Hughes v. S.A.W. Entertainment, LTD
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 San Francisco Division

United States District Court
Northern District of California

NICOLE HUGHES, et al., Plaintiffs, v. S.A.W. ENTERTAINMENT, LTD, et al., Defendants.	Case No. 16-cv-03371-LB **ORDER STAYING PROCEEDINGS** Re: ECF Nos. 87, 88, 89, 91
ELANA PERA, et al., Plaintiffs, v. S.A.W. ENTERTAINMENT, LTD, Defendant.	Case No. 17-cv-00138-LB **ORDER STAYING PROCEEDINGS** Re: ECF Nos. 25, 26, 28

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INTRODUCTION

23 These two actions are labor disputes brought as putative collective actions under the Fair
24 Labor Standards Act (FLSA) and class actions under Federal Rule of Civil Procedure 23. The
25 named plaintiffs, who bring claims on behalf of themselves and other putative class members, are
26 or were exotic dancers who are suing the companies that managed the nightclubs where they
27 worked.
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The parties have filed a number of motions. First, the defendants have moved to compel the plaintiffs to arbitrate their claims, citing arbitration provisions in the contracts they signed with the plaintiffs.[1] Second, the defendants move to dismiss or stay these actions on the ground that they are subsumed in another earlier-filed FLSA collective action and Rule 23 class action, Roe v. SFBSC Management, LLC, No. 14-cv-03616-LB, also brought by former exotic dancers that worked at the same nightclubs at issue here (as well as other nightclubs).[2] The parties in that case reached a court-approved settlement agreement that would release the defendants of many of the claims at issue in these actions (the settlement, however, is currently on appeal to the Ninth Circuit[3]). Third, the plaintiffs move for conditional certification under the FLSA and move to have notice of these actions issued to all other similarly situated dancers.[4]

The issue of arbitration is a threshold issue. Each of the five named plaintiffs — Nicole Hughes, Angelynn Hermes, and Penny Nunez in the Hughes case and Elana Pera and Sarah Murphy in the Pera case — signed contracts with the defendants in which the parties agreed to resolve all disputes through arbitration instead of litigation.[5] If those provisions are enforceable and the plaintiffs' claims are therefore subject to mandatory arbitration, they cannot be litigated in this court (which would render the defendants' motions to dismiss and the plaintiffs' motions for conditional certification and notice moot).

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[1] Defs.' Hughes Mot. to Compel Arbitration – No. 16-cv-03371-LB – ECF No. 87; Def.'s Pera Mot. to Compel Arbitration – No. 17-cv-00138-LB – ECF No. 28; see also Defs.' Hughes Mot. to Compel Arbitration re Opt-In Pl. Dora Marchand – No. 16-cv-03371-LB – ECF No. 91. Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Defs.' Hughes Mot. to Dismiss – No. 16-cv-03371-LB – ECF No. 88; Def.'s Pera Mot. to Dismiss – No. 17-cv-00138-LB – ECF No. 26.

[3] No. 17-17079 (9th Cir.).

[4] Pls.' Hughes Supplemental Mem. in Supp. of Mot. for Conditional Certification and Issuance of Notice – No. 16-cv-03371-LB – ECF No. 89; Pls.' Pera Mot. for Conditional Class Certification and Issuance of Notice – No. 17-cv-00138-LB – ECF No. 25.

[5] Defs.' Hughes Mot. to Compel Arbitration, Bordeau Decl. Ex. 1 (Hughes/Gold Club contracts) – No. 16-cv-03371-LB – ECF No. 87-2 at 6–9; id. Ex. 2 (Nunez/Gold Club contracts) – No. 16-cv-03371-LB – ECF No. 87-2 at 11–19; Defs.' Hughes Mot. to Compel Arbitration, Fusco Decl. Ex. 1 (Hughes/SAW contracts) – No. 16-cv-03371-LB – ECF No. 87-4 at 7–14; id. Ex. 2 (Hermes/SAW contracts) – No. 16-cv-03371-LB – ECF No. 87-4 at 16–25; Def.'s. Pera Mot. to Compel Arbitration, Calcagni Decl. Ex. 1 (Pera/SAW contracts) – No. 17-cv-00138-LB – ECF No. 28-2 at 7–21; id. Ex. 2 (Murphy/SAW contracts) – No. 17-cv-00138-LB – ECF No. 28-2 at 23–33.

The parties' motions raise a timing issue, however. All of the parties agree that under a 2016 decision by the Ninth Circuit, Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), the arbitration provisions the defendants seek to invoke are unenforceable. The defendants argue, however, that the Supreme Court granted certiorari in Morris earlier this year, held argument on October 2, and may soon issue a decision that reverses the Ninth Circuit, which would alter the legal landscape concerning the enforceability of arbitration provisions like the ones at issue here. The defendants therefore request that the court defer on ruling on the arbitration issue and stay these proceedings until the Supreme Court issues its decision. The plaintiffs, perhaps unsurprisingly, oppose this request.

