JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:18-cv-00103-JLS-DFM Date: March 14, 2018
Title: Patricia Campos et al. v. DXP Enterprises, Inc. et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER (1) DENYING PLAINTIFFS' MOTION TO REMAND (Doc. 13); (2) GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAYING THE MATTER PENDING ARBITRATION (Doc. 12); AND (3) DENYING AS MOOT DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS (Doc. 14)

Before the Court are three Motions. The first is a Motion to Remand ("MTR") filed by Plaintiffs Patricia Campos and Nichole Wright-Culp. (MTR, Doc. 13.) Defendant DXP Enterprises, Inc. opposed, and Plaintiffs replied. (MTR Opp., Doc. 20; MTR Reply, Doc. 21.) The second is Defendant's Motion to Compel Arbitration or In the Alternative to Stay Proceedings Pending Arbitration. (MTC, Doc. 12.) The third is Defendant's Motion for Judgment on the Pleadings as to Plaintiffs' PAGA Claim. (MJP, Doc. 14.) Plaintiffs opposed both of Defendant's Motions, and Defendant replied to both oppositions. (MTC Opp., Doc. 19; MJP Opp., Doc. 18; MTC Reply, Doc. 22; MJP Reply, Doc. 23.) Having considered the parties' briefs, the Court DENIES Plaintiffs' Motion to Remand; GRANTS Defendant's Motion to Compel Arbitration; STAYS the matter pending arbitration; and DENIES AS MOOT Defendant's Motion for Judgment on the Pleadings.

I. BACKGROUND

Plaintiff Patricia Campos is the mother of Plaintiff Nichole Wright-Culp. (FAC ¶ 25, Doc. 1-1.) Plaintiffs are former employees of Defendant DXP, the successor-in-interest to Cortech Engineering, LLC, which was acquired by DXP in September 2015.[1] (*Id.* ¶¶ 11–12, 26.) Around the time Plaintiffs began their employment in 2014, they each signed Defendant's standard Arbitration Agreement, which provided the following:

> "[A]ny controversy, claim or dispute between Employee and Employer relating to or arising out of Employee's employment or the cessation of that employment will be submitted to final and binding arbitration for determination in accordance with the JAMS Employment Arbitration Rules & Procedures … . Employee acknowledges that he or she was provided with a copy of, and read and reviewed, the Rules prior to signing this Agreement. A copy of the Rules is also available from Employer's Human Resources Department and can be found on-line at www.jamsadr.com/rules-employmentarbitration."

(Arbitration Agreements, Exs. A and B to Pawlak Decl., Doc. 12-4.) The Agreement delineated "[p]ossible disputes covered by the [Agreement]" as including but not limited to "unpaid wages, breach of contract, torts, violation of public policy, discrimination, harassment, retaliation, or any other employment-related claims … ." (*Id.*) Moreover, the Agreement provided that the parties to the arbitration "may conduct discovery to the same extent as would be permitted in a court of law." (*Id.*)

[1] Cortech Engineering, LLC, which is named as a Defendant but is no longer in existence, was acquired by DXP on September 1, 2015. (Messersmith Decl. ¶ 3, Doc. 12-2.) By virtue of the acquisition, DXP acquired all rights enforceable by Cortech. (*Id.*)

The Agreement purported to limit parties to bringing claims in only their "individual capacit[ies], and not as a plaintiff or class member in any purported class or representative proceeding." (*Id.*) Further, the arbitrator "may not consolidate more than one party's claims, and may not otherwise preside over any form of a representative or class proceeding." (*Id.*)

Finally, the Agreement included a severance clause, which stated that "[i]f any portion, provision, or part of this Agreement is held, determined, or adjudicated to be invalid unenforceable, or void for any reason whatsoever, each such portion, provision, or part will be severed from the remaining portions, provisions, or parts of this Agreement and will not affect the validity or enforceability of such remaining portions, provisions, or parts." (*Id.*)

On October 10, 2017, Plaintiffs filed the instant lawsuit in California Superior Court. (Compl., Ex. C to Notice of Removal, Doc. 1-3.) On December 4, 2017, Plaintiffs filed their First Amended Complaint ("FAC"). (FAC, Ex. A to Notice of Removal, Doc. 1-1.) In the FAC, Plaintiffs alleged the following facts:

In September 2015, Plaintiff Wright-Culp was approached by her supervisor, Marc Sanchez, who asked her to find out what Defendant's competitors were bidding for a particular contract, but Wright-Culp refused. (*Id.* ¶ 28.) She informed Sanchez that such action would be a violation of state and federal law. (*Id.*) Following her refusal, Sanchez began "mistreating Ms. Wright-Culp and making false accusations toward[] her regarding her work performance." (*Id.* ¶ 29.)

