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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NEAL PATAKY, JESSICA CLEEK, and
LAUREN MICHELSON, individually,
and on behalf of others similarly situated,
Plaintiffs,
v.
THE BRIGANTINE, INC., a California
corporation,
Defendant.

Case No.: 3:17-cv-00352-GPC-AGS

**ORDER DENYING DEFENDANT’S
MOTION TO COMPEL
ARBITRATION AND DENYING
DEFENDANT’S MOTION TO STAY
THE PROCEEDINGS PENDING
DECISION OF THE SUPREME
COURT OF THE UNITED STATES**

[ECF No. 9.]

Before the Court is Defendant The Brigantine, Inc.’s (“Defendant’s” or “Brigantine’s”) motion to compel arbitration or, alternatively, to stay the proceedings pending decision of the Supreme Court of the United States in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). (Dkt. No. 9.) The motion has been fully briefed. (Dkt. Nos. 20, 22.) The Court deems this motion suitable for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the parties’ arguments and the applicable law, the Court **DENIES** Defendant’s motion to compel arbitration and **DENIES** Defendant’s request for a stay.

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BACKGROUND

1
2 On February 22, 2017, Plaintiffs Neal Pataky (“Plaintiff” or “Pataky”), Jessica
3 Cleek (“Plaintiff” or “Cleek”), and Lauren Michelson (“Plaintiff” or “Michelson”)
4 (collectively, “Plaintiffs”), on behalf of themselves and others similarly situated, filed the
5 instant putative class action against The Brigantine, Inc., a California corporation which
6 owns and operates multiple restaurants in San Diego County. (Dkt. No. 1, Compl. ¶ 4.)
7 Plaintiffs allege that Defendant maintained an unlawful “tip pooling” policy, under which
8 Plaintiffs, who were employed as servers at Defendant’s restaurants, had to “tip out”
9 portions of their earned tip income to other employees who do not provide direct table
10 service to customers. (Compl. ¶¶ 8–9.) Plaintiffs assert three claims for relief based on
11 Defendant’s alleged violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §
12 201 *et seq.*, (Compl. ¶¶ 15–22); unfair business practices in violation of California’s
13 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, (Compl. ¶¶
14 23 – 28); and unlawful business practices in violation of the UCL, Cal. Bus. & Prof. Code
15 § 17200 *et seq.*, (Compl. ¶¶ 29–34).

16 In support of its motion, Defendant attached copies of the Employment At-Will
17 and Arbitration Agreement, signed by Pataky, Cleek, and Michelson on September 4 or
18 September 5, 2014. (Dkt. No. 9-2, Carl Decl. Exs. A, C, E.) Employees are presented
19 with an Employment At-Will and Arbitration Agreement as part of Defendant’s hiring
20 practice. (Carl Decl. ¶ 3.) As a matter of company policy, employees are not required to
21 sign the document. (*Id.*) Human resources instructs managers not to force or require
22 employees to sign the agreement—indeed, some employees decline to sign the
23 agreement, with no effect on their employment status. (*Id.*) Nonetheless, Defendant does
24 not specify whether employees are affirmatively instructed that signing the agreement is
25 optional. (*See id.*) And the language of the Arbitration Agreement does not give
26 employees any notice that they may opt out of the agreement, or that signing it is
27 completely voluntary and will have no effect on their employment status. (*See* Dkt. No.
28 9-2, Carl Decl. Exs. A, C, E.)

