

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 MICHAEL F. DORMAN, individually
5 as a participant in the SCHWAB
6 PLAN RETIREMENT SAVINGS AND
7 INVESTMENT PLAN and on behalf
8 of a class of all those
9 similarly situated,

10 Plaintiff,

11 v.

12 CHARLES SCHWAB & CO. INC.;
13 CHARLES SCHWAB & CO INC.;
14 SCHWAB RETIREMENT PLAN
15 SERVICES INC.; CHARLES SCHWAB
16 BANK; CHARLES SCHWAB
17 INVESTMENT MANAGEMENT, INC.;
18 JOHN DOES 1-50; and XYZ
19 CORPORATIONS 1-5,

20 Defendants.

Case No. 17-cv-00285-CW

ORDER ON DEFENDANTS' MOTION
TO COMPEL ARBITRATION,
DISMISS, AND TO STAY CLAIMS
AND DEFENDANTS'
ADMINISTRATIVE MOTION TO SEAL

(Dkt. Nos. 70, 71)

21 In this putative class action ERISA case, Defendants Charles
22 Schwab Corporation, Charles Schwab & Co Inc., Schwab Retirement
23 Plan Services Inc., Charles Schwab Bank, Charles Schwab
24 Investment Management, Inc., Walter W. Bettinger III, Charles R.
25 Schwab, Joseph R. Martinetto, Martha Tuma, Jay Allen, Dave
26 Callahan, John C. Clark, John Does 1-50, and XYZ Corporations 1-5
27 move to compel individual arbitration of Plaintiff Michael F.
28 Dorman's claims against Defendants and to stay or dismiss this
action while the arbitration is pending. Alternatively,
Defendants move to stay this action pending a ruling by the
Supreme Court in Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th
Cir. 2016), cert. granted, 137 S. Ct. 809 (2017). Plaintiff

1 filed an opposition to this motion and Defendants filed a reply.
2 On November 14, 2017, the Court held a hearing on Defendants'
3 motion. Upon considering the papers and the arguments of
4 counsel, the Court DENIES Defendants' motion.

5 FACTUAL BACKGROUND

6 Unless otherwise noted, the factual background is from the
7 allegations of the First Amended Complaint. See Docket No. 56.

8 The Charles Schwab Corporation (Charles Schwab) and its
9 subsidiaries, Charles Schwab & Co. Inc. and Charles Schwab Bank
10 (the Schwab entities), provide a wide range of financial
11 services, including wealth management, securities brokerage,
12 banking, money management, custody, and financial advisory
13 services. Schwab News Release July 2017, available at
14 [https://aboutschwab.com/images/uploads/inline/schwab_q2_2017_earn](https://aboutschwab.com/images/uploads/inline/schwab_q2_2017_earnings_release.pdf)
15 [ings_release.pdf](https://aboutschwab.com/images/uploads/inline/schwab_q2_2017_earnings_release.pdf). Walter W. Bettinger III, Charles R. Schwab,
16 and Joseph R. Martinetto are members of the Board of Directors of
17 Charles Schwab. Martha Tuma, Jay Allen, Dave Callahan and John
18 C. Clark are members of the Employee Benefits Administrative
19 Committee at Charles Schwab.

20 The SchwabPlan Retirement Savings and Investment Plan
21 (SchwabPlan or the Plan) is a defined contribution, individual
22 account plan sponsored and administered by Charles Schwab.
23 Eligible employees of the Schwab entities may participate by
24 contributing a portion of their wages to their account and
25 receive matching employer contributions, as well as any
26 investment returns, less any applicable fees. Participants in
27 the Plan may choose to invest their contributions (and the
28 matching employer contributions) in one or more investment

1 options made available by the Plan. Declaration of Holly Morgan
2 (Morgan Decl.) ¶¶ 3-5, Ex. 1.

3 Since 2009, the Plan has offered several investment options
4 that were managed by Charles Schwab, including the Schwab S&P 500
5 Index Fund, seven Schwab mutual funds, ten Schwab "target date"
6 funds, a Schwab money market fund, and a deposit account in the
7 Schwab Bank. Dorman alleges that these Schwab-affiliated funds
8 charged higher fees and performed more poorly than other
9 investment options on the market. Dorman contends that the
10 Schwab entities violated their fiduciary duties to the Plan in
11 offering these Schwab-affiliated funds without "meaningful
12 investigation" into whether they were prudent investments and
13 whether there were better options available.

