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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT BANKWITZ, et al.,

Plaintiffs,

v.

ECOLAB, INC., A DELAWARE
CORPORATION,

Defendant.

Case No. [17-cv-02924-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO COMPEL ARBITRATION
AND TO STAY PROCEEDINGS**

Docket No. 21

Plaintiffs filed a class action wage and hour complaint against their employer, Ecolab, after signing an arbitration agreement purporting to require arbitration of all employment-related claims and to prohibit class, collective, and representative actions in any forum. Before the Court is Ecolab’s motion to compel arbitration or to stay this action until the Supreme Court reviews the enforceability of employment class action waivers in *Morris v. Ernst & Young, LLP*, 137 S. Ct. 809 (2017). The Court conditionally **DENIES** the motion to compel arbitration and **GRANTS IN PART AND DENIES IN PART** the motion to stay because the Supreme Court’s *Morris* decision will be dispositive.

I. BACKGROUND

Plaintiffs are employees of Ecolab who claim they were misclassified as exempt employees and therefore wrongfully denied overtime and doubletime premiums. They bring claims under the California Labor Code, the Unfair Competition Law, and the Private Attorney General Act (“PAGA”). Ecolab moved to compel arbitration of all Plaintiffs’ claims except the PAGA claim, or in the alternative to stay this case pending the United States Supreme Court’s ruling on the enforceability of arbitration agreements like Ecolab’s in *Morris*.

Plaintiffs assented to Ecolab’s Arbitration Agreement as a condition of employment with

1 no option to opt-out. Docket No. 21, Declaration of Amy Daly (“Daly Decl.”), ¶ 5. The
2 agreement mandates that both parties arbitrate all claims and requires Plaintiffs to arbitrate in an
3 individual capacity—not as a collective or class claim. Daly Decl. ¶ 10, Ex. 5 (“Agreement”) at 2.
4 The Agreement permits severance of unlawful provisions “except that arbitration may only
5 proceed in an individual capacity.” *Id.* Furthermore, the Agreement states, “[t]he arbitrator shall
6 not have the authority to hear multiparty, class, collective or representative actions.” Agreement
7 at 3.

8 In opposition to Defendant’s motion, Plaintiffs argue that the Agreement is unenforceable
9 under *Morris* because it requires them to waive their right to bring “any class or collective action
10 in any court or in arbitration related to any dispute.” Agreement at 2. Plaintiffs also argue that,
11 irrespective of the legality of the class action waiver, the Agreement is unconscionable and
12 therefore unenforceable.

13 **II. DISCUSSION**

14 A. Class Action Waiver

15 The Ninth Circuit has held that arbitration agreements requiring employees to pursue
16 work-related claims individually are unenforceable because class and collective actions are
17 protected forms of “concerted activity” under the National Labor Relations Act. *Morris v. Ernst*
18 *& Young, LLP*, 834 F.3d 975, 975 (9th Cir. 2016).

19 The agreement in *Morris* prohibited concerted action of all legal claims, required that
20 employees use only arbitration, and was a condition of employment with no opt-out provision. *Id.*
21 Likewise, the Agreement here prohibits class actions against Ecolab in all forums, compels
22 employees to arbitration, and is a condition of employment. Agreement at 1–3. The Agreement’s
23 class action waiver provision is therefore unlawful under *Morris*, as Ecolab concedes. Docket No.
24 21 at 15.

25 Moreover, the class action waiver provision is not severable under the Agreement’s own
26 terms, which permit severance of unlawful provisions “except that arbitration may only proceed in
27 an individual capacity.” Agreement at 2. Accordingly, after severing the class action waiver, the
28 Court would not be able to compel arbitration of class claims because the parties did not contract

1 to class-wide arbitration. *Stolt-Nielsen S.A. v. Animal Feeds Int'l. Corp.*, 559 U.S. 662, 684
2 (2010). The Agreement also expressly deprives the arbitrator of any authority to hear multiparty,
3 class, collective or representative claims. Agreement at 3. Thus, Ecolab’s Arbitration Agreement
4 is unenforceable under *Morris* because the class action waiver is not severable.