After considering the relevant factors, the court determines that a stay of the proceedings, including a deferral on the defendants' motions to compel arbitration (as well as the defendants' motions to dismiss and the plaintiffs' motions for conditional certification and notice), is warranted. The court therefore stays both the Hughes and Pera cases pending a decision by the Supreme Court in Morris and a decision by the court, to follow thereafter, on the defendants' motions to compel arbitration.

ANALYSIS

1. Staying Proceedings Pending the Supreme Court's Decision in Morris v. Ernst & Young

In Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), the Ninth Circuit held that agreement provisions requiring employees to pursue legal claims against their employers only through arbitration and to arbitrate only as individuals in separate proceedings, as opposed to in a collective action, violate the National Labor Relations Act and are therefore unenforceable. Id. at 980.

Both sides here agree that Morris renders the arbitration provisions in these cases unenforceable.[6] The defendants argue, however, that the court should defer ruling on their motions

[6] See Defs.' Hughes Mot. to Compel Arbitration – No. 16-cv-03371-LB – ECF No. 87-1 at 7 (Morris covers "class-action waivers — like those Defendants seek here to enforce"), 15–16 & n. 7 (arguing that a motion to compel arbitration would be "futile" in light of Morris) (citing cases); Pls.' Hughes Mot. to Compel Arbitration Opp'n – No. 16-cv-03371-LB – ECF No. 19–20; Def.'s Pera Mot. to

to compel arbitration and stay the proceedings here until the Supreme Court — which granted certiorari in Morris and heard argument on October 2, 2017 — issues its decision, which may reverse the Ninth Circuit.

The defendants' request for a stay has merit. When the Supreme Court first granted certiorari in Morris, courts confronted with similar circumstances as the ones presented here split as to whether stays were appropriate or not. Compare, e.g., McElrath v. Uber Techs., Inc., No. 16-cv-07241-JSC, 2017 WL 1175591, at *3–7 (N.D. Cal. Mar. 30, 2017) (granting a motion to stay pending a Supreme Court decision in Morris in an employment case where the defendants moved to compel arbitration) with, e.g., Daugherty v. SolarCity Corp., No. C 16-05155 WHA, 2017 WL 386253, at *3–4 (N.D. Cal. Jan. 26, 2017) (denying a motion to stay pending a Supreme Court decision in Morris in an employment case where the defendants moved to compel arbitration). With oral argument before the Supreme Court now complete and a decision likely to be issued soon, however, courts have been more uniform in granting stays. See Ralph v. Haj, Inc., No. 17cv1332 JM(JMA), 2017 WL 5248251, at *3 (S.D. Cal. Nov. 13, 2017) (deferring ruling on motion to compel and enforceability of arbitration provision until after the Supreme Court issues its decision in Morris); Bui v. Northrop Grumman Sys. Corp., No. 15-cv-1397-WQH-WVG, 2017 WL 5256739, at *3 (S.D. Cal. Nov. 9, 2017) (staying employment class action in which motion to compel arbitration was pending until after the Supreme Court issues its decision in Morris); Conde v. Open Door Mktg., LLC, No. 15-cv-04080-KAW, 2017 WL 5172271, at *8 (N.D. Cal. Nov. 8, 2017) (Conde II) (same); Robledo v. Randstad US, L.P., No. 17-cv-01003-BLF, 2017 WL 4934205, at *6 (N.D. Cal. Nov. 1, 2017) (same); Bankwitz v. Ecolab, Inc., No. 17-cv-02924-EMC, 2017 WL 4642284, at *6 (N.D. Cal. Oct. 17, 2017) (same).

Courts look to several factors in determining whether a stay of one litigation pending resolution of another litigation is appropriate, including "(1) the possible damage which may result

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Compel Arbitration – No. 17-cv-00138-LB – ECF No. 28-1 at 12–13; Pls.' Pera Mot. to Compel Arbitration Opp'n – No. 17-cv-00138-LB – ECF No. 30 at 2–3. The defendants make this concession in order to preemptively rebut a potential argument by the plaintiffs that they have waived their right to arbitration by not fully pursuing a motion to compel arbitration earlier, by arguing that Morris renders any such earlier attempt to compel arbitration futile.

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from granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) (citing Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936)); accord, e.g., Robledo, 2017 WL 4934205, at *2 (applying these factors in pending motion to compel arbitration in employment class action to decide whether to stay proceedings pending a Supreme Court decision in Morris); McElrath, 2017 WL 1175591, at *5 (same). The court examines these factors here.

1.1 The Possible Damage That May Result From Granting a Stay

The plaintiffs identify two potential harms related to a stay: (1) they will be delayed in pursuing their claims, and (2) potential opt-in plaintiffs will be delayed in receiving notice of these actions, and their FLSA statutes of limitation will continue to run, thereby potentially prejudicing them. The defendants respond that (1) any prejudice to the named plaintiffs from a stay of their claims is minimal and (2) there is no prejudice to potential opt-in plaintiffs, because the potential opt-ins are all also class members in Roe and have already received one class notice in connection with that case, and it is therefore not reasonable to infer that potential opt-ins who were not spurred to action based on that notice in Roe would be prejudiced by a limited delay in receiving a second notice in these actions. Additionally, at the December 14, 2017 hearing, the court raised the prospect of tolling the statute of limitations for the potential opt-in plaintiffs, and the defendants agreed that doing so made sense.

