. *See CLS Transp. L.A., LLC v.*
9 *Iskanian*, 135 S. Ct. 1155 (2015) (denying petition for writ of certiorari); *see also CarMax Auto*
10 *Superstores Cal., LLC v. Areso*, No. 15-236, 2015 WL 5005244, at *1 (U.S. Dec. 14, 2015)
11 (denying petition for writ of certiorari on the question of whether *Iskanian* is preempted by the
12 FAA); *CarMax Auto Superstores Cal., LLC* Pet. for Writ of Certiorari at i, available at
13 <http://www.scotusblog.com/wp-content/uploads/2015/09/CarMax-petition.pdf> (last accessed Dec.
14 18, 2015).

15 For the reasons stated above, as well as for the reasons articulated in this Court’s
16 Supplemental Class Certification Order, the Court finds that Uber has not demonstrated that it has
17 a strong showing on the merits or likelihood of success on appeal(s). Nonetheless, the Court
18 believes that in light of the close analysis required of the severability question and the possibility
19 of the Ninth Circuit hearing the *Sakkab* case en banc, a serious legal question has been raised by
20 Uber.

21 C. Irreparable Harm to Uber

22 Because Uber’s appeal only demonstrates “serious legal questions,” Uber must show not
23 only the fact that it will suffer irreparable harm absent a stay, but also the balance of the hardships
24 absent a stay tips sharply in its favor. *See In re Carrier IQ*, 2014 WL 2922726, at *1.

25 Uber identifies irreparable harm in the form of undergoing the expense of a trial and losing
26 the anticipated advantages of arbitration. Mot. at 13. This reason was sufficient in *Mohamed v.*
27 *Uber Technologies, Inc.*, in which this Court found that a reversal of the Court’s decision on the
28 2014 contracts might result in “this Court’s substantive rulings . . . be[ing] for naught, and the

1 parties will have expended significant resources to obtain what, in all likelihood, would constitute
2 non-binding advisory opinions.” Case No. C-14-5200-EMC, 2015 WL 4483990, at *6 (N.D. Cal.
3 July 22, 2015). For that reason, the Court partially stayed the *Mohamed* case, permitting only
4 reasonable discovery related specifically to Plaintiff Mohamed. However, while Uber may
5 arguably suffer some irreparable harm for the reasons identified in *Mohammed*, the balance of
6 hardships do not tip sharply in its favor.

7 1. Time and Expense of Trial

8 This is not a case in which the arbitration issue presents an “all or nothing” situation,
9 where a defendant might be forced to needlessly endure the time and expense of a trial should the
10 arbitration clause ultimately be enforced. Regardless of what happens with the December 9, 2015
11 subclass, Uber will be subject to a class action trial. The September 1, 2015 class has a right to
12 move forward with trial; the Ninth Circuit denied Uber’s petition for permission to appeal the
13 September 1, 2015 order granting class certification, as well as Uber’s motion to stay the *Gillette*
14 proceedings during its appeal of this Court’s order holding that the 2013 arbitration agreements
15 were unconscionable. *See* Docket No. 389; Case No. 15-16181, Docket No. 30. Moreover, the
16 September 1, 2015 class includes not only those who are subject only to the 2013 agreement but
17 also those who opted out of the 2014 and 2015 agreements. Thus, the only effect of the Court’s
18 supplemental class certification order will be to affect the size of the class going to trial, not the
19 fact and temporal scope of the trial.

20 Moreover, Uber has failed to make a persuasive case that the trial will be dramatically
21 different were the December 9, 2015 subclass included in that trial. At the hearing on this matter,
22 Uber argued that a broader range of evidence is required if the December 9, 2015 subclass is
23 included, in part because of the time period covered by the December 9, 2015 subclass. However,
24 as noted, the September 1, 2015 class not only includes drivers who signed the 2013 agreement (or
25 no arbitration agreement at all), but drivers who opted out of the 2014 and 2015 arbitration
26 agreements. Thus, the time period subject to the trial will be the same regardless of whether the
27 December 9, 2015 subclass is included. Furthermore, much of the evidence on liability will focus
28 on Uber’s conduct (*e.g.*, the amount of control it exercises over the drivers), and Uber has not

1 argued that there was any significant change in its degree of control it exercised between 2013 and
2 2014 and 2015. Nor has Uber demonstrated that evidence on the other *Borello* factors which
3 inform the merits of the dispute, *see* Docket No. 251 at 20-27, will be significantly altered were
4 both subclasses instead of only the September 1, 2015 class to proceed to trial. Given the trial
5 evidence will not change dramatically even if the December 9, 2015 subclass is included, there
6 will be minimal hardship to Uber resulting from trial of both as opposed to one subclass.