5 The Supreme Court heard oral arguments in *Morris* on October 2, 2017. Its ruling is
6 forthcoming. Unless and until the Supreme Court reverses *Morris*, it continues to be the law of
7 this circuit and this Court is bound to follow it. *See Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th
8 Cir. 2000). Nevertheless, if appropriate, the parties may revisit the issue after the case is decided.

9 B. Unconscionability

10 Plaintiffs argue that even if *Morris* does not apply, the agreement is unenforceable because
11 it is unconscionable. A successful unconscionability defense requires a showing of both
12 procedural and substantive unconscionability. *Armendariz v. Found. Health Psychcare Svcs., Inc.*,
13 24 Cal.4th 83, 99 (2000). As explained below, Plaintiffs have demonstrated only marginal
14 procedural unconscionability and no substantive unconscionability. For that reason, the
15 Arbitration Agreement is not unconscionable.

16 1. Procedural Unconscionability

17 Procedural unconscionability focuses on “oppression” and “surprise” during the
18 negotiation of a contract. *Id.* at 114. “Oppression” arises from an inequality of bargaining power.
19 *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003). “Surprise” involves the
20 extent to which the disputed terms are hidden by the party seeking to enforce them. *Id.* All
21 contracts of adhesion are at least slightly oppressive, but adhesion alone gives rise to only a low
22 degree of procedural unconscionability. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261–62
23 (9th Cir. 2017). Without other indications of procedural unconscionability, contracts of adhesion
24 will still be enforced. *Id.* Here, it is undisputed that the Agreement is a slightly oppressive
25 contract of adhesion because it was imposed upon Plaintiffs as a condition of employment with no
26 opt-out provision. Docket No. 21, Daly Decl. ¶ 5.

27 Plaintiffs fail to demonstrate additional procedural unconscionability, however. They
28 claim that Ecolab’s failure to attach the governing American Arbitration Association (“AAA”)

1 rules to the Agreement resulted in unconscionable “surprise” because Plaintiffs were unable to
2 read the AAA rules before signing. However, incorporation of arbitration rules is only
3 unconscionable when significant rights are “artfully hidden” from the party giving them up. *See*
4 *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1246 (2016). Plaintiffs do not claim that any
5 significant rights were hidden in the AAA rules. Rather, they challenge the incorporation of the
6 rules in and of itself. Ecolab correctly notes that both the California Supreme Court and the Ninth
7 Circuit have rejected that argument, finding that the incorporation of rules in and of itself is not
8 procedurally unconscionable. *See Baltazar*, 62 Cal. 4th at 1246 (rejecting claim that employer's
9 failure to provide copy of AAA rules with arbitration agreement gave rise to a “greater degree of
10 procedural unconscionability”); *Poublon*, 846 F.3d at 1262 (same); *compare Fitz v. NCR Corp.*,
11 118 Cal. App. 4th 702, 721 (2004) (holding that an incorporated AAA discovery rule was
12 deliberately hidden by a conflicting discovery provision in the arbitration agreement).

13 Plaintiffs also argue that the Agreement is unconscionable because it does not specify
14 which version of the AAA rules will apply. *See Harper v. Ultimo*, 113 Cal.App.4th 1402, 1406–
15 1407 (2003) (finding unconscionability where neither the arbitration agreement nor the
16 incorporated Better Business Bureau rules specified which version of the rules applied). Ecolab’s
17 Agreement provides a link to an online copy of the AAA rules, which state that the rules in place
18 at the time of arbitration apply. *See* AAA Employment Arbitration Rules, Art. 1. Courts have
19 held that an agreement is not procedurally unconscionable for failure to specify what version of
20 arbitration rules apply when the rules themselves do so. *Lucas v. Gund*, 450 F. Supp. 2d 1125,
21 1131–32 (C.D. Cal. 2006) (holding that “[w]hen an agreement references other rules . . . [which]
22 specify which version of the rules should apply to the dispute, those rules control” and are not
23 unconscionable); *see also, Evans v. CenterStone Dev. Co.*, 134 Cal. App. 4th 151, 158 (2005)
24 (finding that when an agreement provided certain rules should govern but did not specify which
25 version of the rules, the rules’ provision applying those in effect on the date of commencement of
26 the arbitration should control).