The court agrees that the potential harm to the plaintiffs from the delay that may result from a stay of these proceedings until the Supreme Court issues a decision in Morris is minimal. See, e.g., Robledo, 2017 WL 4934205, at *3 (holding in November 2017 that a stay "that will likely last no more than a few months while the Supreme Court writes its opinion" would not prejudice plaintiffs); Bankwitz, 2017 WL 4642284, at *5 (holding same in October 2017); McElrath, 2017 WL 1175591, at *5–6 (holding same in March 2017); see also Roe v. SFBSC Mgmt., LLC, No. 14-cv-03616-LB, 2015 WL 1798926, at *4 (N.D. Cal. Apr. 17, 2015) (Roe II) (holding in the related

Roe class action that a stay would require plaintiffs to wait to pursue their claims did not impose unfair prejudice).

As for the potential opt-in plaintiffs, the court tolls the statute of limitations for their putative FLSA claims during any stay of these proceedings, thereby obviating that potential prejudice. Cf. Coppernoll v. Hamcor, Inc., No. C 16-05936 WHA, 2017 WL 1508853, at *2–4 (N.D. Cal. Apr. 27, 2017) (holding that, in a putative employment class action stayed pending a Supreme Court decision in Morris, courts have the power to equitably toll FLSA claims, and tolling statute of limitations); see also Roe II, 2015 WL 1798926, at *5 (tolling statute of limitations in related Roe class action during stay pending appeal).

1.2 The Hardship and Inequity If the Cases Were Not Stayed

In assessing what hardship or inequity might result if these cases were not stayed, the court examines whether the arbitration provisions at issue here are enforceable assuming the Supreme Court were to reverse the Ninth Circuit in Morris. If the arbitration provisions are otherwise enforceable, then the harm that the defendants might suffer (if the cases are not stayed until the Supreme Court issued a decision) could be significant. As the court previously held in Roe, in circumstances such as these, "denying a stay would irreparably harm [the defendants]. This harm lies primarily in the resources that [the defendants] would have to expend pursuing this litigation — expenditures that, if the [higher court] ultimately reverses and [allows] this case to [go to] arbitration, would be largely squandered." Roe II, 2015 WL 1798926, at *3. If, however, the arbitration provisions are unenforceable even if the Supreme Court were to reverse the Ninth Circuit, the defendants might not suffer any harm even if the cases were not stayed.

The plaintiffs offer two principal arguments as to why the arbitration provisions would be unenforceable even if the Supreme Court reversed the Ninth Circuit: (1) the defendants have waived their right to arbitration, and (2) the arbitration provisions are unconscionable and therefore unenforceable. The defendants argue that neither of these arguments is a ground for holding their arbitration provisions unenforceable. In evaluating the parties' arguments, the court does not endeavor to fully adjudicate whether the arbitration provisions are or are not enforceable. Instead, it examines the issue preliminarily to determine whether the defendants have made

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enough of an argument — that the arbitration provisions would be enforceable but for the Ninth Circuit's opinion in Morris — that not staying these proceedings until the Supreme Court issues its decision in Morris would subject them to a hardship or inequity.

1.2.1 The Defendants Have Made Arguments That They Have Not Waived Their Putative Right to Arbitration That Are Sufficient to Show a Hardship or Inequity in the Absence of a Stay

"The right to arbitration, like other contractual rights, can be waived." Martin v. Yasuda, 829 F.3d 1118, 1124 (9th Cir. 2016). But "'[w]aiver of a contractual right to arbitration is not favored,' and, therefore, 'any party arguing waiver of arbitration bears a heavy burden of proof.'" Richards v. Ernst & Young, 744 F.3d 1072, 1074 (9th Cir. 2013) (quoting Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986)). "Specifically, 'a party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.'" Id. (internal brackets omitted) (quoting Fisher, 791 F.2d at 694).[7]

1.2.1.1 Knowledge of an existing right to compel arbitration

Here, the first element of waiver is satisfied: it is undisputed that the defendants had knowledge that their contracts with the plaintiffs contained arbitration provisions.

1.2.1.2 Acts inconsistent with an existing right to compel arbitration

The plaintiffs make three principal arguments as to how the defendants acted inconsistently with a right to compel arbitration: (1) the defendants moved to compel arbitration in the Hughes case in 2016, but then changed course and affirmed that they would not be moving to compel arbitration, (2) the defendants have filed motions to dismiss and opposed the plaintiffs' class-

[7] The factors that California state courts take into account are similar and include "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1124 (9th Cir. 2008) (quoting St. Agnes Med. Ctr. v. PacifiCare of Cal., 31 Cal. 4th 1187, 1196 (2003)).

certification motions in both Hughes and Pera and therefore evinced an intent to litigate, not to arbitrate, and (3) the defendants have litigated, not arbitrated, the related Roe action, which is inconsistent with a right to arbitrate here.