7 2. Binding Judgment

8 In the event that both classes' claims are tried and the Ninth Circuit reverses on the Court's
9 supplemental class certification order, any verdict in Plaintiffs' favor as to the 2014 and 2015
10 drivers who signed those agreements would likely be vacated. *See Richards v. Ernst & Young*
11 *LLP*, 744 F.3d 1072, 1076 fn. 4 (9th Cir. 2013) (vacating district court's order certifying class of
12 litigants after finding district court should have compelled arbitration); *see also Hospital & Health*
13 *Care Workers' Union, Local 250 v. San Benito Health Found.*, CA No. 92-17028, 1994 U.S. App.
14 LEXIS 6673, at *6 (9th Cir. Mar. 29, 1994) (reversing grant of summary judgment on the merits
15 of the case where district court should have compelled arbitration). At the hearing, Uber also
16 agreed that in all likelihood, the Court would be required to dismiss the December 9, 2015
17 subclass's claims for lack of jurisdiction were it to prevail on the merits of the supplemental class
18 certification and arbitration orders. Thus, Uber will not be subject to a legally binding trial
19 judgment which would vitiate its right to arbitration were the Ninth Circuit to ultimately uphold
20 that right.

21 In any event, if these appeals are pending at the time of trial, the Court will stay entry of
22 judgment with respect to the December 9, 2015 subclass so long as Uber's appeals are pending.
23 *See Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 757 n. 5 (9th Cir. 1983), *abrogated on other*
24 *grounds by Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 834 (1990) (finding that
25 Rule 58 permits a district court to delay the entry of judgment, although the district court should
26 not ordinarily delay the entry of judgment on a jury verdict since Rule 62(b) provides procedures
27 for a defendant to secure a stay of execution on the entered judgment). This assures Uber will be
28 protected against entry of judgment until its appeal on the arbitration issue is heard.

1 Accordingly, Uber has not demonstrated that it will suffer significant irreparable injury or
2 great hardship from moving forward with the trial. It will not suffer substantial harm from having
3 to try both as opposed to one subclass, and it will not be subject to a final and irrevocable
4 judgment on the merits pending resolution of its appeals because this Court, if necessary, will stay
5 entry of judgment until the appeals are decided.

6 D. Irreparable Harm to Plaintiffs

7 By contrast, if a stay of the entire case is issued – as Uber requests – and the June, 2016
8 trial date vacated and continued, the September 1, 2015 class would be deprived of their right to
9 have their claims timely heard and decided. This case has been pending since 2013, and will have
10 been ongoing for nearly three years by the date of the June 2016 trial. In *Mohamed*, the plaintiffs
11 had suggested that a stay could prevent the filing of an amended complaint with new plaintiffs, an
12 irreparable harm that the Court found “largely speculative” given that those individuals were not
13 yet plaintiffs in the suit or barred from filing their own actions. *See Mohamed*, 2015 WL
14 4483990, at *7. However, here there is a certified class (which the Ninth Circuit has refused to
15 review) who is ready to go to trial on the merits in June. The harm to this certified class that will
16 result from delaying the adjudication of their certified claims is not speculative, and weighs
17 significantly against issuing a stay. Alternatively, if the Court were to stay trial on the December
18 9, 2015 class and proceed with trial on the September 1, 2015 class, this could result in costly and
19 inefficient piecemeal litigation, raising the specter of two jury trials (each lasting several weeks)
20 on overlapping issues.

21 E. Public Interest

22 Finally, the Court considers the public interest. Here, Uber argues that the public interest
23 favors a stay because a stay will vindicate the federal policy favoring arbitration. Mot. at 14-16.
24 But balanced against that is the significant public interest in this case, including the need to attain
25 legal guidance on the important core issue of whether Uber’s drivers should be considered
26 employees or independent contractors. This case is currently the lead case on the issue of the
27 status of Uber drivers in the nation, and is progressed much further than other cases that have been
28 filed across the country. *E.g.*, Case No. 15-cv-06143, *Ogunmokun v. Uber Techs., Inc.*

1 (E.D.N.Y.); Case No. 15-cv-2418-DLR, *Sena v. Uber Techs., Inc.* (D. Az.); Case No. 15-1001,
2 *Micheletti v. Uber Techs., Inc.* (W.D. Tex.). The public interest thus also weighs against issuing a
3 complete stay and delaying trial.


4 **III. CONCLUSION**

5 In its motion to stay, Uber has arguably raised serious legal questions. However, Uber has
6 not demonstrated that the balance of the hardships absent a stay tips sharply in its favor so as to
7 warrant a complete stay. As explained above, Uber will not suffer substantial irreparable harm or
8 great hardship in moving forward with the trial scheduled for June 20, 2016 on both the September
9 1, 2015 and December 9, 2015 subclasses. In comparison, both the harm in delaying the
10 adjudication of Plaintiffs’ – particularly the September 1, 2015 class’s – claims and the public
11 interest weighs heavily against issuing a complete stay. Instead, Uber’s rights to arbitration of the
12 December 9, 2015 subclass claims can be effectively preserved by a conditional stay of entry of
13 final judgment if the appeals are still pending. For these reasons, the Court **CONDITIONALLY**
14 **GRANTS IN PART AND DENIES IN PART** Uber’s motion to stay.

15 This order disposes of Docket No. 411.

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17 **IT IS SO ORDERED.**

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19 Dated: December 22, 2015

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21 _____
22 EDWARD M. CHEN
23 United States District Judge
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United States District Court
For the Northern District of California