14 Dorman was employed at Charles Schwab & Co., Inc. for six
15 years, until he left the company on October 8, 2015. Id. ¶ 7.
16 On February 23, 2009, shortly after starting his employment, he
17 completed a Uniform Application for Securities Industry
18 Registration or Transfer (Form U-4), which is required for all
19 registered representatives under the Financial Industry
20 Regulatory Authority (FINRA) rules. Id. ¶ 8, Ex. 3. Form U-4
21 contains a provision stating:

22 I agree to arbitrate any dispute, claim or controversy
23 that may arise between me and my firm, or a customer,
24 or any other person, that is required to be arbitrated
25 under the rules, constitutions, or by-laws of the SROs
26 indicated in Section 4 (SRO REGISTRATION) as may be
27 amended from time to time and that any arbitration
28 award rendered against me may be entered as a judgment
in any court of competent jurisdiction.

On December 19, 2014, Dorman electronically signed an
Acknowledgment of the Schwab Investor Financial Consultant

1 Compensation Plan (Compensation Plan Acknowledgment). Id. ¶ 9,
2 Ex. 4. The Compensation Plan describes the compensation
3 structure of a financial consultant (FC) like Dorman. The
4 Acknowledgment contains a section entitled "11.0 Arbitration of
5 Disputes." This section states:

6 11.1 Any controversy, dispute, or claim arising out of
7 or relating to the FC's employment or the termination
8 of employment shall be resolved by binding
9 arbitration . . .

10 [. . .]

11 11.3 This Agreement does not apply to . . . claims for
12 benefits under any ERISA-governed benefit plan(s),
13 which shall be resolved pursuant to the claims
14 procedures under such benefit plans.

15 [. . .]

16 11.5 Any claims or disputes between the FC and the
17 Company shall be brought solely on an individual basis.
18 The FC and the Company agree to waive the right to
19 commence, be a party to, or be an actual or putative
20 class member of any class, collective, or
21 representative action arising out of or relating to the
22 FC employment or termination of employment. If this
23 waiver is found to be unenforceable by a civil court of
24 competent jurisdiction, then any claim on a class,
25 collective, or representative basis shall be filed and
26 adjudicated in a court of competent jurisdiction, and
27 not in arbitration.

28 Id. at 9.

While Dorman was employed at Charles Schwab, he participated
in the Plan. Id. ¶¶ 9-10. On December 18, 2015, after Dorman
left his employment with Schwab, he received a full distribution
of his account balance and ceased his participation in the Plan.

Id. ¶ 12.

A version of the Plan Document that was restated and amended
as of January 1, 2016 and executed on June 13, 2016 provides:

15.11 Arbitration of Disputes
(a) Any claim, dispute or breach arising out of or

1 in any way related to the Plan shall be settled by
binding arbitration . . .

2 Id., Ex. 1 at 56.

3 On January 19, 2017, Dorman filed the present litigation.
4 He brings claims on behalf of the Plan pursuant to ERISA
5 § 502(a)(2) to recover losses resulting from Defendants'
6 fiduciary breaches and prohibited transactions and pursuant to
7 ERISA § 502(a)(3) to recover injunctive and other equitable
8 relief.

9 LEGAL STANDARD

10 The Federal Arbitration Act (FAA) provides that any
11 agreement within its scope "shall be valid, irrevocable, and
12 enforceable, save upon such grounds as exist at law or in equity
13 for the revocation of any contract." 9 U.S.C. § 2. The FAA
14 represents a "liberal federal policy favoring arbitration
15 agreement, notwithstanding any state substantive or procedural
16 policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury
17 Constr. Corp., 460 U.S. 1, 24 (1983). A party to a valid
18 arbitration agreement may petition a federal district court "for
19 an order directing that such arbitration proceed in the manner
20 provided for in such agreement." 9 U.S.C. § 4. In considering a
21 motion to compel arbitration, a court should consider "whether a
22 valid arbitration agreement exists" and "whether the agreement
23 encompasses the dispute at issue." Lifescan, Inc. v. Premier
24 Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). If
25 so, the court should enforce the agreement. Id.

26 A court has the power to stay proceedings, which arises from
27 its inherent power "to control the disposition of the causes on
28 its docket with economy of time and effort for itself, for

1 counsel, and for litigants." Landis v. North Am. Co., 299 U.S.
2 248, 254 (1936). "A stay is not a matter of right, even if
3 irreparable injury might otherwise result." Nken v. Holder, 556
4 U.S. 418, 433 (2009).

