**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

STEVE THOMA

Plaintiff,

v.

CBRE GROUP, INC. *et al.*

Defendants.

Case No.: CV 16-6040-CBM-AJWx

**ORDER RE: MOTION TO COMPEL ARBITRATION**

The matter before the Court is Defendant JPMorgan Chase National Corporate Services, Inc., JPMorgan Chase & Co., and JP Morgan Chase Bank, N.A.'s (collectively, "Chase's") Motion to Compel Arbitration (the "Motion"). (Dkt. No. 38.)

## I. BACKGROUND

Plaintiff's Complaint asserts various federal and state law claims on a class, collective, and/or representative basis arising from Defendants' alleged misclassification of facility managers as exempt employees. Chase's Motion seeks to compel arbitration of Plaintiff's claims on an individual basis pursuant to the arbitration agreement entered into between Chase and Plaintiff in connection with Plaintiff's employment (the "Arbitration Agreement"). The Motion also seeks dismissal of this action or a stay pending arbitration.

## II. STATEMENT OF THE LAW

Under the Federal Arbitration Act ("FAA"),[1] a written agreement to arbitrate in a contract involving interstate commerce is "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12 (2001); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010). A party aggrieved by the refusal of another to arbitrate under a written arbitration agreement may petition any United States district court for an order directing that arbitration proceed in the manner provided in the agreement. 9 U.S.C. § 4; *Volt Info. Servs., Inc. v. Bs. of Ts. of Leland Junior Univ.*, 489 U.S. 468, 474 (1989). The Court's role under the FAA is limited to determining: "(1) whether a valid agreement to arbitration exists and, if it does, (2) whether the agreement encompasses the dispute at issue.[2]" *Id.* (citations omitted).

## III. DISCUSSION

On August 14, 2010, Plaintiff signed an offer letter for employment with Chase which included a signed affirmation by Plaintiff as follows:

> I understand my employment is subject to my and JP Morgan chase's agreement to submit employment-related disputes that cannot be resolved internally to binding arbitration, as set forth in the Binding Arbitration Agreement <http://www.jpmorganchase.com/pdfdoc/JPMCArbAgreement>. By signing below I acknowledge and agree that I have read and understand the Binding Arbitration Agreement, have accepted its terms and understand that it is a condition of my employment with

[1] The FAA applies here because the Arbitration Agreement and Plaintiff's employment with Chase involve interstate commerce. (Arbitration Agreement ¶ 7(i); Chester Decl. ¶ 2; Compl. ¶¶ 1, 2.) *See* 9 U.S.C. § 2; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1101 (C.D. Cal. 2015); see also *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1101 (C.D. Cal. 2015); *Herrera v. CarMax Auto Superstores Cal., LLC*, 2014 WL 3398363, at *3 (C.D. Cal. July 2, 2014) *Herrera v. CarMax Auto Superstores Cal., LLC*, 2014 WL 3398363, at *3 (C.D. Cal. July 2, 2014).

[2] Plaintiff does not dispute his claims are encompassed within the scope of the Arbitration Agreement. (*See* Arbitration Agreement ¶¶ 1-2 (claimed covered by the arbitration agreement include those arising out of or related to plaintiff's employment or separation from employment with Chase).

JPMorgan Chase.

The Binding Arbitration Agreement provides:

> Any and all "Covered Claims" (as defined below) between me and JP Morgan Chase (collectively "Covered Parties" or "parties", individually each a "covered Party" or "Party") shall be submitted to and resolved by final and binding arbitration in accordance with this Agreement.

(Arbitration Agreement ¶ 1.) The Arbitration Agreement also includes the following class, collective, and representative action waiver:

> All Covered Claims under this Agreement must be submitted on an individual basis. No claims may be arbitrated on a class or collective basis. Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, regardless of whether the action is filed in arbitration or in court. Furthermore, if a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum. Claims may not be joined or consolidated in arbitration with disputes brought by other individual(s), unless agreed to in writing by all parties.

(*Id.* ¶ 4 (the "Waiver").) Plaintiff contends the Arbitration Agreement is unenforceable because it violates the National Labor Relations Act ("NLRA").[3]

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

29 U.S.C. § 157. Under Section 8 of the NLRA, it is "an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158.

The Ninth Circuit recently found in *Morris v. Ernst & Young, LLP* that the

[3] Plaintiff does not contend the Arbitration Agreement is invalid on any other grounds.

"mutual aid or protection clause" set forth in Section 7 of the NLRA "includes the substantive right to collectively 'seek to improve working conditions through resort to administrative and judicial forums.'" 834 F.3d 975, 983 (9th Cir. 2016). The Circuit therefore held the "concerted action waiver"[4] in the employer's agreements was unenforceable because it interfered with a substantive federal right protected by the NLRA's § 7 in violation of § 8 by obligating employees to pursue work-related claims individually and preventing concerted activity by employees in arbitration proceedings. *Id.* at 983-84, 990.