In September 2016, Plaintiff Campos was told by her supervisor, John Pugh, to use Cortech's tax identification number, rather than DXP's, on certain reports related to Defendant's account with the United States Coast Guard. (*Id.* ¶ 17.) Campos refused, informing Pugh that it was a violation of the law to use an incorrect identification number. (*Id.* ¶ 17.) Campos then issued an internal complaint. (*Id.* ¶ 18.) Thereafter, Campos was removed from all projects related to the Coast Guard account. (*Id.* ¶ 19.) Around the same time, Pugh and another supervisor, Melanie Moimes, asked Campos to sign her name on certain invoices that did not comply with federal and state securities law. (*Id.* ¶ 20.) Again, Campos refused and issued another internal complaint. (*Id.* ¶¶

20–21.) "Shortly after these incidents, the manner in which Ms. Campos was treated by Defendant[] rapidly deteriorated." (*Id.* ¶ 22.)

On October 7, 2016, Wright-Culp, who customarily worked remotely, was ordered to appear in person at Defendant's premises. (*Id.* ¶ 31.) Wright-Culp contacted Defendant's Human Resources Department, but it took no action. (*Id.* ¶ 32.) Then, on October 10, 2016, Campos and Wright-Culp were both terminated. (*Id.* ¶¶ 23, 33.)

Based on these allegations, Plaintiffs alleged claims for (1) violation of the Whistleblower Protection Act, Cal. Lab. Code § 1102.5; (2) retaliation, Cal. Lab. Code §§ 98.6, 1102.5(c); (3) familial retaliation, Cal. Lab. Code § 1102.5(h); (4) wrongful termination, Cal. Lab. Code §§ 98.6, 1102.5; and (5) violation of the Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.* (*Id.* ¶¶ 37–72.) Plaintiffs seek to recover lost wages, emotional distress damages, punitive damages, statutory damages under the PAGA, and attorneys' fees. (*Id.* at 24–25.) However, the FAC does not demand a specific dollar amount.

On January 19, 2018, Defendant removed the case to this Court on the basis of diversity jurisdiction. (Notice of Removal, Doc. 1.)

II. MOTION TO REMAND

The sole issue in Plaintiffs' Motion to Remand is whether Defendant has carried its burden to show that the amount in controversy is satisfied.[2]

A. Legal Standard

A federal court has diversity jurisdiction under 28 U.S.C. § 1332 if the amount in controversy exceeds $75,000 and the parties to the action are citizens of different states. *See* 28 U.S.C. § 1332(a). However, "[i]t is to be presumed that a cause lies outside the limited jurisdiction of the federal courts and the burden of establishing the contrary rests

[2] The parties agree that there is complete diversity of citizenship between the parties and that Plaintiffs' damages cannot be aggregated to satisfy the amount in controversy.

upon the party asserting jurisdiction." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (quoting *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (quotation marks omitted)). Courts "strictly construe the removal statute against removal jurisdiction," and "the defendant always has the burden of establishing that removal is proper." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

Where removal is on the basis of diversity jurisdiction and "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount in controversy exceeds $[75],000." *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997) (quotation marks omitted)); *see also* 28 U.S.C. § 1446(c)(2)(B). Conclusory allegations as to the amount in controversy are insufficient. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1091 (9th Cir. 2003). Nor can a defendant establish the amount in controversy by "mere speculation and conjecture." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). Rather, the defendant should "submit evidence outside the complaint, including affidavits or declarations, or other summary-judgment-type evidence relevant to the amount in controversy at the time of removal." *See id.* (quoting *Singer*, 116 F.3d at 377) (quotation marks omitted).

B. Discussion

At the time of removal, Defendant submitted evidence that Campos earned an annual salary of $80,000 at the time of her termination in October 2016; thus, Defendant concluded that Campos's lost wages, having accrued for more than a year, necessarily exceed the statutory minimum. (Notice of Removal ¶ 19; Pawlak Removal Decl. ¶ 3, Ex. K to Notice of Removal, Doc. 1-11.) Plaintiffs do not dispute Campos's salary but argue that Defendant's calculation relies on the "speculative assumption" that Campos has remained unemployed. (MTR Mem. at 4–6, Doc. 13.)

