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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ANH BUI, individually and on behalf  
of all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NORTHROP GRUMMAN SYSTEMS  
CORP., a Delaware Corporation,  
  
Defendant.

CASE NO. 15cv1397-WQH-WVG  
ORDER

HAYES, Judge:

The matter before the Court is the Motion for Reconsideration filed by Plaintiff Anh Bui. (ECF No. 32).

**I. Background**

On April 14, 2015, Plaintiff Anh Bui commenced this action by filing the Class Action Complaint in San Diego County Superior Court. (ECF No. 1-3 at 6). On May 21, 2015, Plaintiff filed the First Amended Class Action Complaint (“FAC”), which is the operative complaint in this case. (ECF Nos. 1 at 2; 1-3 at 30). The FAC asserts: (1) four state-law wage and hour claims arising from Plaintiff’s employment with Defendant, (2) a claim for violation of California Business & Professions Code section 17200, *et seq.*, and (3) a claim for violation of California’s Private Attorneys’ General Act of 2004 (“PAGA”), seeking civil penalties for Defendant’s alleged wage and hour violations. (ECF No. 1 at 3). On June 25, 2015, Defendant Northrop Grumman Systems Corp. removed the action to the Court pursuant to the Class Action Fairness

1 Act (“CAFA”), 28 U.S.C. §§ 1332, 1441, 1446, and 1453. *Id.* at 2.

2 On July 2, 2015, Defendant filed a Motion to Compel Bilateral Arbitration and  
3 Stay Proceedings, or Alternatively, To Dismiss Under Rule 12(b)(3). (ECF No. 3). In  
4 the motion, Defendant stated that the Arbitration Agreement “provides for an express  
5 waiver of class-wide arbitration in favor of bilateral arbitration.” (ECF No. 3-1 at 8).  
6 Defendant stated,

7 because Plaintiff failed to file her claims in the proper arbitration venue,  
8 her claims should be dismissed with prejudice pursuant to Rule 12(b)(3)  
9 with directions that Plaintiff must pursue bilateral non-class arbitration of  
her claims as required by the express terms of the Arbitration Agreement  
to the extent she chooses to pursue such claims at all.

10 *Id.* at 15. On July 20, 2015, Defendant filed a Motion to Transfer Venue. (ECF No. 6).

11 On August 10, 2015, Plaintiff filed a “non-opposition to Defendant’s Motion to  
12 Compel Bilateral Arbitration of Plaintiff’s Individual Claims except for her [PAGA]  
13 Claims.” (ECF No. 11 at 2). In the non-opposition, Plaintiff “agree[d] to dismiss her  
14 putative class and putative class claims without prejudice and submit her individual  
15 claims to arbitration.” *Id.*

16 On September 18, 2015, the Court heard oral argument on the Motion to Compel  
17 Bilateral Arbitration and Stay Proceedings, or Alternatively, To Dismiss Under Rule  
18 12(b)(3). (ECF No. 14). On October 19, 2015, Defendant filed a Motion to Stay. (ECF  
19 No. 15).

20 On December 10, 2015, the Court issued an Order denying Defendant’s Motion  
21 to Transfer Venue, denying Defendant’s Motion to Stay, and granting Defendant’s  
22 Motion to Compel Bilateral Arbitration and Stay Proceedings. (ECF No. 20 at 15-16).

23 The Court

24 ordered that, pursuant to Plaintiff’s request, Plaintiff’s first through fifth  
25 putative class and class claims are dismissed without prejudice. (ECF No.  
26 11 at 1). It is further ordered that the Motion to Compel Bilateral  
27 Arbitration and Stay Proceedings is granted (ECF No. 3). Pursuant to 9  
U.S.C. § 4, the parties are directed to proceed to arbitration in accordance  
with the terms of the Arbitration Agreement with respect to all of  
Plaintiff’s remaining claims. This litigation is stayed pending the outcome  
of the arbitration.

28 *Id.* at 15. On February 26, 2016, the Court issued an order denying Defendant’s Motion

1 to Certify Interlocutory Appeal to the United States Court of Appeals for the Ninth  
2 Circuit. (ECF No. 28).

3 On September 22, 2016, Plaintiff filed the Motion for Reconsideration of this  
4 Court's December 10, 2015 Order. (ECF No. 32). On October 17, 2016 Defendant  
5 filed a response in opposition. (ECF No. 34). On October 24, 2016, Plaintiff filed a  
6 reply. (ECF No. 35).