5 Instead, a stay is "an exercise of judicial discretion," and
6 "the propriety of its issue is dependent upon the circumstances
7 of the particular case." Id. (citation and internal quotation
8 and alteration marks omitted). The party seeking a stay bears
9 the burden of justifying the exercise of that discretion. Id.
10 In determining whether to grant a stay, courts generally consider
11 the following competing interests: "the possible damage which may
12 result from the granting of a stay, the hardship or inequity
13 which a party may suffer in being required to go forward, and the
14 orderly course of justice measured in terms of the simplifying or
15 complicating of issues, proof, and questions of law which could
16 be expected to result from a stay." Lockyer v. Mirant Corp., 398
17 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted).

18 DISCUSSION

19 I. Motion to Compel Arbitration

20 A. Applicability of various arbitration agreements to 21 Dorman's claims

22 Defendants contend that the Plan Document, Form U-4, and the
23 Compensation Plan Acknowledgment are valid agreements that
24 require arbitration under the FAA.

25 1. Plan Document

26 Defendants argue that the Plan Document binds Dorman. But
27 the Plan Document provided by Defendants was dated January 1,
28 2016 and executed on June 13, 2016, over a year after Dorman

1 terminated his participation in the Plan on December 18, 2015.¹
2 See Morgan Decl., Ex. 1 at 2, 90. The Plan Document issued a
3 year after Dorman ceased participation in the Plan cannot apply
4 to his claims. To hold otherwise would be inequitable because it
5 would allow a plan defendant to amend the plan documents
6 unilaterally at any time, even after a participant has brought
7 suit against the defendant, and put the participant at a
8 disadvantage.

9 Defendants provide no authority supporting their contention
10 that a plan document executed after the participant has ceased
11 participation in the plan can bind the participant to
12 arbitration. For example, in Chappel v. Lab. Corp. of Am., the
13 Ninth Circuit enforced the plan's mandatory arbitration clause
14 even though the plaintiff "had not previously known about the
15 clause." 232 F.3d 719, 723 (9th Cir. 2000). But there is no
16 indication that the plan's mandatory arbitration clause was
17 enacted after the plaintiff ceased all participation in the plan.
18 See id. The remaining cases cited by Defendants are similarly
19 unavailing because, in each case, the plan document was in effect
20 while the plaintiff participated in the plan. See Smith v. Aegon
21 Companies Pension Plan, 769 F.3d 922, 931 (6th Cir. 2014) (venue
22 selection amendment enacted in 2007 applied to plaintiff's claim
23 because plaintiff continued to receive plan payments through
24 2011); Marin v. Xerox Corp., 935 F. Supp. 2d 943, 945 (N.D. Cal.
25 2013) (plan document in effect at the time defendant denied

26
27 _____
28 ¹ Defendants did not provide any other version of the Plan Document.

1 plaintiff's claim controlled); Laasko v. Xerox Corp., 566 F.
2 Supp. 2d 1018, 1022 (C.D. Cal. 2008) (same). The Plan Document
3 therefore does not bind Dorman.

4 2. Form U-4

5 Defendants argue that Form U-4's arbitration provision
6 encompasses Dorman's claims because the provision covers "any
7 dispute, claim or controversy" between Dorman and Schwab.
8 Defendants read this provision out of context. The provision
9 actually states:

10 I agree to arbitrate any dispute, claim or controversy
11 that may arise between me and my firm, or a customer,
12 or any other person, that is required to be arbitrated
under the rules, constitutions, or by-laws of the SROs
indicated in Section 4 (SRO REGISTRATION) . . .

13 Morgan Decl., Ex. 3 at 12 ¶ 5. The arbitration provision does
14 not apply to any dispute between Dorman and Schwab, but only
15 those that are "required to be arbitrated under the rules,
16 constitutions, or by-laws of the SROS indicated in Section 4."
17 Id. Section 4 of Form U-4 lists a number of SROs, or self-
18 regulatory organizations such as FINRA, but mentions nothing
19 whatsoever about the Plan. Id. at 2-4. Defendants fail to
20 explain adequately why the language of this provision encompasses
21 Dorman's claims.