"[C]ourts consider mitigation when calculating back pay if the plaintiff submits affidavits or other evidence specifying the amount of mitigation." *Fusco v. Victoria's*

Secret Stores, LLC, 806 F. Supp. 2d 1240, 1243 (M.D. Fla. 2011). *See also Marcenaro v. Creative Hairdressers Inc.*, 2012 WL 1405690, at *2 (S.D. Fla. Apr. 23, 2012) ("[T]he burden is on [the plaintiff] to demonstrate that mitigation of damages has occurred"). However, Plaintiffs neither assert nor have they submitted any evidence to indicate that Campos has obtained post-termination employment and thereby mitigated her lost wages. Accordingly, in the absence of any evidence of mitigation, the Court finds that Defendant has shown by a preponderance of the evidence that Campos's lost wages exceed the statutory minimum. *See Sword v. Strata Mine Servs., LLC*, 2017 WL 4202215, at *3 (S.D.W. Va. Sept. 21, 2017) (accepting the defendant's calculation of back pay where the plaintiff offered no approximation of the amount he had earned since his termination).

Thus, the Court has subject matter jurisdiction over Campos's claims under 28 U.S.C. § 1332(a) and may properly exercise supplemental jurisdiction over Wright-Culp's claims irrespective of whether her damages independently satisfy the amount in controversy. *See* 28 U.S.C. § 1367(a); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005).

Pursuant to the foregoing, Plaintiffs' Motion to Remand is DENIED.

III. MOTION TO COMPEL ARBITRATION OR TO STAY

Defendant seeks to compel all causes of action to arbitration. (MTC Mem. at 2, Doc. 12-1.) In the alternative, "[i]f the Court declines to compel arbitration of Plaintiffs' PAGA claim, and does not dismiss the PAGA claim pursuant to [Defendant's] Motion for Judgment on the Pleadings," Defendant moves for a stay of proceedings pending the outcome of arbitration. (*Id.* at 2–3.)

A. Legal Standard

Congress enacted the Federal Arbitration Act "in 1925 as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012). The FAA provides that an agreement to arbitrate disputes arising from "a contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable." 9

U.S.C. § 2. "The court's role under the Act is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The "party seeking to compel arbitration has the burden under the FAA to show [these two elements]." *Ashbey v. Archstone Property Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), *superseded by statute on other grounds*. However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). Arbitration agreements may also "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In these analyses, a court may consider evidence outside of the pleadings, such as declarations and other documents filed with the court, using "a standard similar to the summary judgment standard of [Federal Rule of Civil Procedure 56]." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004); *see also Hadlock v. Norwegian Cruise Line, Ltd.*, No. 10-0187-AG (ANx), 2010 WL 1641275, at *1 (C.D. Cal. Apr. 19, 2010); *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1104 n.1 (9th Cir. 2010) ("We take . . . facts from the First Amended Complaint, on file in the district court, and declarations filed in support of and in opposition to the motion to dismiss. All are part of our record.").

B. Discussion

1. Clear Agreement to Arbitrate

"The threshold issue in deciding a motion to compel arbitration is 'whether the parties agreed to arbitrate.'" *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1133 (C.D.

Cal. 2011) (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 756 (9th Cir. 1988)). "When determining whether a valid contract to arbitrate exists, we apply ordinary state law principles that govern contract formation." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) (citing *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002)). Here, Plaintiffs do not dispute that the signed Arbitration Agreements filed by Defendant are authentic and, if valid, evidence a clear agreement to arbitrate. (*See* Arbitration Agreements.) Accordingly, the Court finds that a clear agreement to arbitrate exists in this case.

2. Scope of the Agreement

Defendant must also demonstrate that the Agreement encompasses the dispute at issue. *Chiron Corp.*, 207 F.3d at 1130. Here, the Agreement covers the following claims:

> "[A]ny controversy, claim or dispute between Employee and Employer relating to or arising out of Employee's employment or the cessation of that employment will be submitted to final and binding arbitration for determination in accordance with JAMS . . . . Possible disputes covered by the above include (but are not limited to) . . . violation of public policy . . . retaliation, or any other employment-related claims under laws including but not limited to . . . the California Labor Code."

