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

FLORA ARMENTA, individually and
on behalf of others similarly situated,

Plaintiff,

v.

STAFFWORKS, LLC,

Defendant.

Case No. 17-cv-00011-BAS-NLS

**ORDER DENYING
DEFENDANT’S MOTION TO
COMPEL ARBITRATION,
STRIKE CLASS CLAIMS, AND
STAY LITIGATION**

[ECF No. 6]

Presently before the Court is Defendant Staffworks, LLC’s motion to compel Plaintiff Flora Armenta’s individual claims to arbitration, strike her class claims, and stay the case pending the outcome of arbitration. (ECF No. 6.) Plaintiff opposes. (ECF No. 9.)

The Court finds this motion suitable for determination on the papers submitted and without oral argument. See Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the following reasons, the Court **DENIES** Defendant’s motion to compel arbitration, strike class claims, and stay litigation.

1 **I. BACKGROUND**

2 Plaintiff Flora Armenta sought job placement through Defendant Staffworks,
3 LLC—a staffing agency that places applicants with various client companies.
4 (Milana-Slater Decl. ¶¶ 3, 6, ECF No. 6-2.) Prior to being assigned to work for a client
5 company, applicants visit Defendant’s office to fill out initial paperwork and
6 participate in a brief interview to determine the applicant’s skillset and desired
7 employment. (Id. ¶¶ 3–4.)

8 When Plaintiff visited Defendant’s office, she received and signed a one-page
9 Mandatory Arbitration Agreement (“Agreement”). (Milana-Slater Decl. ¶ 7, Ex. A.)
10 The Agreement states, in pertinent part:

11 **MANDATORY ARBITRATION AGREEMENT**

12 In connection with my employment at StaffWorks, LLC
13 (“STAFFWORKS”), . . . I agree that any dispute or controversy which
14 would otherwise require or allow [or] resort to any court or other
15 governmental dispute resolution forum, between myself and
16 STAFFWORKS (or its owners, partners, directors, officers, employees
17 and parties affiliated with its employee benefit and health plans)
18 arising from, related to, or having relationship or connection
19 whatsoever with my seeking employment with, employment by, or
20 other association with STAFFWORKS, whether based on tort,
21 contract, statutory, or equitable law, or otherwise, (including claims for
discrimination under the Fair Employment Housing Act) shall be
submitted to and determined by binding arbitration in conformity with
the procedures of the California Arbitration Act

22 (Id.)

23 Plaintiff later commenced this putative class and collective action against
24 Defendant under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq., and
25 California labor law. (Compl. ¶¶ 56–92, ECF No. 1.) At the heart of Plaintiff’s claims
26 is the allegation that Defendant failed to pay Plaintiff and those similarly situated,
27 resulting in the underpayment of wages in violation of the FLSA and California labor
28 law. (Id. ¶ 5.) Based on the Agreement, Defendant now moves to compel arbitration

1 of Plaintiff's individual claims, strike her class claims, and stay this action pending
2 the outcome of arbitration. (ECF No. 6.)

3
4 **II. LEGAL STANDARD**

5 The Federal Arbitration Act ("FAA") applies to disputes involving contracts
6 that touch upon interstate commerce or maritime law. 9 U.S.C. § 1; see also Circuit
7 City Stores, Inc. v. Adams, 532 U.S. 105, 109, 119 (2001); Yahoo! Inc. v. Iversen, 836
8 F. Supp. 2d 1007, 1009 (N.D. Cal. 2011). It reflects a "national policy favoring
9 arbitration," Preston v. Ferrer, 552 U.S. 346, 349 (2008), and emphasizes that valid
10 arbitration agreements must be "rigorously enforce[d]" according to their terms, Am.
11 Exp. Co. v. Italian Colors Rest., 570 U.S. ---, 133 S. Ct. 2304, 2309 (2013).

12 Thus, the FAA commands that written arbitration agreements "shall be valid,
13 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for
14 the revocation of any contract." 9 U.S.C. § 2. The second clause, known as the FAA's
15 "savings clause," permits arbitration agreements to be invalidated by "generally
16 applicable contract defenses, such as fraud, duress, or unconscionability." AT&T
17 Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assoc., Inc.*
18 *v. Casarotto*, 517 U.S. 681, 687 (1996)); see also *Mortensen v. Bresnan Commc'ns,*
19 *LLC*, 722 F.3d 1151, 1158 (9th Cir. 2013).