The plaintiffs' third argument is easily dispensed with. The fact that the defendants reached a settlement in court, not in arbitration, in the related Roe case — which they did only after the other defendant in Roe first tried to compel arbitration and lost that fight — does not constitute a waiver of their arbitration rights in these actions. "To hold that a defendant waives its right to compel arbitration in one case by entering a judicial settlement in another case would create a disincentive to settle for any defendant facing multiple suits. Such an outcome is to be avoided." Lawrence v. Household Bank (SB), N.A., 343 F. Supp. 2d 1101, 1113 (M.D. Ala. 2003) (citing Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1113 (C.D. Cal. 2002) and other cases).

As for the plaintiffs' second argument, while the defendants have filed motions to dismiss and filed oppositions to the plaintiffs' certification motions, none of these filings addressed the merits of the plaintiffs' claims. (Their motions to dismiss were procedural attempts to dismiss or stay these cases pending the settlement in Roe, and their certification oppositions were certification oppositions.) These filings are not inconsistent with a right to arbitration. See Martin, 829 F.3d at 1125 ("filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act [inconsistent with the right to arbitration]," while "seeking a decision on the merits of an issue may satisfy this element"); Conde II, 2017 WL 5172271, at *6 ("[A] motion to deny certification is likewise not premised on the merits of the case, and is insufficient to constitute an act inconsistent with an intent to arbitrate.").

The plaintiffs' first argument is the most involved and requires a brief summary of the procedural history of the Hughes litigation in particular. Ms. Hughes originally brought a collective and class action complaint in June 2016 alleging FLSA and California state law claims.[8] In September 2016, the defendants moved to compel arbitration.[9] In October 2016, Ms. Hughes

[8] Hughes Class Action and Collective Action Compl. – No. 16-cv-03371-LB – ECF No. 2.

[9] Defs.' [Original] Hughes Mot. to Compel Arbitration – No. 16-cv-03371-LB – ECF No. 27.

filed an amended complaint, joined now by Ms. Hermes and Ms. Nunez, alleging FLSA claims, California state law claims, and a new claim under the California Private Attorney General Act (PAGA).[10] In November 2016, the parties filed a joint case-management statement in which the defendants "affirm[ed] that [they] do not intend to move to compel arbitration of any of Plaintiffs' class, collective, or representative claims to arbitration."[11] The plaintiffs argue that the defendants' decision to expressly affirm that they would not pursue arbitration operates as a waiver.

The defendants respond that at the time they filed that case-management statement, they would not have been able to enforce their arbitration agreements because (1) the Ninth Circuit had issued its decision in Morris, which rendered the arbitration provisions at issue here unenforceable, and (2) Ms. Hughes had brought a PAGA claim, which is not arbitrable. The defendants argue that their attempt to move to compel arbitration was therefore futile — and a party cannot waive its right to arbitration when an attempt to pursue arbitration is futile. See Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1187 (9th Cir. 1986) ("[T]here can be no waiver [where] there was no existing right to arbitration."). The plaintiffs in turn respond that the Ninth Circuit actually issued its Morris decision in August 2016 — over a month before the defendants first tried to move to compel arbitration in September 2016 — and as Morris did not prevent the defendants from trying to compel arbitration then, they cannot claim now that Morris rendered any attempt to compel arbitration futile.[12] The defendants in turn respond that certain later district court opinions, which came out after they had filed their motion to compel arbitration, indicated that courts would read Morris broadly and signaled to them that an attempt to compel arbitration would have been futile.

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[10] Hughes First Amend. Class Action and Collective Action Compl. – No. 16-cv-03371-LB – ECF No. 32. Ms. Hughes's PAGA claim is now being released as part of the Roe collective and class action settlement, see Defs.' Hughes Mot. to Dismiss, Myette Decl. Ex. 1 – No. 16-cv-03371-LB – ECF No. 88-3 at 8, and therefore it is no longer at issue here.

[11] Hughes Joint Case Mgmt. Statement – No. 16-cv-03371-LB – ECF No. 46 at 6.

[12] The plaintiffs also argue that if the Ninth Circuit's Morris decision in fact rendered the arbitration provisions unenforceable then, it still renders them unenforceable now, as Morris is still in effect and remains the law of the circuit. While this is true, it does not help illuminate the underlying issue the court addresses here, namely, whether the court should stay these proceedings to await a decision in Morris from the Supreme Court.

The parties do not devote much effort to arguing whether the presence of Ms. Hughes's PAGA claim affects arbitrability and futility — the defendants mention it in passing, and the plaintiffs do not address it at all. In any event, this argument is easily dispensed with: the defendants cannot base a futility argument on the presence of Ms. Hughes's PAGA claim. A defendant can move to compel arbitration of non-PAGA claims even if they are coupled with a PAGA claim. See Franco v. Arakelian Enters., Inc., 234 Cal. App. 4th 947, 965–66 (2015) (holding that a party can compel arbitration of individual claims regardless of the presence of a PAGA claim); accord Aviles v. Quik Pick Express, LLC, __ F. App'x __, No. 15-56951, 2017 WL 5643191, at *2 (9th Cir. Nov. 24, 2017) (same). The presence of a PAGA claim therefore does not render any attempt to compel arbitration futile.