(Arbitration Agreements.) However, the arbitrator "may not … preside over any form of a representative or class proceeding." (*Id.*)

All of Plaintiffs' claims arise out of Plaintiffs' employment with Defendant. (*See* FAC.) Indeed, Plaintiffs do not dispute that their non-PAGA claims fall within the broad scope of the Agreement. Accordingly, the Court finds that the Agreement "encompasses the dispute at issue" as to Plaintiffs' non-PAGA claims. *Chiron Corp.*, 207 F.3d at 1130.

However, Plaintiffs contend that their PAGA claim is outside the scope of the Agreement because it is a representative action. (MTC Opp. at 1.) Although Defendant argues that Plaintiffs' PAGA claim is individual because of the individualized nature of Plaintiffs' allegations, (MTC Reply at 13–15), California case law is clear that PAGA actions are categorically representative, not individual, insofar as they are "a type of qui tam action, in which the employee-plaintiff acts as private attorney general—an agent of the state—while the governmental entity on whose behalf he or she sues is the real party in interest." *Franco v. Arkelian Enterprises, Inc.*, 184 Cal. Rptr. 3d 501, 513 (Ct. App. 2015); *Reyes v. Macy's, Inc.*, 135 Cal. Rptr. 3d 832, 834 (Ct. App. 2011). Therefore, Plaintiffs' PAGA claim is outside the scope of the Arbitration Agreement and shall remain pending in this judicial forum.

3. Validity of the Agreement

Although Defendant adequately demonstrates a clear agreement to arbitrate that encompasses Plaintiffs' non-PAGA claims, Plaintiffs argue that the Agreement is unconscionable. (MTC Opp. at 1–11.) "[A]rbitration agreements are valid, irrevocable and enforceable except upon grounds that exist for revocation of the contract generally." *Serpa v. Cal. Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 701-02 (2013) (citations omitted). The party challenging the validity of the arbitration agreement bears the burden of proof. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1296 (9th Cir. 2006). Under California law,[3] a contract is not enforceable if it is found to be unconscionable.

"Unconscionability under California law 'has both a procedural and a substantive element,'" and "[c]ourts use a 'sliding scale' in analyzing these two elements." *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 963 (9th Cir. 2012) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."

[3] The parties agree that California law applies in this case.

Armendariz, 24 Cal. 4th at 114. "No matter how heavily one side of the scale tips, however, *both* procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable." *Kilgore*, 673 F.3d at 963 (emphasis in original) (citing *Armendariz*, 24 Cal. 4th at 114).

a. Procedural Unconscionability

The Court first considers procedural unconscionability. Under California law, "[p]rocedural unconscionability concerns the manner in which the contract was negotiated and the respective circumstances of the parties at that time, focusing on the level of oppression and surprise involved in the agreement." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (citing *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783 (9th Cir. 2002)). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation.'" *Id.* (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982)). "Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectation of the weaker party." *Id.* (citing *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1571 (2009)). Here, Plaintiffs argue that the Arbitration Agreement is procedurally unconscionable for two reasons: (1) it is a contract of adhesion, and (2) Defendant failed to attach the JAMS Rules of arbitration to the Agreement. (MTC Opp. at 2–6.)

Generally, where an "arbitration agreement was presented to [an employee] on a take-it-or-leave-it basis, and [her] signature was a condition of employment with [the employer]," the contract is "a standard contract of adhesion imposed and drafted by [the employer]." *Sanchez v. Carmax Auto Superstores Cal., LLC*, 224 Cal. App. 4th 398, 402 (2014) (citing *Armendariz*, 24 Cal. 4th at 113). Here, Plaintiffs have submitted no admissible evidence that they were presented the Agreement on a take-it-or-leave it basis.[4] Nevertheless, the Court recognizes that "bargaining power is generally unequal in

[4] Plaintiffs' Counsel submitted a declaration which states, "Plaintiffs conveyed to me that they recall the arbitration agreements being a precondition to their employment, such that if they

most employer-employee relationships," and it is rare that an employee would have the opportunity to negotiate the terms of an arbitration agreement. *Taft v. Henley Enterprises, Inc.*, No. SACV-15:1658-JLS (JCGx), 2016 WL 9448485, at *5 (C.D. Cal. Mar. 2, 2016) (*citing Armendariz*, 24 Cal. 4th at 115)). *See also Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1470 (2009) ("[A]dhesion contracts in the employment context typically contain some measure of procedural unconscionability.").