27 2. Substantive Unconscionability

28 Because the Agreement is only slightly procedurally unconscionable, Plaintiffs must prove

1 a high degree of substantive unconscionability. *Armendariz*, 24 Cal. 4th at 114 (holding that “the
2 more substantively oppressive the contract term, the less evidence of procedural unconscionability
3 is required to come to the conclusion that the term is unenforceable, and vice versa”). Contracts
4 are substantively unconscionable when their terms are unreasonably one-sided or have overly
5 harsh effects. *Id.*

6 Plaintiffs argue that the Agreement is unreasonably one-sided or overly harsh because it
7 (1) requires them to pay attorney fees they would not have to pay in court; (2) demands a “free
8 peek” at Plaintiffs’ case by requiring informal dispute resolution; (3) allows for unilateral
9 termination by Ecolab; and (4) requires use of arbitrators who may not be neutral because Ecolab
10 is a “repeat player.” These arguments are not persuasive.

11 Plaintiffs’ attorney fee argument fails under the plain language of the Agreement. The
12 Agreement does not require Plaintiffs to pay fees that they would not have to pay in court. The
13 relevant provision states, “If, under applicable federal, state, or local law, the prevailing party
14 would be entitled to an award of attorney’s fees and costs, the arbitrator may award such fees and
15 costs.” Agreement at 3. Thus, the Agreement explicitly permits the arbitrator to award Plaintiffs’
16 attorney fees subject to any applicable fee shifting statute. That the Agreement does not
17 affirmatively mandate fee shifting does not render it unconscionable, because courts presume that
18 arbitrators follow the law. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 82
19 (2000) (holding that an arbitration agreement that did not mention arbitration costs and fees was
20 not unenforceable on the theory that it failed to provide the plaintiff with protection from
21 prohibited costs); *compare Armendariz*, 14 Cal. 4th at 110 (holding that an arbitration agreement
22 that *required* an employee to bear expenses he would not have to bear in court was
23 unconscionable).

24 Likewise, the Agreement does not require Plaintiffs to provide Ecolab with a “free peek” at
25 Plaintiffs’ case. The Agreement merely *encourages* an attempt at dispute resolution through
26 Ecolab’s Human Resources Department prior to filing for arbitration. Agreement at 2
27 (“[a]ssociates are encouraged to . . . resolve any work-related problem [through HR Policy Manual
28 procedures] before initiating [arbitration]”). It does *not* require such dispute resolution prior to

1 filing arbitration. *Id.* Although a contractual *requirement* of pre-dispute resolution may add a
2 degree of unconscionability, that is not the situation here. *Compare Nyulassy v. Lockheed Martin*
3 *Corp.*, 120 Cal. App. 4th 1267, 1282–83 (2004) (finding that an arbitration agreement *requiring*
4 the plaintiff to submit to employer-controlled dispute resolution gave the defendant an
5 unconscionable “free peek” at the plaintiff’s case.).