The trickier issue is the parties' competing Morris arguments. Assuming the Ninth Circuit's opinion in Morris does in fact render the arbitration provisions here unenforceable — and both sides agree that it does — the issue would have been simple if Morris had been issued after the defendants had moved to compel arbitration, and the defendants withdrew their motion in the wake of that decision. In that case, the motion would be futile, and the defendants therefore could not be deemed to have their right to make an arbitration argument later if Morris were ever overturned. See Letizia, 802 F.2d at 1187 ("[T]here could be no waiver here because there was no existing right to arbitration."). The issue is somewhat trickier here because the Ninth Circuit issued its Morris opinion before the defendants moved to compel arbitration, and the defendants nevertheless moved to compel arbitration in the face of Morris, only to then (so they claim) belatedly realize that Morris rendered their motion futile. Nevertheless, the court finds that despite this, the defendants have not necessarily waived their right to seek arbitration should Morris be reversed. The futility doctrine, as described by the Ninth Circuit, focuses on whether there was an existing right to arbitration under "the then-prevailing law in this circuit," Letizia, 802 F.2d at 1187, not whether, or when, a party realized what the law was. Additionally, to hold that a party that belatedly realizes its motion is futile cannot withdraw it without running the risk of waiver would create a disincentive for parties to withdraw motions, thereby increasing costs and taxing the resources of litigants and the court. The defendants have reasonably strong arguments that the

plaintiffs have not met their "heavy burden of proof," Richards, 744 F.3d at 1074, in establishing that the defendants acted inconsistently with an existing right to compel arbitration.

1.2.1.3 Prejudice to the parties opposing arbitration

"[I]n order to establish prejudice, the plaintiffs must show that, as a result of the defendants having delayed seeking arbitration, they have incurred costs that they would not otherwise have incurred, that they would be forced to relitigate an issue on the merits on which they have already prevailed in court, or that the defendants have received an advantage from litigating in federal court that they would not have received in arbitration." Martin, 829 F.3d at 1127.

The only prejudice the plaintiffs claim is a generalized complaint about the delay of time.[13] They do not claim that they incurred any costs from that delay, nor that they are being forced to relitigate a merits issue on which they have already prevailed in court (as no merits issues have been decided in these cases), nor that the defendants have received an advantage from litigating in court that they would not have received in arbitration. The defendants have a reasonably strong argument that the plaintiffs' generalized complaint is insufficient to carry the "heavy burden" that the plaintiffs bear in showing prejudice. See Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270 (9th Cir. 2002) (party claiming waiver "bears a 'heavy burden of proof'" and must "articulate how [s]he was prejudiced" to establish waiver); Conde II, 2017 WL 5172271, at *7 (rejecting claim of prejudice where plaintiffs claimed that "they have expended time and money" because of the defendant's delay in moving to compel arbitration but did not articulate "specifics as to the resources [they] assert were wasted").[14]

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[13] See Pls.' Hughes Mot. to Compel Arbitration Opp'n – No. 16-cv-03371-LB – ECF No. 93 at 18; Pls. Pera Mot. to Compel Arbitration Opp'n – No. 17-cv-00138-LB – ECF No. 30 at 4–5.

[14] The cases that the plaintiffs cite regarding prejudice are distinguishable, as each of them involved scenarios in which the party opposing arbitration had either already incurred substantial litigation costs in discovery or had litigated and won a motion on the merits that arbitration threatened to undo. See Ford v. Yasuda, No. 5:13-cv-01961-PSG-DTB, 2015 WL 3650216, at *8–9 (C.D. Cal. Apr. 29, 2015) (a case where defendants lost a merits motion on the issue of whether the plaintiffs were employees, where compelling arbitration would force the plaintiffs to relitigate the issue and allow the defendants to forum-shop), *aff'd sub. nom.* Martin v. Yasuda, 829 F.3d 1118 (9th Cir. 2016); Kelly v. Pub. Util. Dist. No. 2 of Grant Cnty., 552 F. App'x 663, 664 (9th Cir. 2014) (a case in which the parties actively litigated in court for eleven months, including by taking discovery and litigating preliminary-injunction motions and motions to dismiss); Joca-Roca Real Estate, LLC v. Brennan, 772 F.3d 945, 949 (1st Cir. 2014) (a case in which "the parties engaged actively in discovery; and the [party opposing

The court need not definitively resolve all questions on the issue of waiver here. The ultimate underlying issue at this juncture is whether the court should stay these proceedings pending the Supreme Court's decision in Morris, which entails a consideration of the hardship or inequity that a party might suffer in the absence of a stay. As described above, the defendants have made sufficiently strong arguments that they have not waived their arbitration rights to make a showing that they would suffer hardship and inequity if they were required to go forward now before the Supreme Court issues its decision.

1.2.2 The Defendants Have Made Arguments That the Arbitration Clauses Are Not Unconscionable That Are Sufficient to Show a Hardship or Inequity in the Absence of a Stay

1.2.2.1 Governing Law

The Federal Arbitration Act provides that arbitration agreements are unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" federal law. *Doctor's Assoc.*, Inc. v. Casarotto, 517 U.S. 681, 687 (1996). The court determines whether the putative arbitration agreement is enforceable under the laws of the state where the contract was formed. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Ingle v. Circuit City Stores, 328 F.3d 1165, 1170 (9th Cir. 2003).