1 Paragraph 2 of the Arbitration Agreement reads as follows:

2 *I and the Company agree to utilize binding individual arbitration as the sole and*
3 *exclusive means to resolve all disputes that may arise out of or be related in any*
4 *way to my employment, including but not limited to the termination of my*
5 *employment and my compensation. I and the Company each specifically waive*
6 *and relinquish our respective rights to bring a claim against the other in a court of*
7 *law. Both I and the Company agree that any claim, dispute, and/or controversy*
8 *that I may have against the Company (or its owners, directors, officers, managers,*
9 *employees, or agents), or the Company may have against me, shall be submitted to*
10 *and determined exclusively by binding arbitration under the Federal Arbitration*
11 *Act (“FAA”), in conformity with the procedures of the California Arbitration Act*
12 *(Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the*
13 *Act’s other mandatory and permissive rights to discovery). The FAA applies to*
14 *this Agreement because the Company’s business involves interstate commerce.*
15 *Included within the scope of this Agreement are all disputes, whether based on tort,*
16 *contract, statute (including, but not limited to, any claims of discrimination,*
17 *harassment and/or retaliation, whether they be based on the California Fair*
18 *Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as*
19 *amended, or any other state or federal law or regulation), equitable law, or*
20 *otherwise. The only exception to the requirement of binding arbitration shall be*
21 *for claims arising under the National Labor Relations Act which are brought before*
22 *the National Labor Relations Board, claims for medical and disability benefits*
under the California Workers’ Compensation Act, Employment Development
Department claims, or other claims that are not subject to arbitration under current
law. However, nothing herein shall prevent me from filing and pursuing
proceedings before the California Department of Fair Employment and Housing, or
the United States Equal Employment Opportunity Commission (although if I
choose to pursue a claim following the exhaustion of such administrative remedies,
that claim would be subject to the provisions of this Agreement). By this binding
arbitration provision, I acknowledge and agree that both the Company and I give
up our respective rights to trial by jury of any claim I or the Company may have
against the other.

23 (Dkt. No. 9-2 at 4.)

24 Paragraph 3 of the Arbitration Agreement contains a class action waiver:

25 All claims brought under this binding arbitration Agreement shall be brought in the
26 individual capacity of myself or the Company. This binding arbitration Agreement
27 shall not be construed to allow or permit the consolidation or joinder of other
28 claims or controversies involving any other employees or parties, or permit such
claims or controversies to proceed as a class action, collective action or any similar

1 representative action. No arbitrator shall have the authority under this agreement
2 to order any such class, collective or representative action. By signing this
3 agreement, I am agreeing to waive any substantive or procedural rights that I may
4 have to bring an action on a class, collective, representative, or other similar basis.

5 (*Id.*)

6 Paragraph 6 contains a severability provision: “If any term, provision or portion of
7 this Agreement is determined to be void or unenforceable it shall be severed and the
8 remainder of this Agreement shall be fully enforceable.” (*Id.* at 5.)

9 Each of the three Plaintiffs supplied a declaration testifying that the copies of the
10 Employment At-Will and Arbitration Agreement proffered by Defendant “do not look
11 familiar,” that they lack “specific recollection of having signed” the Agreement, that they
12 “had no idea” that they “may have signed an arbitration agreement with Brigantine” until
13 they reviewed Defendant’s exhibits, and that they lack “recollection of anyone at
14 Brigantine ever explaining . . . that signing an arbitration agreement meant [they] could
15 not file a lawsuit about employment issues with Brigantine, or represent other employees
16 in a class action.” (Dkt. No. 12-4, Cleek Decl. ¶ 9; Dkt. No. 12-5, Michelson Decl. ¶ 9;
17 Dkt. No. 12-6, Pataky Decl. ¶ 10.) None of the Plaintiffs took the agreements home for
18 review or consulted an attorney. (*Id.*)

19 On March 16, 2017, Defendant filed the instant motion to compel arbitration.
20 (Dkt. No. 9.) In the alternative, Defendant requests that the Court stay the proceedings
21 pending the Supreme Court’s ruling in *Morris*. (Dkt. No. 9.) On April 7, 2017, Plaintiffs
22 filed an opposition to Defendant’s motion, arguing that *Morris* prevents the Court from
23 compelling arbitration in the instant case, and that a stay is inappropriate. (Dkt. No. 20.)
24 On April 21, 2017, Defendant filed a reply. (Dkt. No. 22.)

25 **LEGAL STANDARD**

26 Pursuant to the Federal Arbitration Act (“FAA”), arbitration agreements “shall be
27 valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity
28 for the revocation of any contract.” 9 U.S.C. § 2. The FAA provides that “a party

1 aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written
2 agreement for arbitration may petition any United States district court . . . for an order
3 directing that . . . arbitration proceed in the manner provided for in such agreement.” 9
4 U.S.C. § 4. Federal policy favors arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury*
5 *Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA “establishes that, as a matter of federal
6 law, any doubts concerning the scope of arbitrable issues should be resolved in favor of
7 arbitration, whether the problem at hand is the construction of the contract language itself
8 or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 24–25.