20 The court's role under the FAA is limited to determining (1) whether a valid
21 arbitration agreement exists and, if so, (2) whether the scope of the agreement
22 encompasses the dispute at issue. See *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
23 207 F.3d 1126, 1130 (9th Cir. 2000). "If a party seeking arbitration establishes these
24 two factors, the court must compel arbitration." *Farrow v. Fujitsu Am., Inc.*, 37 F.
25 Supp. 3d 1115, 1119 (N.D. Cal. 2014) (citing *Chiron Corp.*, 207 F.3d at 1130); see
26 also 9 U.S.C. § 4 ("[U]pon being satisfied that the making of the agreement for
27 arbitration or the failure to comply therewith is not in issue, the court shall make an
28

1 order directing the parties to proceed to arbitration in accordance with the terms of
2 the agreement.”).

3 4 **III. ANALYSIS**

5 **A. Under the National Labor Relations Act, Agreements That Prevent** 6 **Employees from Engaging in Concerted Activity Are Illegal.**

7 In its motion to compel arbitration, Defendant argues the Agreement is
8 enforceable and this Court should not only compel Plaintiff’s individual claims to
9 arbitration, but also strike her class allegations. (Mot. 3:14–12:21.) Plaintiff opposes,
10 asserting that the Agreement is unenforceable under *Morris v. Ernst & Young, LLP*,
11 834 F.3d 975, 979, 984–85 (9th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017).
12 (Opp’n 2:13–28.)

13 In *Morris v. Ernst & Young*, the Ninth Circuit considered whether an employer
14 violates the National Labor Relations Act (“NLRA”) by requiring employees to sign
15 an agreement containing a concerted action waiver. 834 F.3d at 979. “This ‘concerted
16 action waiver’ required employees to (1) pursue legal claims against Ernst & Young
17 exclusively through arbitration and (2) arbitrate only as individuals and in ‘separate
18 proceedings.’” *Id.* Consequently, “employees could not initiate concerted legal claims
19 against the company in any forum—in court, in arbitration proceedings, or
20 elsewhere.” *Id.*

21 To determine whether the concerted action waiver was enforceable, the Ninth
22 Circuit examined the NLRA’s provisions regarding concerted activity. *Morris*, 834
23 F.3d at 981. Section 7 of the NLRA provides that “[e]mployees shall have the right to
24 self-organization, to form, join, or assist labor organizations, to bargain collectively
25 through representatives of their own choosing, and to engage in other concerted
26 activities for the purpose of collective bargaining or other mutual aid or protection.”
27 29 U.S.C. § 157. This “right of employees to act together”—concerted activity—“is
28 the essential, substantive right established by the NLRA.” *Morris*, 834 F.3d at 979

1 (emphasis omitted); see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–66 (1978)
2 (discussing Section 7). Further, under Section 8 of the NLRA, “[i]t shall be an unfair
3 labor practice for an employer . . . to interfere with, restrain, or coerce employees in
4 the exercise of” this right. See 29 U.S.C. § 158. “Section 8 has long been held to
5 prevent employers from circumventing the NLRA’s protection for concerted activity
6 by requiring employees to agree to individual activity in its place.” *Morris*, 834 F.3d
7 at 983 (emphasis omitted).

8 In applying these two sections, the Ninth Circuit reasoned that a labor-related
9 civil action—such as the class and collective action before it—is concerted activity
10 under Section 7 of the NLRA. *Morris*, 834 F.3d at 981–82. But the “separate
11 proceedings” clause in Ernst & Young’s arbitration agreement prevented “concerted
12 activity by employees in arbitration proceedings, and the requirement that employees
13 only use arbitration prevent[ed] the initiation of concerted legal action anywhere
14 else.” *Id.* at 984. Therefore, the separate proceedings clause interfered with concerted
15 activity in violation of Section 8 of the NLRA, and it could not be enforced. *Id.*

16 Thus, the Ninth Circuit held that an NLRA violation arises, regardless of the
17 forum, “so long as the exclusive forum provision is coupled with a restriction on
18 concerted activity in that forum.” *Morris*, 834 F.3d at 989. In other words, given that
19 employees have the right to pursue employment claims collectively, an agreement
20 violates the NLRA when employees are (1) limited to pursuing claims in only one
21 forum and (2) prevented from acting in concert in that forum. See *id.* at 983–84.

22 In this case, the Mandatory Arbitration Agreement limits Plaintiff to pursuing
23 employment claims in only one forum: arbitration. The Court must therefore
24 determine whether the Agreement also prevents Plaintiff from acting in concert with
25 other employees in that forum, i.e., participating in class arbitration. See *Morris*, 834
26 F.3d at 983–84.