Contractual unconscionability has both a procedural and a substantive component. Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). The "prevailing view" is that both components must be present before a contract can be deemed unconscionable. Id. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability

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arbitration] incurred what must have been substantial costs associated with more than a dozen depositions, interrogatories, document production, and conferences with the magistrate judge and opposing counsel"); Gray Holdco, Inc. v. Cassady, 654 F.3d 444, 460–61 (3d Cir. 2011) (a case in which "the parties took the depositions of eight separate individuals; exchanged extensive written discovery responses, including 200 separate interrogatories, requests for admission and written document production requests; the parties exchanged more than 20,000 pages of documents and submitted to the District Court approximately 100 pages of Proposed Findings of Fact and Conclusions of Law"). The plaintiffs have incurred no analogous costs or prejudice here.

is required to come to the conclusion that the term is unenforceable, and vice versa." Id. "The party opposing arbitration bears the burden of proving that the arbitration provision is unconscionable." Correa v. Firestone Complete Auto Care, No. C 13-0123 CW, 2013 WL 6173651, at *2 (N.D. Cal. Nov. 25, 2013) (citing Arguelles-Romero v. Superior Court, 184 Cal. App. 4th 825, 836 (2010)).

1.2.2.2 Application

In the related Roe litigation, the court previously found the arbitration clauses used by the nightclubs at issue here both procedurally and substantively unconscionable. Roe v. SFBSC Mgmt., LLC, No. 14-cv-03616-LB, 2015 WL 930683, at *5–11 (N.D. Cal. Mar. 2, 2015) (Roe I). The plaintiffs argue that the same outcome is compelled here.

In response, the defendants first argue that the plaintiffs here were not subject to as much procedural unconscionability when they signed their contracts as the plaintiffs in Roe were. The Roe plaintiffs "submitted declarations in which they allege that, when they signed their contracts, they were 'mostly naked,' were told that the contracts were 'time-sensitive,' were 'rushed' into signing them, and were told that they could not bring the contracts home to review.'" Roe I, 2015 WL 930683, at *7 (emphasis in original). The declarations that the plaintiffs make here bear certain similarities to those of the plaintiffs in Roe, but also some differences (none of the plaintiffs here say that there were rushed into signing contracts while naked, for example). The defendants may be able to make arguments that the arbitration agreements that the plaintiffs in these cases signed, as contrasted to the ones in Roe, were not procedurally unconscionable.

Regarding substantive unconscionability, the plaintiffs make two primary arguments. First, they argue the provisions are unconscionable because the provisions (1) require them to share all costs and fees associated with arbitration and (2) allow the defendants to recover costs and attorney's fees from them should they lose an action to enforce the arbitration agreement but do not allow them to recover costs and attorney's fees should they win. Second, they argue the provisions are unconscionable because the provisions prohibit them from filing a class action against the defendants but allow the defendants to file a class action against them and other dancers. The plaintiffs argue that both of these were bases for finding similar arbitration

provisions unconscionable in the related Roe litigation, see Roe I, 2015 WL 930683, at *9–11, and the same conclusion is compelled here.

As to the plaintiffs' first argument regarding arbitration fees and costs, there is a key distinction in the substantive unconscionability analysis here as compared to Roe. In Roe, the contracts required the parties to split the cost of arbitration evenly between the plaintiffs and the defendants. The Ninth Circuit has repeatedly found that provisions requiring employees to split arbitration fees with employers are unconscionable and therefore unenforceable under California law. See Roe I, 2015 WL 930683, at *11 (citing cases). This time around, however, the defendants have agreed to pay all costs associated with arbitration and forgo any claims for costs and fees against the plaintiffs.[15] The Ninth Circuit has indicated that an employer may be able to take an arbitration agreement that was originally unconscionable because it requires an employee to bear half the cost of arbitration and render it non-unconscionable after-the-fact by agreeing to bear the full cost of arbitration. See Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1212 (9th Cir. 2016) (Mohamed II), *aff'g in part and rev'*g in part 109 F. Supp. 3d 1185 (N.D. Cal. 2015) (Mohamed I).

The arbitration clause in Mohamed provided that "'[I]n all cases where required by law, [employer] will pay the Arbitrator's and arbitration fees. If under applicable law [employer] is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the Parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator." Mohamed I, 109 F. Supp. 3d at 1207. The district court there held that this clause was unconscionable, as "[u]nder California law, any clause in an employment agreement that would impose 'substantial forum fees' on an employee in her attempt to vindicate her unwaivable statutory rights is contrary to public policy and therefore substantively unconscionable." Id. (citing Armendariz, 24 Cal. 4th at 110). The employer there tried to "walk back" this provision by offering "to pay any [arbitration] fees." Id. at 1210. The district court noted that the employer made this offer only after the litigation had commenced, not when the

[15] Dec. 14, 2017 Hr'g (agreeing to pay all arbitration costs and forgo claims for costs and fees against the plaintiffs).

contract was first signed, and held that "[t]his after-the-fact concession cannot render the [arbitration] clause conscionable." Id. But the Ninth Circuit reversed the district court and compelled arbitration, holding that because the employer "ha[d] committed to paying the full cost of arbitration," the court need not consider whether the fee term would have been unconscionable "if it were enforced as written." Mohamed II, 848 F.3d at 1212.