9 In ruling on a motion to compel arbitration, a court must determine two gateway
10 matters: (1) whether there is an agreement to arbitrate between the parties; and (2)
11 whether the agreement covers the dispute. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130
12 (9th Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).
13 If these conditions are satisfied, the court lacks discretion to deny the motion and must
14 compel arbitration. 9 U.S.C. § 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218
15 (1985) (“By its terms, the [FAA] leaves no place for the exercise of discretion by a
16 district court, but instead mandates that district courts *shall* direct the parties to proceed
17 to arbitration.”). In addition, § 3 of the FAA provides that once a court compels
18 arbitration, the court “shall on application of one of the parties stay the trial of the action”
19 until arbitration has occurred. 9 U.S.C. § 3. However, “[i]f the making of the arbitration
20 agreement or the failure, neglect, or refusal to perform the same be in issue, the court
21 shall proceed summarily to the trial thereof.” 9 U.S.C. § 4.

22 DISCUSSION

23 I. Motion to Compel Arbitration

24 A. The Existence of the Arbitration Agreement

25 “It is a settled principle of law that ‘arbitration is a matter of contract.’” *Ingle v.*
26 *Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (quoting *United*
27 *Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). “To
28 evaluate the validity of an arbitration agreement, federal courts ‘should apply ordinary

1 state-law principles that govern the formation of contracts.” *Id.* (quoting *First Options*
2 *of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

3 Plaintiffs contest the existence of the arbitration agreements. (Dkt. No. 20 at 20–
4 24.) Plaintiffs testify that they each lack recollection of having signed or seen the
5 arbitration agreement nearly three years ago, that they did not understand the agreement
6 to mean that they could not file an employment lawsuit against Defendant on behalf of
7 themselves or others similarly situated, that they do not recall receiving an explanation
8 from anyone regarding the consequences of signing the agreement, and that they never
9 reviewed the agreement at home or with a lawyer. (Dkt. No. 12-4, Cleek Decl. ¶ 9; Dkt.
10 No. 12-5, Michelson Decl. ¶ 9; Dkt. No. 12-6, Pataky Decl. ¶ 10.)

11 While the circumstances surrounding the formation of the agreements may be
12 unclear (*e.g.*, how the agreements were presented to Plaintiffs; whether anyone witnessed
13 Plaintiffs sign the agreements; and what, if anything, Defendant or its representatives said
14 to Plaintiffs about the agreements), Plaintiffs’ objections do not go to the existence of a
15 contract. Plaintiffs do not contest that the agreements bear their respective signatures.
16 Plaintiffs cite no law requiring Defendant or its representative to countersign the
17 arbitration agreement, where the agreement makes amply clear that the agreement is
18 between the employee and Brigantine, expressly defined in the agreement as “the
19 Company.” (Dkt. No. 9-2 at 4–5.)

20 Furthermore, *Flores v. Nature’s Best Distribution, LLC*, 7 Cal. App. 5th 1, 6 (Cal.
21 Ct. App. 2016), *review denied* (Mar. 29, 2017), is inapposite. The *Flores* court expressly
22 declined to decide whether the defendant properly authenticated the arbitration
23 agreement. *See* 7 Cal. App. 5th at 9 (“We do not need to address whether the Agreement
24 was properly authenticated because, even assuming the Agreement indeed bears
25 plaintiff’s signature, it fails to reflect plaintiff’s agreement to submit her claims against
26 defendants in the instant case to binding arbitration pursuant to its terms.”). Unlike the
27 arbitration agreement in this case, the body of the agreement in *Flores* did not define
28 either “employee” or “Company” or identify with which entity the plaintiff had made an

1 agreement. *Id.* The arbitration agreement in *Flores* further failed to clearly define which
2 disputes would be subject to arbitration, and which would instead be subject to resolution
3 through a grievance and arbitration procedure contained in a collective bargaining
4 agreement. *Id.* at 10. The arbitration agreement did not identify which set of rules would
5 apply to binding arbitration. *Id.* In conclusion, the *Flores* court held that the ambiguity
6 of the agreement precluded a conclusion that the parties had reached an agreement:

7 Viewing the Agreement as a whole, the Agreement is ambiguous regarding (1)
8 whether the arbitration provision of the Agreement (not a grievance and arbitration
9 procedure of a collective bargaining agreement) applied to any or all of plaintiff’s
10 claims against any or all of defendants in the instant action and (2) the governing
11 rules and procedures for any such arbitration. We cannot conclude the parties
12 reached agreement on the matter of submitting any or all of plaintiff’s claims to
13 final and binding arbitration as contemplated by the Agreement. The trial court
14 therefore did not err by denying the petition; we do not need to analyze whether the
15 arbitration provision was procedurally and/or substantively unconscionable.