## 7 **II. Contentions of the Parties**

8 Following this Court's December 10, 2015 Order, the Court of Appeals decided  
9 *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) on August 22, 2016. (ECF  
10 No. 32 at 4). Plaintiff contends that *Morris* "conclusively establishes that any concerted  
11 action waiver of employment related claims violates the National Labor Relations Act  
12 ("NLRA") . . . and therefore cannot be enforced." (ECF No. 32 at 4). Plaintiff contends  
13 that in its December 10, 2015 Order, this Court referred to the class action waiver in the  
14 Arbitration Agreement to conclude that Plaintiff's PAGA claim fell within the scope  
15 of the Agreement. *Id.* at 6-7. Plaintiff contends that following the *Morris* decision, the  
16 class action waiver in this case is unenforceable as to Plaintiff's class claims and  
17 "Plaintiff must be permitted to collectively pursue all claims, be it in arbitration or in  
18 court." *Id.* at 7.

19 Plaintiff further contends that she did not waive the right to bring her putative  
20 class and class claims when she "filed a partial opposition and partial non-opposition  
21 to the Motion to Compel Bilateral Arbitration (EFC No. 11) whereby [she] agreed to  
22 dismiss her putative class and class claims without prejudice" in August 2015. (ECF  
23 Nos. 32 at 3; 35 at 2-3). Plaintiff contends that it was reasonable to refrain from making  
24 an argument regarding the NLRA in August 2015 because "[b]efore the *Morris*  
25 decision, there was no Ninth Circuit guidance on this issue accepting this argument."  
26 (ECF No. 35 at 3). Plaintiff contends that "the Court should either remove the case  
27 from arbitration and bring it back to court for class action treatment or allow Plaintiff  
28 to pursue class arbitration" if it grants Plaintiff's Motion for Reconsideration. *Id.* at 4-5.

1 Defendant contends that “Plaintiff waived any argument that the parties’  
2 class-action waiver is unenforceable under the NLRA or for any other reason, because  
3 she never argued as much before now.” (ECF No. 34 at 5). Defendant contends that  
4 in 2012, the National Labor Relations Board determined that concerted class action  
5 waivers violate the NLRA – and that this “argument was plainly available to Plaintiff  
6 by August 2015, when she responded to Defendant’s motion to compel arbitration.”  
7 *Id.* at 10 (citing *Morris*, 834 F.3d at 980). Defendant further contends that “*Morris* is  
8 irrelevant to the” Court’s December 10, 2015 Order because the Court “dismissed  
9 Plaintiff’s putative class claims without prejudice ‘pursuant to [Plaintiff’s] request,’ not  
10 the parties’ class-action waiver.” *Id.* at 13 (quoting ECF No. 20 at 15).

### 11 **III. Applicable Law**

12 Local Rule 7.1(i)(2) provides that “[e]xcept as may be allowed under Rule . . . 60  
13 of the Federal Rules of Civil Procedure, any motion or application for reconsideration  
14 must be filed within twenty-eight (28) days after the entry of the ruling, order or  
15 judgment sought to be reconsidered.” Federal Rule of Civil Procedure 60(b) provides  
16 that a

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18 court may relieve a party or its legal representative from a final judgment,  
19 order, or proceeding for the following reasons: (1) mistake, inadvertence,  
20 surprise, or excusable neglect; (2) newly discovered evidence that, with  
21 reasonable diligence, could not have been discovered in time to move for  
22 a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic  
or extrinsic), misrepresentation, or misconduct by an opposing party; (4)  
the judgment is void; (5) the judgment has been satisfied, released or  
discharged; it is based on an earlier judgment that has been reversed or  
vacated; or applying it prospectively is no longer equitable; or (6) any  
other reason that justifies relief.

23 Fed. R. Civ. P. 60(b)(1-6). “A motion under Rule 60(b) must be made within a  
24 reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of  
25 the judgment or order or the date of the proceeding.” Fed. R. Civ. P. 60(c)(1). Under  
26 Rule 60(b), “[w]hat qualifies as a reasonable time depends on the facts of each case[.]”  
27 and “[t]he relevant facts may include the length and circumstances of the delay and the  
28 possibility of prejudice to the opposing party.” *In re Int’l. Fibercom, Inc.*, 503 F.3d

1 933, 945 (9th Cir. 2007) (citations omitted).