However, even if the Court assumes that the Agreement is properly characterized as a contract of adhesion, such a conclusion "is not dispositive" for purposes of the procedural unconscionability inquiry. *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 981 (2010) (quoting the trial court with approval). Courts have consistently found that "where the arbitration provisions presented in a contract of adhesion are highlighted for the employee, any procedural unconscionability [resulting from the adhesion] is 'limited.'" *Serafin v. Balco Props. Ltd., LLC*, 235 Cal. App. 4th 165, 179 (2015) (citing *Roman*, 172 Cal. App. 4th at 1470-71). Here, the Agreement was "unquestionably highlighted for [Plaintiffs]" as a "freestanding document" with a clear title that informed them that it "relat[ed] solely to arbitration." *Taft*, 2016 WL 9448485, at *6. Moreover, the Agreement is "not overly-long and is written in clear, unambiguous language." *See Dotson*, 181 Cal. App. 4th at 981. Thus, even assuming that the Agreement is a contract of adhesion, the resulting degree of procedural unconscionability is minimal.

Plaintiffs also claim that Defendant failed to attach the JAMS Rules to the Agreement, an omission that sustains an additional finding of procedural unconscionability. (MTC Opp. at 4–6.) While a party's "failure to attach [the referenced arbitration rules], standing alone, is insufficient grounds to support a finding of procedural unconscionability … it could be a factor supporting [such] a finding … where the failure would result in surprise to the party opposing arbitration." *Taft*, 2016 WL 9448485, at *6 (citations omitted).

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did not sign the agreements they would not be permitted to work for Defendant[]." (Paraivi Decl. to MTC Opp. ¶ 6, Doc. 19-1.) Plaintiffs' alleged statements are hearsay and thus are not admissible for the truth of the matter asserted. Fed. R. Evid. § 801.

Here, the Agreement states in relevant part:

> "[A]rbitration … [shall be conducted] in accordance with the JAMS Employment Arbitration Rules & Procedures … ." Employee acknowledges that he or she was provided with a copy of, and read and reviewed, the Rules prior to signing this Agreement. A copy of the Rules is also available from [Defendant's] Human Resources Department and can be found on-line at www.jamsadr.com/rules-employmentarbitration."

(Arbitration Agreements.) Thus, at the time of signing, Plaintiffs specifically acknowledged receiving a copy of the JAMS Rules. But even accepting Plaintiffs' present contention that they did not receive a copy, the Agreement nonetheless eliminates any surprise that might otherwise result from Defendant's failure to attach them. The Agreement clearly identifies the JAMS Rules as the governing rules and instructs Plaintiffs to find them at "easily accessible" sources, *i.e.* the internet or Defendant's Human Resources Department. *See Lane*, 224 Cal. App. 4th at 691. Accordingly, even if the JAMS Rules were not affirmatively provided to Plaintiffs, "these additional facts mitigate against a finding that the [A]greement was procedurally unconscionable." *Serafin*, 235 Cal. App. 4th at 180. Therefore, there is no evidence related to the availability of the JAMS Rules that supports a finding of procedural unconscionability.

At most, Plaintiffs have shown a minimal degree of procedural unconscionability resulting only from the presumably adhesive nature of the Agreement. "Under the sliding-scale approach, [Plaintiffs] are therefore obligated to make a strong showing of substantive unconscionability to render the [Agreement] unenforceable." *Taft*, 2016 WL 9448485, at *7.

b. Substantive Unconscionability

"Substantive unconscionability addresses the fairness of the term in dispute." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010) (quoting *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100 (2002)). Under California law, "[a] provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose "harsh or oppressive terms.'" *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1573 (2009) (quoting *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005)). "Thus, mutuality is the 'paramount' consideration when assessing substantive unconscionability." *Pokorny*, 601 F.3d at 997-98 (quoting *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004)). Here, Plaintiffs argue that the Agreement is substantively unconscionable for two reasons: (1) it improperly limits discovery; and (2) it impermissibly waives Plaintiffs' right to bring a representative claim under PAGA. (MTC Opp. at 6–11.)

Plaintiffs argue that the Agreement, by incorporating the JAMS Rules, attempts to limit Plaintiffs to "just one deposition and affords unchecked discretion to the arbitrator to determine whether to grant any additional depositions." (MTC Opp. at 10.) However, the Agreement specifically provides that "the parties may conduct discovery to the same extent as would be permitted in a court of law." (Arbitration Agreements.) Under this provision, the parties are necessarily entitled to "discovery sufficient to adequately arbitrate their statutory claim[s] … ." *Armendariz*, 24 Cal. 4th at 106. *See also Ziober v. BLB Res., Inc.*, 2014 WL 12700980, at *3 (C.D. Cal. July 31, 2014), *aff'd*, 839 F.3d 814 (9th Cir. 2016). Therefore, the Agreement does not impermissibly limit discovery.