16 *Id.* at 11(internal citation omitted). *Flores* is distinguishable from the instant case, and
17 Plaintiffs’ reliance on *Flores* is misplaced.

18 In addition, the arbitration agreement each Plaintiff signed specifically provides, “I
19 and the Company each specifically waive and relinquish our respective rights to bring a
20 claim against the other in a court of law.” (Dkt. No. 9-2 at 4.) The agreement also
21 contains a bolded, all-caps acknowledgment before the signature line:

22 **MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE**
23 **READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL**
24 **OF THE ABOVE TERMS. I FURTHER UNDERSTAND THAT THIS**
25 **AGREEMENT REQUIRES ME TO ARBITRATE ANY AND ALL**
26 **DISPUTES THAT ARISE OUT OF MY EMPLOYMENT.**

27 **DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE**
28 **ACKNOWLEDGMENT AND AGREEMENT.**

29 (*Id.* at 5.) That Plaintiffs now lack recollection of having signed the agreement and now
30 testify that they did not understand the agreement does not comport with the
31 acknowledgment that they signed.

1 Plaintiffs also dispute that the arbitration agreement covers the instant litigation.
2 (Dkt. No. 20 at 20–24.) “Any doubts concerning the scope of arbitrable issues should be
3 resolved in favor of arbitration.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir.
4 1999). Here, there can be no doubt regarding the expansive scope of the arbitration
5 agreement, given the following unambiguous language:

6 I and the Company agree to utilize binding individual arbitration as the sole and
7 exclusive means to resolve *all disputes that may arise out of or be related in any*
8 *way to my employment*, including but not limited to the termination of my
9 employment and my compensation . . . Both I and the Company agree that *any*
10 *claim, dispute, and/or controversy that I may have against the Company (or its*
11 *owners, directors, officers, managers, employees, or agents)*, or the Company may
12 have against me, shall be submitted to and determined exclusively by binding
13 arbitration . . . Included within the scope of this Agreement are *all disputes*,
14 whether based on tort, contract, statute (including, but not limited to, any claims of
15 discrimination, harassment and/or retaliation, whether they be based on the
16 California Fair Employment and Housing Act, Title VII of the Civil Rights Act of
17 1964, as amended, or any other state or federal law or regulation), equitable law, or
18 otherwise. The *only exception* to the requirement of binding arbitration shall be for
19 claims arising under the National Labor Relations Act which are brought before
20 the National Labor Relations Board, claims for medical and disability benefits
21 under the California Workers’ Compensation Act, Employment Development
22 Department claims, or other claims that are not subject to arbitration under current
23 law.

19 (Dkt. No. 9-2 at 4 (emphases added).) Because the arbitration agreement clearly covers
20 all disputes arising out of Plaintiffs’ employment with Defendant, save for the narrow
21 exception delineated above, Plaintiffs’ argument is unavailing.

22 Having concluded that the arbitration agreements exist, and that they cover the
23 instant dispute, the Court turns to examine whether the Ninth Circuit’s decision in *Morris*
24 renders the arbitration agreements unenforceable.

25 **B. Applicability of the Ninth Circuit’s Decision in *Morris***

26 In its arbitration jurisprudence, the Supreme Court has repeatedly stated that “[b]y
27 agreeing to arbitrate a statutory claim, a party does not forgo the *substantive rights*
28 afforded by the statute; it only submits to their resolution in an arbitral, rather than a

1 judicial, forum.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.
2 614, 628 (1985) (emphasis added); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.
3 20, 26 (U.S. 1991); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Am.*
4 *Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (stating that although
5 the Supreme Court has never invalidated an arbitration agreement on grounds of the
6 “‘effective vindication’ exception” to the FAA,” the exception “would certainly cover a
7 provision in an arbitration agreement forbidding the assertion of certain statutory rights”);
8 *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 102 (2012) (holding that contract
9 “parties remain free to specify” their choice of judicial forum “so long as the *guarantee*”
10 of the statute “is preserved”).