2 Under Rule 60(b)(6), a court may reconsider a prior order for “any other reason  
3 that justifies relief” – including whether there has been “an intervening change in the  
4 law[.]” Fed. R. Civ. P. 60(b)(6); *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir.  
5 2009). In *Phelps*, the Court of Appeals identified “that the proper course when  
6 analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to  
7 evaluate the circumstances surrounding the specific motion before the court.” 569 F.3d  
8 at 1133. Courts must make a “case-by-case inquiry” based on balancing “numerous  
9 factors” when deciding whether to grant a Rule 60(b)(6) motion. *Jones v. Ryan*, 733  
10 F.3d 825, 839 (9th Cir. 2013). When considering whether a change in the controlling  
11 law justifies relief under Rule 60(b)(6), the Court of Appeals has found “that a change  
12 in the law will not always provide the truly extraordinary circumstances necessary to  
13 reopen a case[.]” and “that something more than a ‘mere’ change in the law is  
14 necessary.” *Phelps*, 569 F.3d at 1133 (citation omitted).

15 When making this determination, courts should consider six factors: (1) the  
16 change in the law; (2) “the petitioner’s exercise of diligence in pursuing his claim for  
17 relief[;]” (3) whether reopening the case would upset “the parties’ reliance interest in  
18 the finality of the case[;]” (4) the extent of “the delay between the finality of the  
19 judgment and the motion for Rule 60(b)(6) relief[;]” (5) the relative “closeness of the  
20 relationship between the decision resulting in the original judgment and the subsequent  
21 decision that represents a change in the law[;]” and (6) concerns of comity. *Jones*, 733  
22 F.3d at 839-40 (citing *Phelps*, 569 F.3d at 1135-39). These “factors . . . are designed  
23 to guide courts in determining whether such extraordinary circumstances have been  
24 demonstrated by an individual seeking relief under” Rule 60(b)(6). *Phelps*, 569 F.3d  
25 at 1135.

#### 26 **IV. Discussion**

27 Motions made under Rule 60(b)(4-6) need only “be made within a reasonable  
28

1 time . . . after the entry of the judgment or order[.]” Fed. R. Civ. P. 60(c).<sup>1</sup> In this case,  
2 approximately nine months passed between this Court’s December 10, 2015 Order and  
3 the date Plaintiff filed the Motion for Reconsideration. The Court of Appeals has held  
4 that “[w]hat constitutes a reasonable time” under Rule 60(b)(6) “depends on the facts  
5 of each case.” *In re Pac. Far East Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989)  
6 (citation omitted). The Court of Appeals has found delays ranging from two to six  
7 years to be reasonable under Rule 60(b). *In re Int’l. Fibercom, Inc.*, 503 F.3d at 945  
8 (citing cases). “Major considerations” include “whether the [nonmoving party] was  
9 prejudiced by the delay and whether the [moving party] had a good reason for failing  
10 to take action sooner.” *In re Pac.*, 889 F.2d at 249. After a review of the circumstances  
11 in this case, the Court finds that Plaintiff’s motion is brought within a “reasonable time”  
12 after the Court’s December 10, 2015 Order.

13 In the December 10, 2015 Order, this Court considered Defendant’s Arbitration  
14 Agreement which applied to Plaintiff through her employment with Defendant. (ECF  
15 No. 20 at 8-9). The Arbitration Agreement provided, in relevant part,

16 Both you and the Company agree to submit all claims covered by this  
17 Program to binding arbitration, rather than to have such claims heard by  
18 a court or jury.

18 . . .

19 [T]his Program covers and applies to any claim, controversy, or dispute,  
20 past, present, or future:

- 21 • Which in any way arises out of, relates to, or is associated with your  
22 employment with the Company, the termination of your employment, or  
23 any communications with third parties regarding or related to your  
employment; and
- As to which a court would be authorized by law to grant relief if the  
claim were successful.

24 (ECF No. 3-5 at 66). The Arbitration Agreement listed examples of covered claims  
25 including, but not limited to, claims for “[w]ages or other compensation due” and for  
26 “[a]ny violation of applicable federal, state, or local law, statute, ordinance, or

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27  
28 <sup>1</sup> The Court analyzes Plaintiff’s Motion for Reconsideration under Rule 60, and  
not Local Rule 7.2(i)(1), because Plaintiff’s Motion was not “filed within twenty-eight  
(28) days after the entry of” this Court’s December 10, 2015 Order. L.R. 7.1(i)(2).

1 regulation.” *Id.* at 67.

2 Under the heading “Class Action Claims[,]” the Arbitration Agreement provided,  
3 in relevant part,

4 both you and the Company waive the right to bring any covered claim  
5 under this Program as a class action . . . [T]he arbitrator will not have  
6 authority or jurisdiction to consolidate claims of different employees into  
one proceeding, nor shall the arbitrator have authority or jurisdiction to  
hear the arbitration as a class action.