As to the plaintiffs' second argument regarding whether the arbitration provisions operate as a unidirectional prohibition on class actions, the defendants respond that the provisions actually operate as a bidirectional prohibition, barring both sides from bringing class actions. Again, the court need not definitively resolve this issue, or resolve all questions as to whether the contracts and the arbitration provisions here are unconscionable or not. It is enough to say at this juncture that the defendants have made a sufficiently strong argument that the provisions are not unconscionable and therefore (assuming a reversal in Morris) enforceable, for the second stay factor — "the hardship or inequity which a party may suffer in being required to go forward," CMAX, 300 F.2d at 268 — to weigh in favor of granting a stay. See generally Roe II, 2015 WL 1798926, at *3 (finding that potential harm to defendant in having to proceed warranted granting a stay).

1.3 The Orderly Course of Justice That Could Be Expected to Result From a Stay

The third factor — "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay," CMAX, 300 F.2d at 268 — weighs heavily in favor of granting a stay. It would be far simpler for the court to address the arbitration question and, if necessary, the remainder of these cases, after the Supreme Court issues its Morris decision and clarifies the law surround arbitration provisions in putative class actions. By contrast, in the absence of a stay, "it would prove to be 'an extraordinary waste of time and money' to continue litigating th[ese] case[s] 'only to have to do it all again because . . . the parties and the Court were proceeding under a legal framework that the Supreme Court determined did not apply.'" Robledo, 2017 WL 4934205, at *5 (internal brackets omitted) (citing Meijer, Inc. v. Abbott Labs., No. C 07-5470 CW, 2009 WL 723882, at *4 (N.D. Cal. Mar. 18, 2009)); accord McElrath, 2017 WL 1175591, at *6 (same).

For the foregoing reasons, the court finds it appropriate to defer ruling on the defendants' motion to compel arbitration and to stay the proceedings pending the Supreme Court's decision in Morris.

2. Staying the Issuance of Notice to Potential Opt-In Plaintiffs

As it was a focus of the parties at the December 14, 2017 hearing, the court briefly addresses the issue of notice to potential opt-in plaintiffs and its reasons for staying issuance of notice as part of its overall stay of these cases.

As the court previously held in Roe, and as other courts have held, the issue of whether the named plaintiffs can litigate their claims in a court or must arbitrate their claims is a threshold issue. If the arbitration provisions the named plaintiffs signed with the defendants are enforceable, the plaintiffs cannot pursue these cases in court on behalf of either themselves or other similarly situated dancers. To paraphrase Roe, the court therefore thinks it wiser to forgo the time, effort, and expense of issuing notice until the Supreme Court issues a decision clarifying the law regarding the enforceability of the arbitration provisions the defendants seek to invoke. Cf. Roe I, 2015 WL 1798926, at *5 ("[T]he better course is to first determine the enforceability of the arbitration agreements before addressing the scope and management of the remainder of this litigation.") (quoting Castle v. Wells Fargo Fin., Inc., No. C 06-4347 SI, 2007 WL 703609, at *3 (N.D. Cal. Mar. 5, 2007)); accord, e.g., *Reyna v. Int'l Bank of Comm*erce, 839 F.3d 373, 377 (5th Cir. 2016) ("[A] district court must consider an agreement to arbitrate as a 'threshold question.'").

The plaintiffs argue that notice should be issued now. To support their position, the plaintiffs cited to a number of cases in their briefs and at the December 14, 2017 hearing, in which they claimed that other courts had allowed notice to be issued before arbitration issues were settled. In each of those cases, however, there was at least one named plaintiff who had not signed any arbitration agreement. For example, Conde v. Open Door Marketing, LLC, No. 15-cv-04080-KAW, 2016 WL 1427641 (N.D. Cal. Apr. 12, 2016) (Conde I) and *D'Antuono v. C & G* of Groton, Inc., No. 3:11cv33 (MRK), 2011 WL 5878045 (D. Conn. Nov. 23, 2011) — the two cases on which the plaintiffs most heavily relied at the December 14, 2017 hearing — were both cases in

which at least one named plaintiff signed no arbitration agreement at all, and hence the litigation would continue in some fashion no matter how the court ruled on the enforceability of the arbitration provisions at issue. See Conde I, 2016 WL 1427641, at *8 n.2 (two of the three named plaintiffs had not signed any arbitration agreements, and the court specifically "disregarded" the declaration of the third named plaintiff in considering the plaintiffs' request that notice be issued); *D'Antuono*, 2011 WL 5878045, at *2 (one of the three named plaintiffs had not signed any arbitration agreement, and the court specifically "administratively close[d]" the cases of the other two named plaintiffs before considering the plaintiffs' request that notice be issued).[16] Among other things, those decisions addressed whether it was appropriate to issue notice in a situation in which many members of the class had potentially signed arbitration agreements. See Conde I, 2016 WL 1427641, at *9 (evaluating whether notice should be issued where "any putative class member who worked directly for [defendant] must arbitrate his or her claim and thus lacks standing to assert claims in this action); *D'Antuono*, 2011 WL 5878045, at *3 (evaluating whether notice should be issued where "many of the potential opt-in plaintiffs have likely signed