11 Section 7 of the National Labor Relations Act (“NLRA”) provides that employees
12 have “the right to self-organization, to form, join, or assist labor organizations, to bargain
13 collectively through representatives of their own choosing, and to engage in other
14 concerted activities for the purpose of collective bargaining or other mutual aid or
15 protection.” 29 U.S.C. § 157. Section 8(a)(1) makes it “an unfair labor practice for an
16 employer to interfere with, restrain, or coerce employees in the exercise of the rights
17 guaranteed in section [7].” 29 U.S.C. § 158(a). In 2012, the National Labor Relations
18 Board (“NLRB”) held that “[t]he right to engage in collective action—including
19 collective *legal* action—is the core substantive right protected by the NLRA and is the
20 foundation on which the Act and Federal labor policy rest.” *In Re D.R. Horton, Inc.*, 357
21 NLRB 2277, 2286 (2012). Accordingly, following the Supreme Court’s arbitration
22 jurisprudence regarding substantive statutory rights, the NLRB concluded that an
23 employer violates the NLRA “when it requires employees covered by the Act, as a
24 condition of their employment, to sign an agreement that precludes them from filing
25 joint, class, or collective claims addressing their wages, hours, or other working
26 conditions against the employer in any forum, arbitral or judicial.” *Id.* at 2277.

27 In *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137
28 S. Ct. 809 (2017), the Ninth Circuit examined “whether an employer violates the National

1 Labor Relations Act by requiring employees to sign an agreement precluding them from
2 bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and
3 conditions of employment.” 834 F.3d at 979. Applying principles of *Chevron* deference,
4 the Ninth Circuit adopted the NLRB’s interpretation of Sections 7 and 8 of the NLRA in
5 *D.R. Horton*.¹ *Id.* at 980–84. “Section 7’s ‘mutual aid or protection clause’ includes the
6 substantive right to collectively ‘seek to improve working conditions through resort to
7 administrative and judicial forums.’” *Id.* at 983 (quoting *Eastex, Inc. v. NLRB*, 437 U.S.
8 556, 566). Accordingly, “an employer may not defeat the right by requiring employees
9 to pursue all work-related legal claims individually” without violating § 8. *Id.*

10 Following the NLRB’s conclusion that “[c]oncerted activity—the right of
11 employees to act *together*—is the essential, substantive right established by the NLRA,”
12 the Ninth Circuit concluded that “Ernst & Young interfered with that right by requiring
13 its employees to resolve all of their legal claims in separate proceedings.” *Id.* at 980.
14 Because the arbitration agreement “interfere[d] with a protected § 7 right in violation of §
15 8,” the “separate proceedings” clause in the contract triggered the savings clause in FAA
16 § 2 and could not be enforced. *Id.* at 983–84. The Ninth Circuit concluded:

17 In sum, the “separate proceedings” provision of the Ernst & Young contract
18 interferes with a substantive federal right protected by the NLRA’s § 7. The
19 NLRA precludes contracts that foreclose the possibility of concerted work-related
20 legal claims. An employer may not condition employment on the requirement that
an employee sign such a contract.

21 *Morris*, 834 F.3d at 990.

22 Defendant reads *Morris* narrowly, arguing that because Plaintiffs were not required
23 to sign an arbitration agreement prohibiting class action, the arbitration agreement, with
24 the embedded class action waiver, is enforceable. (Dkt. No. 9-1 at 16–17; Dkt. No. 22 at
25

26
27 ¹ Defendant argues that *D.R. Horton* “has been rejected by most courts in the Ninth Circuit.” (Dkt. No.
28 22 at 5.) In so arguing, Defendant ignores the Ninth Circuit’s adoption of the NLRB’s interpretation of
Sections 7 and 8 of the NLRA in *Morris*.