6 Plaintiffs also fail to show that the unilateral termination provision is unconscionable.
7 Plaintiffs cite *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) to support this
8 argument, but that case is distinguishable. There, the unilateral modification applied retroactively
9 to disputes arising prior to the date of notice of termination. *Ingle*, 328 F.3d at 1179. In contrast,
10 Ecolab’s modification provision applies only prospectively, not to disputes arising prior to the
11 notice of termination. Agreement at 2. Ecolab does not have the unilateral right to avoid or
12 terminate arbitration once a dispute arises. Plaintiffs have not cited a case where the unilateral
13 right to terminate prospectively has been held unconscionable. Moreover, the entire arbitration
14 agreement in *Ingle* applied only to claims brought by employees and contained a number of other
15 unconscionable provisions that do not appear here. *Ingle*, 328 F.3d at 1175-78 (agreement also
16 required employees to pay an arbitration filing fee to the employer, split the cost of arbitration, and
17 follow a strict one-year statute of limitations, all of which were more burdensome than a court
18 proceeding). Absent other unconscionable terms, Ecolab’s unilateral modification provision does
19 not render the Agreement unconscionable. *Shierkatz Rllp v. Square, Inc.*, No. 15-CV-02202-JST,
20 2015 WL 9258082, at *12 (N.D. Cal. Dec. 17, 2015) (finding no authorities supporting the
21 proposition that a unilateral modification provision can render a delegation provision substantively
22 unconscionable by itself).

23 Lastly, Plaintiffs’ claim that the Agreement does not guarantee a neutral arbitrator also
24 fails. Plaintiffs argue the Agreement favors Ecolab because it requires an arbitrator from the AAA
25 and Ecolab has previously arbitrated with the AAA. Docket No. 23 at 10. However, merely
26 asserting a “repeat player effect” claim is insufficient to support an unconscionability finding. *See*
27 *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) (holding that repeat player
28 argument without any evidence of bias of AAA arbitrators did not support a finding of

1 unconscionability). Plaintiffs must present “particularized evidence demonstrating impartiality.”
2 *Nagrampa*, 469 F.3d at 1285. They have not. Absent evidence to the contrary, California courts
3 have generally found the AAA provides a neutral forum for dispute resolution. *See Nagrampa*,
4 469 F.3d at 1302 (O’Scannlain, J., concurring in pertinent part). *Cf. Mercurio v. Superior Court*,
5 96 Cal.App.4th 167, 178 (2002) (finding substantive unconscionability because the employer
6 benefited from repeatedly appearing before a pool of only eight arbitrators).

7 In sum, though traces of unconscionability are present, the Court finds that it is not enough
8 to render the Agreement unenforceable. Accordingly, the enforceability of Ecolab’s Arbitration
9 Agreement rises and falls with the lawfulness of the class action waiver under *Morris*.

10 C. Stay Pending *Morris*

11 In light of the Supreme Court’s impending decision in *Morris*, Ecolab requests a stay of
12 proceedings. The parties agree that this Court has the discretionary power to stay proceedings.
13 *See Landis v. N. Am. Co.*, 229 U.S. 248, 254 (1936). In deciding whether to stay a case pending a
14 Supreme Court ruling, courts consider: (1) “the possible damage which may result from granting
15 of a stay;” (2) “the hardship or inequity which a party may suffer in being required to go forward;”
16 and (3) “the orderly course of justice measured in terms of the simplifying or complicating of
17 issues, proof, and questions of law which could be expected to result from a stay.” *CMAX, Inc. v.*
18 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 229 U.S. at 254-55).¹ Ecolab bears the
19 burden of establishing the need for the stay. *Clinton v. Jones*, 520 U.S. 681, 706 (1997).

20 1. Possible Damage from Granting Stay

21 The first *Landis* factor concerns the possible damage that could arise from granting the
22 stay. *CMAX*, 300 F.2d at 268. Plaintiffs argue that the stay would damage them by delaying the
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24 ¹ The *Landis* standard applies where a party seeks to stay a district court proceeding pending
25 resolution of *another* action, as is the case here. Plaintiffs list factors from *Hilton v. Braunskill*,
26 481 U.S. 770, 776 (1987)—likelihood of success on the merits and the public interest—that do not
27 apply under the *Landis* standard. However, the *Hilton* standard applies where a party seeks to stay
28 enforcement of a judgment or order pending an appeal of that *same* judgment or order in the *same*
case. *See Lal v. Capital One Fin. Corp.*, No. 16-CV-06674-BLF, 2017 WL 282895, at *2, *5
(N.D. Cal. Jan. 23, 2017) (citing *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)); *see also*
McElrath v. Uber Techs., Inc., No. 16-CV-07241-JSC, 2017 WL 1175591, at *5 (N.D. Cal. Mar.
30, 2017) (applying the *Landis* factors, not the *Hilton* factors, to a stay pending the Supreme
Court’s *Morris* decision). Here, *Landis*, not *Hilton*, applies.