22 3. Compensation Plan Acknowledgment

23 The Compensation Plan Acknowledgment arbitration and class
24 action provisions are limited to claims "arising out of or
25 relating to the [financial consultant's] employment or the
26 termination of employment." Morgan Decl., Ex. 4 §§ 11.1, 11.5.
27 While Defendants contend that Dorman's breach of fiduciary duty
28 claims are ones "arising out of or relating to [his] employment

1 or termination of employment," it is not clear that Defendants
2 are correct. Defendants themselves contend elsewhere that ERISA
3 claims are not ordinarily viewed as "work-related legal claims."
4 Motion at 18. Moreover, the arbitration provision contains an
5 exception for "claims for benefits under any ERISA-governed
6 employee benefit plan(s)," which are to be resolved according to
7 the "claims procedures under such benefit plans." Id. § 11.3.
8 Dorman's claims, which arise not under the Compensation Plan but
9 under the SchwabPlan, are therefore governed by the claims
10 procedures of the SchwabPlan.

11 Because the arbitration provisions cited by Defendants do
12 not encompass Dorman's claims, they do not require him to submit
13 his claims to arbitration.

14 B. Bowles v. Reade

15 Even if the arbitration provisions cited by Defendants
16 encompassed Dorman's claims, the provisions could not be
17 enforced. Dorman brings his claims pursuant to §§ 502(a)(2) and
18 502(a)(3) "on behalf of the plan." He cannot waive rights that
19 belong to the Plan, such as the right to file this action in
20 court.

21 The Court recently resolved this question in a similar case,
22 Cryer v. Franklin Templeton Res., Inc., 2017 WL 4410103 (N.D.
23 Cal. Oct. 4, 2017). There, a release and class action waiver
24 signed by the plaintiff could not be enforced against the
25 plaintiff's § 502(a)(2) claims brought on behalf of the plan.
26 Id. at *3. Relying on Bowles v. Reade, 198 F.3d 752 (9th Cir.
27 1999), the Court explained that "a plan participant cannot
28 settle, without the plan's consent, a § 502(a)(2) breach of

1 fiduciary duty claim seeking 'a return to [the plan] and all
2 participants of all losses incurred and any profits gained from
3 the alleged breach of fiduciary duty.'" Id. (quoting Bowles, 198
4 F.3d at 760). See also In re Schering Plough Corp. ERISA Litig.,
5 589 F.3d 585, 594 (3d Cir. 2009) ("The vast majority of courts
6 have concluded that an individual release has no effect on an
7 individual's ability to bring a claim on behalf of an ERISA plan
8 under § 502(a)(2)."). By the same token, a participant bringing
9 a § 502(a)(2) claim also cannot release the right to file in
10 court or the right to file a class action on behalf of a plan,
11 which also belong to the plan. Cryer, 2017 WL 4410103, at *4
12 (quoting Munro v. Univ. of S. California, 2017 WL 1654075, at *5
13 (C.D. Cal. Mar. 23, 2017)) ("Just as a participant suing on
14 behalf of a plan under § 502(a)(2) cannot waive a plan's right to
15 pursue claims, a participant cannot waive a plan's right to file
16 its claims in court."). The Court therefore concluded that the
17 release and class action waiver could not be enforced against the
18 plaintiff's claims brought in a representative capacity on behalf
19 of the plan. Id.

20 Here, too, enforcement of the arbitration and class action
21 provisions would violate the principles set forth in Bowles v.
22 Reade. Dorman brings §§ 502(a)(2) and 502(a)(3) claims seeking
23 to restore losses incurred by the Plan. See Docket No. 56 at 35
24 (Amended Complaint). As a result, he cannot release the right to
25 file a claim in court or the right to file a class action, both
26 of which belong to the Plan.

27 Defendants argue that the Court's reasoning in Cryer does
28 not apply to this case because the Plan agreed to arbitration by

1 virtue of its Plan Document's arbitration provision. See Plan
2 Document § 18.1 (board of directors of the Plan Sponsor reserves
3 the right to . . . adopt any amendment or modification thereto").
4 But the Court has already concluded that the Plan Document does
5 not bind Dorman because it was executed after he ceased all
6 participation in the Plan.