1 2–5.) Defendant relies chiefly upon a footnote distinguishing *Johnmohammadi v.*
2 *Bloomingtondale’s, Inc.*, 755 F.3d 1072 (9th Cir. 2014), an earlier Ninth Circuit decision.
3 (*Id.*) In the footnote, the majority in *Morris* wrote: “In contrast, there was no § 8
4 violation in *Johnmohammadi v. Bloomingtondale’s, Inc.* because the employee there could
5 have opted out of the individual dispute resolution agreement and chose not to.” *Morris*,
6 834 F.3d at 983 n.4. In *Johnmohammadi*, the employee, who sought to bring a class
7 action on behalf of herself and fellow employees for unpaid wages, received upon her
8 hiring a set of documents “inform[ing] her that she agreed to resolve all employment-
9 related disputes through arbitration unless she returned an enclosed form within 30 days
10 electing, as the form put it, ‘NOT to be covered by the benefits of Arbitration.’
11 *Johnmohammadi* did not return the opt-out form.” 755 F.3d at 1074. Despite
12 *Johnmohammadi*’s argument that “filing th[e] class action on behalf of her fellow
13 employees [wa]s one of the ‘other concerted activities’ protected by the Norris–
14 LaGuardia Act and the NLRA,” the Ninth Circuit chose not to “decide whether
15 *Johnmohammadi* has correctly interpreted this statutory phrase. To prevail, she must still
16 show that *Bloomingtondale*’s interfered with, restrained, or coerced her in the exercise of her
17 right to file a class action.” *Id.* at 1075. Because *Johnmohammadi* had the right to opt
18 out of the agreement and voluntarily chose not to do so, the arbitration agreement was
19 valid, and arbitration must be compelled. *Id.* at 1077.

20 Defendant’s attempt to analogize the facts of this case to *Johnmohammadi* is
21 unavailing. Unlike the agreement in *Johnmohammadi*, the arbitration agreement in this
22 case does not contain any express indication or implicit suggestion that employees had
23 the right to opt out of the agreement, that they could refuse to sign the agreement without
24 repercussion to their employment status, or that they could take the agreement home for
25 thirty days to decide whether or not to opt out. (Dkt. No. 9-2, Carl Decl. ¶ 3.) While
26 Defendant maintains that managers were instructed not to require employees to sign the
27 agreement, there is no evidence that managers affirmatively informed employees that
28 they had the choice not to sign the agreement. (*Id.*) Moreover, while employees are

1 presented with an Employment At-Will and Arbitration Agreement as part of
2 Defendant's hiring practice, (*id.*), it is unclear under what circumstances Plaintiffs were
3 presented with the agreement, and what, if anything, Plaintiffs learned from Defendant or
4 its representatives about the agreement. Although the agreements were signed on
5 September 4 or 5, 2014, Plaintiffs were hired well in advance of September 2014: Cleek
6 was hired on May 1, 2013, (Dkt No. 20-1, Cleek Decl. ¶ 2); Michelson was hired in May
7 2013, (Dkt. No. 20-2, Michelson Decl. ¶ 2); and Pataky was hired some time in 2005,
8 (Dkt. No. 20-3, Pataky Decl. ¶ 2). Defendant has not shown that Plaintiffs were on notice
9 that they had an affirmative opt-out right. The facts surrounding the formation of the
10 arbitration agreements fall far short of the facts in *Johnmohammadi*.

11 Although the Court need not resolve the question, the Court observes that the
12 footnote distinguishing *Johnmohammadi* appears to be in tension with the remainder of
13 the majority's opinion in *Morris*. In *Morris*, the Ninth Circuit concluded that a provision
14 prohibiting concerted legal action in any forum violates § 8 of the NLRA on its own; the
15 requirement that an employee sign a concerted action waiver is an additional violation of
16 § 8:

17 Section 8 establishes that “[i]t shall be an unfair labor practice for an employer . . .
18 to interfere with, restrain, or coerce employees in the exercise of the rights
19 guaranteed in section 157.” 29 U.S.C. § 158. A “separate proceedings” clause
20 does just that: it prevents the initiation of any concerted work-related legal claim,
21 in any forum. Preventing the exercise of a § 7 right strikes us as “interference”
22 within the meaning of § 8. Thus, the Board's determination that a concerted action
waiver violates § 8 is no surprise. *And an employer violates § 8 a second time by
conditioning employment on signing a concerted action waiver.*

23 *Morris*, 834 F.3d at 982. *Morris* makes clear that “the arbitration requirement is not the
24 problem. The same [separate proceedings] provision in a contract that required court
25 adjudication as the exclusive remedy would equally violate the NLRA. *The NLRA*
26 *obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on*
27 *arbitration.*” *Morris*, 834 F.3d at 984 (emphasis added). Indeed, the decision reiterates
28