Chase's contention the NLRA does not apply to Plaintiff here because Plaintiff is a former employee, is unpersuasive. *Morris* involved a lawsuit by former employees who entered into arbitration agreements as a condition of their employment, which the Ninth Circuit held violated the former employees' rights to engage in concerted activity under the NLRA by precluding them from filing class, collective, or representative lawsuits. Accordingly, whether Plaintiff is still employed by Chase does not change the fact that the Waiver violated the NLRA at the time Plaintiff entered into the Arbitration Agreement[5] as a condition of his employment.[6] Moreover, Plaintiff asserts various wage and hour claims which allegedly occurred during Plaintiff's (and other putative class members') employment with Chase.

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[4] Specifically, the "concerted activity waiver" contained in the agreements required plaintiffs to: (1) pursue legal claims against their employer exclusively through arbitration; and (2) arbitrate claims only as individuals and in "separate proceedings."

[5] *See, e.g., O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 563 (N.D. Cal. 2015) ("[T]he purpose of analyzing unconscionability at the time an agreement is drafted is to *deter* drafters from including such unconscionable terms in their agreements in the first instance . . .. 'An employer will not be deterred from routinely inserting such . . . illegal clause[s] into the arbitration agreement it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter.'") (quoting *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th at 124 n.13 (Cal. 2000)).

[6] Here, the offer letter signed by Plaintiff expressly stated: "I understand my employment is subject to my and JPMorgan Chase's agreement to submit employment-related disputes that cannot be resolved internally to binding arbitration." (Chester Decl. Ex. A.)

Here, the Waiver in the Arbitration Agreement violates the NLRA by precluding Plaintiff from engaging in concerted activity by requiring Plaintiff to pursue work-related claims individually in arbitration.[7] *Morris*, 834 F.3d at 983-84, 990. Accordingly, the Court finds the Waiver is unenforceable under *Morris*.[8]

* * *

The Arbitration Agreement expressly provides that if the class, collective, or representative action waiver is found to be unenforceable, the class, collective and/or representative action must be litigated in court. (Arbitration Agreement ¶ 8.) Since the Arbitration Agreement does not permit claims to be arbitrated on a class-wide, collective or representative basis, the Court denies Chase's Motion.[9] *Stolt-Nielsen S.A. v. Animal Feeds Int'l. Corp*, 559 U.S. 662, 684 (2010); *Mackall*, 2016 WL 6462089, at *1 (denying motion to compel arbitration, finding class waiver in arbitration agreement with employer was invalid under the NLRA and *Morris v. Ernst & Young*, and that the arbitration agreement was unenforceable under the FAA based on *Stolt-Nielsen* because the parties did not contract to pursue class claims in arbitration).[10]

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[7] The Supreme Court granted certiorari of *Morris* on January 13, 2017. This Court, however, is bound by the Ninth Circuit's decision in *Morris* until it is expressly overruled by the Ninth Circuit *en banc*, by the Supreme Court, or subsequent legislation. *United States v. Maxey*, 989 F.2d 303, 305 (9th Cir. 1993).

[8] *See Echevarria v. Aerotek, Inc.*, 2017 WL 24877, at *3 (N.D. Cal. Jan. 3, 2017) (class action waiver in arbitration agreement unenforceable under *Morris*); *Bui v. Northrop Grumman Sys. Corp.*, 2016 WL 7178921, at *4 (S.D. Cal. Dec. 9, 2016) (same); *Whitworth v. Solarcity Corp.*, 2016 WL 6778662, at *1 (N.D. Cal. Nov. 16, 2016) (same); *Cashon v. Kindred Healthcare Operating, Inc.*, 2016 WL 6611031, at *2 (N.D. Cal. Nov. 9, 2016) (same); *Mackall v. Healthsource Glob. Staffing, Inc.*, 2016 WL 6462089, at *1 (N.D. Cal. Nov. 1, 2016) (same); *Gonzalez v. Ceva Logistics U.S., Inc.*, 2016 WL 6427866, at *8 (N.D. Cal. Oct. 31, 2016) (same).

[9] The Court also finds the Waiver is not severable from the remainder of the Arbitration Agreement. Severing the Waiver and requiring Plaintiff to arbitrate his individual claims would effectively preclude Plaintiff from pursuing class, collective and representative claims, and thereby violate the NLRA. *See Echevarria*, 2017 WL 24877, at *3; *Whitworth*, 2016 WL 6778662, at *4; *Gonzalez*, 2016 WL 6427866, at *7.

[10] The Court also finds the representative waiver in the Arbitration Agreement is unenforceable. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th

## IV. CONCLUSION

Accordingly, the Court **DENIES** Chase's Motion to Compel Arbitration.[11]

**IT IS SO ORDERED.**

DATED: January 26, 2017.

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

Cir.2015); *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (Cal. 2014).

[11] Having denied Chase's Motion to Compel Arbitration, the Court also denies Chase's request to dismiss this action and stay proceedings pending arbitration.