1 relief they are allegedly owed. The forthcoming Supreme Court ruling in *Morris* minimizes the
2 potential damage because the stay would be short and not indefinite. *See McElrath v. Uber*
3 *Techs., Inc.*, No. 16-CV-07241-JSC, 2017 WL 1175591, at *5 (N.D. Cal. Mar. 30, 2017) (granting
4 a stay pending *Morris* because it would be of “short, not indefinite, duration”). The first factor
5 does not weigh against granting a stay.

6 2. Possible Hardship from Denying Stay

7 The second factor considers the possible harm from requiring Ecolab to litigate while
8 *Morris* is pending in the Supreme Court. *CMAX*, 300 F.2d at 268. As explained above, if the
9 Supreme Court overturns *Morris*, the Agreement’s class action waiver may ultimately be deemed
10 enforceable. In such a scenario, Plaintiffs would be precluded from pursuing class claims in any
11 forum, the Court would have to refer Plaintiffs’ individual claims to arbitration, and only
12 Plaintiffs’ PAGA claims would arguably remain in this Court. Continued litigation on class
13 certification issues—discovery concerning the Rule 23(a) and Rule 23(b)(3) factors, including
14 motion practice related to class certification—might cause unnecessary hardship on Ecolab if the
15 class action waiver were ultimately enforced. *See McElrath*, WL 1175591, at *5. Further,
16 allowing substantive motion practice on Plaintiffs’ individual claims to proceed absent a stay —
17 such as motions to dismiss or motions for summary judgment—might also be prejudicial insofar
18 as it would deprive Defendant of the right to benefit from arbitration of those issues. *Id.*

19 However, Defendant is unlikely to suffer prejudice from limited discovery on Plaintiffs’
20 individual claims in the interim, since a similar exchange of information would likely need to
21 occur in arbitration, too. *See Daugherty v. SolarCity Corp.*, No. C 16-05155 WHA, 2017 WL
22 386253, at *4 (N.D. Cal. Jan. 26, 2017) (allowing limited discovery because it would be useful for
23 both class action and in individual arbitration).

24 The same may not be true for Plaintiffs’ PAGA claim, however, even if it may ultimately
25 proceed in this Court. To some extent, discovery on the PAGA representative claim may
26 ultimately resemble class-like discovery. For example, PAGA permits the recovery of fixed civil
27 penalties. *See* Cal. Lab. Code § 2699. Such penalties are typically fixed based on the number of
28 violations, “except [where] a civil penalty is specifically provided” elsewhere. *Id.* § 2699(f)(2)

1 (setting default fixed penalties of \$100 for each aggrieved employee per pay period for initial
2 violation and \$200 for each subsequent violation). Identifying the number of violations, however,
3 may require discovering the hours worked and wages received by each employee on a daily or
4 weekly basis, and then calculating whether they were underpaid any wages. Other penalties are
5 keyed to variables like employees' rate of pay, *see, e.g.*, Cal. Labor Code § 203(a) (waiting time
6 penalties for violations of §§ 201 and 202 are a continuation of "wages" "from the due date
7 thereof at the same rate until paid or until an action therefor is commenced" but not more than 30
8 days), or the amount of underpaid wages, *see, e.g.*, Cal. Labor Code § 558 (a) (initial violations are
9 \$50 for each underpaid employee for each pay period "in addition to an amount sufficient to
10 recover underpaid wages" and \$100 for subsequent violations plus the underpaid amount). Thus
11 calculating the amount of civil penalties might also require discovery of information that would be
12 similar to class discovery.