[16] The other cases the plaintiffs cite in their briefs are all similar. See Woods v. Club Cabaret, Inc., 140 F. Supp. 3d 775, 782 (C.D. Ill. 2015) (defendant did not begin adding arbitration provisions into its contracts until after the plaintiff's claims arose and the plaintiff filed the case); Sylvester v. Wintrust Fin. Corp., No. 12 C 01899, 2013 WL 5433593, at *6, 9 (N.D. Ill. Sept. 30, 2013) (two out of five opt-in plaintiffs had signed arbitration agreements but the named plaintiff had not, and the court stayed the action with respect to those two opt-ins); Romero v. La Revise Assocs., L.L.C., 968 F. Supp. 2d 639, 643 (S.D.N.Y. 2013) (named plaintiff did not sign an arbitration agreement); Hernandez v. Immortal Rise, Inc., No. 11 CV 4360(RRM)(LB), 2012 WL 4369746, at *5 (E.D.N.Y. Sept. 24, 2012) (discussing only whether the class should exclude class members who signed arbitration agreements, with no discussion that the named plaintiffs had signed arbitration agreements); Sealy v. Keiser Sch., Inc., No. 11-61426-CIV, 2011 WL 7641238, at *3 (S.D. Fla. Nov. 8, 2011) (addressing arguments that the vast majority of the class executed arbitration agreements and hence the named plaintiff was not "similarly situated" to them); Davis v. Four Seasons Hotel Ltd., No. 08-00525 HG-BMK, 2011 WL 4590393, at *3 (D. Haw. Sept. 30, 2011) (three of six named plaintiffs executed arbitration agreements); Whittington v. Taco Bell of Am., Inc., No. 10-cv-01884-KMT-MEH, 2011 WL 1772401, at *3, 5 (D. Colo. May 10, 2011) (defendant was unable to produce evidence that plaintiff had signed an arbitration agreement); Ali v. Sugarland Petroleum, No. 4:09-cv-0170, 2009 WL 5173508, at *4 (S.D. Tex. Dec. 22, 2009) (discussing only whether the class should exclude class members who signed arbitration agreements, with no discussion that the named plaintiff had signed an arbitration agreement); Davis v. NovaStar Mortg., 408 F. Supp. 2d 811, 817–18 (W.D. Mo. 2005) (discussing only whether the class should exclude class members who signed arbitration agreements, with no discussion that the named plaintiff had signed an arbitration agreement); Villatoro v. Kim Son Rest., 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003) (discussing whether the defendant's "newly implemented arbitration policies and newly signed arbitration/release agreements" would affect the scope of the class, with no discussion that the named plaintiff had signed one of these new agreements).

[arbitration] agreements”). By contrast, the issue here is whether notice should be issued in a situation in which each of the named plaintiffs has signed an arbitration agreement. In this latter situation, the court finds it appropriate to stay the issue of notice until after it issues its determination on the arbitration issue. See Roe I, 2015 WL 1798926, at *5; accord, e.g., Reyna, 839 F.3d at 376 (holding that courts should “address the arbitrability of [a named plaintiff]’s claims at the outset of proceedings, prior to considering conditional certification” and that cases where “court[s] decline to determine the validity of arbitration agreements with potential opt-in plaintiffs, not the arbitration agreements with the . . . named plaintiff[s]” are inapposite) (emphasis in original).[17]

CONCLUSION

For the foregoing reasons, the court defers decision on the parties’ pending motions. The court additionally stays these cases pending the Supreme Court’s decision in Morris and the court’s decision, to follow thereafter, on the defendants’ motions to compel arbitration. The court equitably tolls the FLSA statute of limitations for potential opt-in plaintiffs while these actions are stayed.

IT IS SO ORDERED.

Dated: December 18, 2017

LAUREL BEELER
United States Magistrate Judge

[17] The plaintiffs also argue that one of the opt-in plaintiffs to the Hughes action, a Diana Tejada, never agreed to arbitration, and that she could provide a basis for issuing notice. Pls.’ Hughes Mot. to Compel Arbitration Opp’n – No. 16-cv-03371-LB – ECF No. 93 at 8–9. The defendants maintain that Ms. Tejada did sign arbitration agreements. Defs.’ Hughes Mot. to Compel Arbitration Reply – No. 16-cv-03371-LB – ECF No. 97 at 11–12. Whether Ms. Tejada did or did not sign an arbitration agreement is immaterial at this juncture, as Ms. Tejada did not move for certification or for issuance of a notice. See Pls.’ Hughes Supplemental Mem. in Supp. of Mot. for Conditional Certification and Issuance of Notice – No. 16-cv-03371-LB – ECF No. 89 at 32 (filed on behalf of Ms. Hughes, Ms. Nunez, and Ms. Hermes, not Ms. Tejada); Pls.’ Pera Mot. for Conditional Certification and Issuance of Notice – No. 17-cv-00138-LB – ECF No. 25 at 3 (filed on behalf of Ms. Pera and Ms. Murphy, not Ms. Tejada).