7 Additionally, the Plan Document was executed unilaterally by
8 the plan sponsor, Charles Schwab. See Reply at 8; Morgan Decl.,
9 Ex. 1 at § 18.1(a). A plan document drafted by fiduciaries--the
10 very people whose actions have been called into question by the
11 lawsuit--should not prevent plan participants and beneficiaries
12 from vindicating their rights in court. See Johnson v.
13 Couturier, 572 F.3d 1067, 1080 (9th Cir. 2009) (citing ERISA
14 § 410(a) and holding that "if an ERISA fiduciary writes words in
15 an instrument exonerating itself of fiduciary responsibility, the
16 words, even if agreed upon, are generally without effect").
17 Otherwise, "fiduciaries would essentially never be held to
18 account for their potential wrongdoing in court" and they would
19 receive "many procedural advantages at the outset of any
20 § 502(a)(2) action that they would not be entitled to in a court
21 proceeding." Munro, 2017 WL 1654075, at *6. "Indeed[,] allowing
22 such arbitration agreements to control participants' § 502(a)(2)
23 claims would, in a sense, be allowing the fox to guard the
24 henhouse." Id.

25 C. Morris v. Ernst & Young, LLP

26 Because the Court has already found that the arbitration
27 provisions either do not apply to Dorman's claims or are
28 unenforceable against them pursuant to Bowles, the Court need not

1 consider the parties' arguments on whether Morris applies to
2 Dorman's claims. Nevertheless, in the interest of completeness,
3 the Court briefly addresses the parties' arguments.

4 Morris holds that class action waivers are unenforceable
5 under the NLRA when they are required by the employer as a
6 condition of employment. Morris, 834 F.3d at 980-83. Thus,
7 Morris would appear to bar any provisions requiring individual
8 arbitration of Dorman's claims that Dorman signed as a condition
9 of his employment. Although Defendants contend that the Court
10 should not apply Morris in this case because the Supreme Court
11 has granted certiorari, Morris remains good law and must be
12 applied until the Supreme Court decides otherwise. See, e.g.,
13 United States v. Joey, 974 F.2d 1344 (9th Cir. 1992) ("Although
14 the Supreme Court has granted certiorari in [the case forming the
15 basis for affirmance], we are bound by our prior decision until
16 the Court decides otherwise.").

17 In sum, the arbitration provisions cited by Defendants (Plan
18 Document, Form U-4, and Compensation Plan Acknowledgment) are not
19 enforceable against Dorman's claims for three independent
20 reasons: (1) they do not bind Dorman or their scope does not
21 encompass Dorman's claims, (2) Bowles v. Reade bars their
22 enforcement, and (3) Morris v. Ernst & Young, LLP and the NLRA
23 bar their enforcement. Accordingly, Defendants' motion to compel
24 arbitration must be denied.

25 II. Motion to Stay Pending Decision in Morris

26 Because the Court's denial of Defendants' motion to compel
27 arbitration does not rely on Morris, Defendants have not
28 established the need for a stay pending the Supreme Court's

1 decision in the same case. Defendants have not shown that they
2 will suffer any harm absent a stay, nor have they shown that any
3 issues of law or proof will be simplified if the case is stayed
4 pending a decision in Morris. On the other hand, Dorman has a
5 right to timely adjudication of his claims. Defendants' request
6 to stay the case is denied.

7 III. Administrative Motion to Seal

8 Defendants seek to seal redacted portions of the
9 Compensation Plan Acknowledgment filed in support of their motion
10 to compel arbitration or stay the case. In considering sealing
11 requests, "a strong presumption in favor of access is the
12 starting point." Kamakana v. City & Cty. of Honolulu, 447 F.3d
13 1172, 1178 (9th Cir. 2006) (internal quotation marks omitted).
14 Parties seeking to seal documents relating to dispositive motions
15 bear the burden of articulating "compelling reasons supported by
16 specific factual findings that outweigh the general history of
17 access and the public policies favoring disclosure, such as the
18 public interest in understanding the judicial process." Id. at
19 1178-79 (internal quotation marks and citation omitted).

20 Defendants filed a declaration pursuant to Civil Local Rule 79-
21 5(d) stating that the redacted portions of the Compensation Plan
22 Acknowledgment contain Charles Schwab's proprietary compensation
23 formulas and strategic business goals. Disclosure of
24 compensation information might cause Defendants competitive harm.
25 Because Defendants have narrowly tailored their request to
26 include only sealable information, this request is granted.

CONCLUSION

The Court DENIES Defendants' motion to compel arbitration, to dismiss, and to stay claims (Docket No. 70). The Court GRANTS Defendants' administrative motion to seal (Docket No. 71).

IT IS SO ORDERED.

Dated: January 18, 2018



CLAUDIA WILKEN
United States District Judge

United States District Court
Northern District of California

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