13 Allowing discovery of the PAGA representative claims may be premature. If *Morris* is
14 reversed and arbitration is compelled, there is possibility (though not a certainty) that PAGA
15 representative claims might be stayed. If the Court were to stay the PAGA claims pending
16 arbitration of the individual claims and Plaintiffs were to lose those claims in arbitration, Ecolab
17 might be able to demonstrate that the outcome of those proceedings should have a collateral
18 estoppel effect on the question of Plaintiffs' standing under PAGA. *See Clark v. Bear Stearns &*
19 *Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992) (recognizing that arbitration decisions may have collateral
20 estoppel effect in federal court). In that event, Ecolab would be prejudiced by having to engage in
21 PAGA discovery that might ultimately be mooted depending on the outcome of Plaintiffs'
22 individual arbitration.

23 To be sure, if the Court were not to stay Plaintiff's PAGA claim and allow it to proceed
24 even where his individual labor code claims are subject to arbitration, were Plaintiff to prevail on
25 his PAGA claim, findings therein could be imported into, perhaps binding on, arbitration. *See*
26 *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) (arbitrators are also bound by
27 doctrine of collateral estoppel); *Arias v. Sup. Ct.*, 46 Cal.4th 969, 987 (2009) (finding of Labor
28 Code violation under PAGA has a collateral estoppel effect that permits employees "to obtain

1 remedies other than civil penalties for the same Labor Code violations” in separate actions).
2 Discovery on Plaintiff’s PAGA claims, including representative claims, would in that event
3 advance the litigation, and thus a stay would cause delay in Plaintiff’s prosecution of the PAGA
4 claim.

5 Nonetheless, given the risk that PAGA claims might be stayed pending arbitration, and the
6 relatively short stay pending *Morris*, the second *Landis* factor leans slightly in favor of granting a
7 stay of the litigation provided Plaintiffs are allowed to proceed with discovery on Bankwitz’s
8 individual claims. *See McElrath*, WL 1175591, at *6.

9 3. Orderly Course of Justice

10 The third factor considers whether a stay will simplify or complicate the judicial process.
11 *CMAX*, 300 F.2d at 268. Ecolab argues that the stay is in the interest of judicial economy because
12 *Morris* may foreclose Plaintiffs’ class claim. The Court agrees. There is little value in litigating a
13 class certification motion or undertaking class discovery now when the Supreme Court’s
14 impending ruling might ultimately moot those claims. The third factor thus weighs in favor of
15 granting the stay. However, no matter the resolution in *Morris*, Plaintiffs will be entitled to bring
16 their individual claims in some forum and their PAGA claims in this Court. Thus, some limited
17 discovery into the individual claims will not involve a potential waste of resources.

18 In these circumstances, a limited stay of this litigation pending the Supreme Court’s review
19 of *Morris* is justified. The stay is granted upon the following conditions: (1) the parties may
20 proceed with individual discovery, (2) the parties shall undertake preservation of evidence relevant
21 to all claims pursuant to Federal Rule of Civil Procedure 26(f), and (3) the parties shall meet and
22 confer regarding a limited discovery plan to facilitate ADR.

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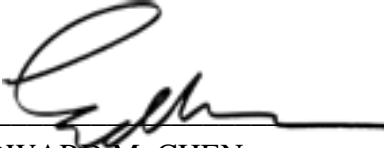
III. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendant’s motion to compel arbitration, and conditionally **STAYS** proceedings, except as specified above, pending the Supreme Court’s decision in *Morris*. The Court will hold a case management conference on October 26, 2017 at 9:30 a.m., with an updated case management statement due one week earlier. ADR will be discussed at that time.

This order disposes of Docket No. 21.

IT IS SO ORDERED.

Dated: October 17, 2017



EDWARD M. CHEN
United States District Judge