However, the Agreement does purport to waive Plaintiffs' right to bring representative claims, such as PAGA claims. (*See* Arbitration Agreements, "Claims shall be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.") In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 382–89 (2014), the California Supreme Court held that (1) an agreement to waive representative claims under the PAGA is contrary to public policy and unenforceable, and (2) this rule against PAGA waivers is not

preempted by the FAA. In *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 429 (9th Cir. 2015), the Ninth Circuit held that the FAA does not preempt the *Iskanian* rule against representative PAGA waivers. In light of this authority, Defendant expressly acknowledges that the waiver of representative claims contained in the Agreement "is generally unenforceable" and requests that the Court sever this provision rather than invalidating the Agreement as a whole. (MTC Reply at 11.) Because the Agreement provides for severance of unenforceable terms, severance of the PAGA waiver is proper in these circumstances. *See Taft*, 2016 WL 9448485, at *9.

Once the Court severs the PAGA waiver provision, the Agreement is not substantively unconscionable. Accordingly, even assuming that Plaintiffs demonstrated a minimal degree of procedural unconscionability, the Agreement remains valid and enforceable. The Court therefore compels arbitration of Plaintiffs' individual non-PAGA claims.

4. Defendant's Requested Stay

In the alternative to arbitration or dismissal of the PAGA claim, Defendant requests that the Court stay the proceedings pending arbitration, arguing that a stay is mandatory pursuant to section 3 of the FAA. (MTC Mem. at 18-21; MTC Reply at 15.) Plaintiffs oppose a stay as to nonarbitrable claims. (MTC Opp. at 13.) As to the PAGA claim specifically, Plaintiffs argue that "it would be prejudicial to the individuals being represented by Plaintiffs if their claims were stayed until completion of arbitration." (*Id.*)

"A party is only entitled to a stay pursuant to section 3 as to arbitrable claims or issues." *Winfrey v. Kmart Corp.*, 692 F. App'x 356, 357 (9th Cir. 2017) (*citing Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). "As to nonarbitrable claims and issues, however, the district court has discretion whether to stay the litigation pending arbitration." *Id.* A trial court may grant a stay "pending resolution of independent proceedings which bear upon the case" where "it is efficient for [the court's] own docket and the fairest course for the parties." *Leyva*, 593 F. 2d at 863.

Although a stay is mandatory as to Plaintiffs' arbitrable claims, the Court has discretion to decide whether to stay the proceedings as to Plaintiffs' nonarbitrable PAGA claim. The Court finds that a stay is proper in these circumstances. First, the factual issues that will be resolved in arbitration clearly "bear upon [the instant] case" because these facts will determine Defendant's liability for Plaintiffs' PAGA claim. *See id.* Thus, it is in the interest of efficiency to grant a stay in order to avoid duplicative proceedings as to the same issues. Second, the Court is not convinced that there are any potential plaintiffs who will be prejudiced by the stay. Although PAGA claims are necessarily representative actions, they are not necessarily class actions. *Arias v. Superior Court*, 209 P.3d 923, 930 n.5 (2009). And while Plaintiffs claim that they seek to represent a class of employees who were harmed by Defendant's conduct, (*see* FAC ¶ 65), they have alleged no facts to support their contention that this is a class claim. Rather, the alleged facts and the nature of Plaintiffs' claims are highly individualized, pertaining only to Plaintiffs' individual employment experiences. Thus, no unfair prejudice will result from granting the stay.

Accordingly, the Court orders a stay of the instant proceedings.

IV. CONCLUSION

For the reasons stated above, the Court DENIES Plaintiffs' Motion to Remand. The Court GRANTS Defendant's Motion to Compel Arbitration as to Plaintiffs' individual, non-PAGA claims. The proceedings are STAYED pending arbitration, including as to Plaintiffs' nonarbitrable representative PAGA claim. Accordingly, in light of the stay, Defendant's Motion for Judgment on the Pleadings as to Plaintiffs' PAGA claim is DENIED AS MOOT without prejudice to Defendant's ability to bring this motion when the stay is lifted. The parties are hereby ORDERED to file a joint status report at the earlier of six months from the date of this Order or within ten (10) days of completion of the arbitration proceedings.

Initials of Preparer: tg