1 repeatedly that the relevant problem is the waiver of class action, not the requirement that
2 the parties submit to arbitration:

3 The *illegality of the “separate proceedings” term* here has nothing to do with
4 arbitration as a forum. It would equally violate the NLRA for Ernst & Young to
5 require its employees to sign a contract requiring the resolution of all work-related
6 disputes *in court* and in “separate proceedings.” The same infirmity would exist if
7 the contract required disputes to be resolved through casting lots, coin toss, duel,
8 trial by ordeal, or any other dispute resolution mechanism, if the contract (1)
9 limited resolution to that mechanism and (2) required separate individual
10 proceedings. *The problem with the contract at issue is not that it requires*
arbitration; it is that the contract term defeats a substantive federal right to pursue
concerted work-related legal claims.

11 *Id.* at 985 (emphases added).

12 Having concluded that concerted legal action is a protected substantive right under
13 the NLRA, the majority continued on to explain how its conclusion squares with the FAA
14 and Supreme Court precedent:

15 Crucial to today’s result is the distinction between “substantive” rights and
16 “procedural” rights in federal law. The Supreme Court has often described rights
17 that are the essential, operative protections of a statute as “substantive” rights. In
18 contrast, procedural rights are the ancillary, remedial tools that help secure the
19 substantive right.

20 *Id.* (internal citations omitted). The difference between substantive and procedural rights
21 “is key, because *substantive rights cannot be waived in arbitration agreements*. This
22 tenet is a fundamental component of the Supreme Court’s arbitration jurisprudence[.]”

23 *Id.* at 985–86 (internal citations omitted) (emphasis added); *see also id.* at 986 n.10
24 (“Contract parties can agree on the procedural terms they like (such as resolving disputes
25 in arbitration), but they may not agree to leave the substantive protections of federal law
26 at the door.”). Accordingly, “when an arbitration contract professes the waiver of a
27 substantive federal right, the FAA’s saving clause prevents a conflict between the statutes
28 by causing the FAA’s enforcement mandate to yield.” *Id.* at 986. Because “[t]he rights
established in § 7 of the NLRA—including the right of employees to pursue legal claims

1 together—are substantive,” and “are the central, fundamental protections of the Act,” the
2 “FAA does not mandate the enforcement of a contract that alleges their waiver.” *Id.*
3 Accordingly, the “separate proceedings” clause was an “illegal” term that could not be
4 enforced under the savings clause in § 2 of the FAA. *Id.* at 985 (“When an illegal
5 provision not targeting arbitration is found in an arbitration agreement, the FAA treats the
6 contract like any other; the FAA recognizes a general contract defense of illegality.”
7 (citing, *inter alia*, 9 U.S.C. § 2)).

8 In light of the above, it is unclear whether providing a clear opportunity to opt out
9 of an arbitration agreement containing a class action waiver, as in *Johnmohammadi*,
10 neutralizes a class action waiver’s interference with Sections 7 and 8 of the NLRA.
11 However, given that the facts surrounding the formation of the arbitration agreements in
12 this case are distinguishable from those in *Johnmohammadi*, the Court does not need to
13 resolve the apparent tension between *Morris* and *Johnmohammadi*. The Court next
14 proceeds to examine whether the class action waiver provision is severable.

15 C. Severability

16 Plaintiffs argue that the Court may not sever the class action waiver in the
17 arbitration agreement and compel Plaintiffs to class arbitration. (Dkt. No. 20 at 19–
18 20.) Even without the class action waiver, there is no contractual basis for determining
19 that the parties agreed to submit to class arbitration. (*Id.*) Defendant does not respond to
20 Plaintiffs’ argument.

21 The Supreme Court has held that “a party may not be compelled under the FAA to
22 submit to class arbitration unless there is a contractual basis for concluding that the party
23 agreed to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684
24 (2010). Furthermore,

25 An implicit agreement to authorize class-action arbitration, however, is not a term
26 that the arbitrator may infer solely from the fact of the parties’ agreement to
27 arbitrate. This is so because class-action arbitration changes the nature of
28 arbitration to such a degree that it cannot be presumed the parties consented to it by
simply agreeing to submit their disputes to an arbitrator.