7 *Id.* at 74. Referring to the “Class Action Claims” section of the Agreement, the Court  
8 found that “[t]he Arbitration Agreement contains an express class action waiver[.]”  
9 (ECF No. 20 at 9, 12). The Court ordered that pursuant to section 4 of the FAA, “the  
10 parties are directed to proceed to arbitration in accordance with the terms of the  
11 Arbitration Agreement with respect to all of Plaintiff’s remaining claims.” *Id.* at 15.

12 In *Morris*, the Court of Appeals held that “[c]oncerted activity—the right of  
13 employees to act together—is the essential, substantive right established by the NLRA.”  
14 834 F.3d at 980. The Court of Appeals held that “[t]he FAA does not mandate the  
15 enforcement of contract terms that waive substantive federal rights[,]” and that “[t]he  
16 rights established in § 7 of the NLRA—including the right of employees to pursue legal  
17 claims together—are substantive.” *Id.* at 986. The Court of Appeals found that the  
18 defendant’s arbitration agreement, which required “its employees to resolve all of their  
19 legal claims in ‘separate proceedings’ . . . violate[d] the NLRA and cannot be enforced.”  
20 *Id.* at 980.

21 In this case, the “Class Action Claims” section of the Arbitration Agreement  
22 covering Plaintiff’s employment with Defendant waived Plaintiff’s “right to bring any  
23 covered claim under this Program as a class action.” (ECF No. 3-5 at 74). A “separate  
24 proceedings” clause – the type ruled unenforceable in *Morris*, “prevents the initiation of  
25 any concerted work-related legal claim, in any forum.” *Morris*, 834 F.3d at 982. The  
26 “Class Action Claims” section of the Arbitration Agreement in this case is similarly  
27 restrictive of Plaintiff’s ability to bring a concerted action against Defendant.  
28 Defendant does not assert that the “Class Action Claims” section is enforceable against

1 Plaintiff in light of *Morris*.

2 The Court does not find that Plaintiff waived her right to pursue her claims on a  
3 class-wide basis at this stage of the litigation by “agree[ing] to dismiss her putative class  
4 and putative class claims without prejudice and submit her individual claims to  
5 arbitration.” (ECF No. 11 at 2). In *Morris*, the Court of Appeals “recognize[d] that our  
6 sister Circuits are divided on this question” and found that the Court of Appeals for the  
7 Seventh Circuit was “the only one that ‘has engaged substantively with the relevant  
8 arguments’” before *Morris* was decided. *Morris*, 834 F.3d at 990 n.16 (citing *Lewis v.*  
9 *Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016)). See also Order Granting Motion  
10 for Reconsideration at 6, *Holly Attia, et al. v. The Neiman Marcus Group, Inc., et al.*,  
11 No. SA CV 16-0504-DOC (C.D. Cal. Oct. 18, 2016), ECF No. 25 (finding that “before  
12 the *Morris* decision there was no clear Ninth Circuit guidance on this issue. Therefore,  
13 the Court finds that it would not have been reasonable to raise this argument sooner in  
14 the litigation.”).

15 After a review of the six factors relating to a Rule 60(b) motion for  
16 reconsideration, the Court finds that the decision of the Court of Appeals in *Morris*  
17 warrants reconsideration of this Court’s December 10, 2015 Order and that Plaintiff is  
18 entitled to relief under Federal Rule of Civil Procedure 60(b)(6). *Phelps*, 569 F.3d at  
19 1140. Specifically, “the close relationship between the underlying decision and the now  
20 controlling [Court of Appeals] precedent[,]” the similarity between the arbitration  
21 clauses in *Morris* and in this case, and the Court’s continuing jurisdiction over this  
22 action support granting Plaintiff’s Motion for Reconsideration. *Id.*


## 23 **V. Conclusion**

24 IT IS HEREBY ORDERED that the Motion for Reconsideration (ECF No. 32)  
25 is GRANTED. Pursuant to Plaintiff’s request in the Motion for Reconsideration (ECF  
26 No. 32 at 7), the Court vacates the part of its December 10, 2015 Order stating “that,  
27 pursuant to Plaintiff’s request, Plaintiff’s first through fifth putative class and class  
28 claims are dismissed without prejudice.” (ECF No. 20 at 15). The Court orders the



1 parties to submit a status report within **thirty (30) days** from the date of this Order as  
2 to how they intend to proceed on Plaintiff's first through fifth putative class and class  
3 claims. The Clerk of the Court is ordered to reopen this case.

4 DATED: December 9, 2016

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6 **WILLIAM Q. HAYES**  
7 United States District Judge

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