1 *Id.* at 685.

2 Here, the arbitration agreement explicitly rules out class arbitration in Paragraphs 2
3 and 3. The agreement states that the parties “agree to utilize binding *individual*
4 arbitration as the *sole and exclusive means* to resolve all disputes that may arise out of or
5 be related in any way to [the employee’s] employment.” (Dkt. No. 9-2 at 4 (emphases
6 added).) The agreement expressly provides that “[t]his binding arbitration Agreement
7 shall not be construed to allow or permit the consolidation or joinder of other claims or
8 controversies involving any other employees or parties, or permit such claims or
9 controversies to proceed as a class action, collective action or any similar representative
10 action.” (*Id.*) The agreement divests the arbitrator of the authority to order class
11 arbitration and forbids employees from “bring[ing] an[y] action on a class, collective,
12 representative, or other similar basis.” (*Id.*)

13 Accordingly, because the parties did not agree to class arbitration, the Court cannot
14 rely on the severability provision in the arbitration agreement to compel Plaintiffs to class
15 arbitration.²

16 **II. Motion to Stay**

17 “The District Court has broad discretion to stay proceedings as an incident to its
18 power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing
19 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). In determining whether to grant a
20 motion to stay, “the competing interests which will be affected by the granting or refusal
21 to grant a stay must be weighed.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th
22 Cir. 2005). These interests include: (1) the possible damage which may result from the
23 granting of a stay, (2) the hardship or inequity which a party may suffer in being required
24 to go forward, and (3) the orderly course of justice measured in terms of the simplifying

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26
27 ² The Court does not find it necessary to reach the remaining arbitration-specific issues raised by the
28 parties, including, *inter alia*, whether Defendant’s arbitration agreement also violates the Norris
LaGuardia Act and the FLSA, (Dkt. No. 20 at 18–19; Dkt. No. 22 at 5–6), and whether the arbitration
agreements are unconscionable, (Dkt. No. 20 at 25–27).

1 or complicating of issues, proof, and questions of law which could be expected to result
2 from a stay. *Id.* The burden is on the moving party. *Clinton*, 520 U.S. at 708.
3 Defendant summarily requests that the Court stay this case pending the Supreme Court’s
4 decision regarding *Morris*, stating that a decision “can be expected within a matter of
5 months.” (Dkt. No. 9-1 at 18; Dkt. No. 22 at 8.) Plaintiffs oppose Defendant’s
6 request. (Dkt. No. 20 at 27–31.)

7 As a starting matter, the Supreme Court recently granted certiorari in *Morris* on
8 January 13, 2017. *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017). There is no
9 indication that a decision will be issued in a matter of months. Furthermore, Defendant
10 makes no attempt to justify a stay, other than stating that the Supreme Court’s ruling in
11 *Morris* is forthcoming. Defendant has not satisfied its burden in moving for a stay. *See*
12 *Clinton*, 520 U.S. at 708.

13 As to the first factor, Plaintiffs have shown that they will face damage from the
14 granting of a stay. Specifically, Plaintiffs assert that a stay pending the Supreme Court’s
15 decision would prejudice Plaintiffs by delaying the opt-in, notice and consent, and
16 conditional class certification procedures for the instant putative FLSA class
17 action. (Dkt. No. 20 at 27–31.) The two-year statute of limitations period would
18 continue to run, and evidence may be lost during the stay. (*Id.*) As to the second factor,
19 Defendant has proffered no argument showing that it will incur hardship or inequity from
20 being required to go forward in the instant litigation. And as to the third factor, while a
21 ruling in *Morris* would directly weigh in on whether this action may proceed in federal
22 court, the sum of the three stay factors do not weigh in favor of a stay.

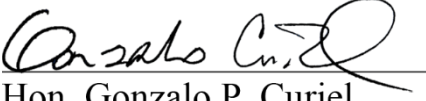
23 CONCLUSION

24 For the foregoing reasons, the Court **DENIES** Defendant’s motion to compel
25 arbitration and **DENIES** Defendant’s request for a stay.

26 **IT IS SO ORDERED.**

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1 Dated: May 3, 2017

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3 Hon. Gonzalo P. Curiel
4 United States District Judge
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