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1 **B. The Agreement Does Not Permit Class Arbitration.**

2 **1. This Court, Not the Arbitrator, Decides Whether Class**
3 **Arbitration Is Permitted.**

4 Before analyzing whether the Agreement allows employees to act in concert in
5 arbitration, the Court must consider whether the parties have delegated this
6 determination to the arbitrator. Although federal policy favors arbitration agreements,
7 the Supreme Court “has made clear that there is an exception to this policy: The
8 question [of] whether the parties have submitted a particular dispute to
9 arbitration, i.e., the ‘question of arbitrability,’ is ‘an issue for judicial determination
10 [u]nless the parties clearly and unmistakably provide otherwise.’” *Howsam v. Dean*
11 *Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (emphasis omitted) (quoting *AT&T*
12 *Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986)); accord *Momot v.*
13 *Mastro*, 652 F.3d 982, 988 (9th Cir. 2011). “Clear and unmistakable evidence of an
14 agreement to arbitrate arbitrability ‘might include . . . a course of conduct
15 demonstrating assent . . . or . . . an express agreement to do so.’” *Mohamed v. Uber*
16 *Techs., Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) (quoting *Momot*, 652 F.3d at 988).

17 For example, in *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1009 (N.D. Cal.
18 2011), the parties’ arbitration agreement incorporated the rules of the American
19 Arbitration Association (“AAA”). These rules included the AAA Supplementary
20 Rules for Class Arbitration, which provide that the arbitrator will decide “whether the
21 applicable arbitration clause permits the arbitration to proceed on behalf of or against
22 a class.” *Id.* at 1010–12. Thus, the court found that the parties clearly and
23 unmistakably delegated to the arbitrator the issue of whether class arbitration is
24 available by incorporating the rules of the AAA into the arbitration agreement. *Id.* at
25 1012; see also *Accentcare, Inc. v. Jacobs*, No. 15-03668-JSW, 2015 WL 6847909, at
26 *4 (N.D. Cal. Nov. 9, 2015) (finding that “the question of arbitrability may be, and
27 was, delegated to the arbitrator by the incorporation of the AAA rules”); accord *Levy*
28

1 v. Lytx, Inc., No. 16-cv-03090-BAS(BGS), 2017 WL 2797113, at *6 (S.D. Cal. June
2 28, 2017).

3 Here, there is no evidence that the parties have “clearly and unmistakably”
4 delegated to the arbitrator the question of arbitrability of class claims. See Momot,
5 652 F.3d at 988. Unlike the arbitration clause in Yahoo!—and as Defendant notes in
6 its motion to compel arbitration—the Agreement “contains no specific language
7 delegating any threshold question of arbitrability to the arbitrator, nor does it contain
8 a reference to any arbitration rules which do so.” (Mot. 11:16–17.)¹ There is also no
9 indication that the parties’ course of conduct demonstrates their assent to arbitrate
10 whether class arbitration is permitted. Therefore, this Court finds no clear and
11 unmistakable evidence that the parties intended the arbitrator to decide whether the
12 agreement permits class arbitration.² Accordingly, the Court will make this
13 determination.

14 15 **2. There Is No Contractual Basis for Class Arbitration.**

16 Although the FAA evinces a strong presumption in favor of arbitration, the Act
17 “does not confer a right to compel arbitration of any dispute at any time.” Volt Info.
18 Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).
19 The FAA imposes a basic precept that arbitration “is a matter of consent, not
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21 ¹ The Agreement does provide that any dispute “shall be submitted to and determined by
22 binding arbitration in conformity with the procedures of the California Arbitration Act.” (Milana-
23 Slater Decl. Ex. A.) “While the parties have agreed to arbitrate in conformity with the procedures
24 of the California Arbitration Act, and while parties may elect to follow state procedures in lieu of
25 the FAA’s procedures, the procedures the California Arbitration Act spells out do not specifically
26 address the question of class arbitration availability.” See Sandquist v. Lebo Auto., Inc., 1 Cal. 5th
27 233, 250 (2016) (internal quotation marks and citations omitted).

28 ² Another exception to the judicial determination of arbitrability arises when a contract
contains an arbitration clause and the plaintiff challenges the validity of the contract as a whole, as
opposed to arguing specifically the arbitration clause is unenforceable. Bridge Fund Capital Corp.
v. Fastbucks Franchise Corp., 622 F.3d 996, 1000 (9th Cir. 2010). This exception is inapplicable
because Plaintiff is specifically challenging an arbitration provision, as opposed to challenging the
validity of a broader agreement that also contains an arbitration provision—such as an employment
agreement. See *id.* at 1000–01.

1 coercion.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)
2 (quoting *Volt Info. Scis.*, 489 U.S. at 479); see also *Yahoo! Inc.*, 836 F. Supp. 2d at
3 1009 (“Arbitration is a matter of contract, and the FAA places arbitration agreements
4 ‘on an equal footing with other contracts.’” (quoting *Rent-A-Ctr., W., Inc. v. Jackson*,
5 561 U.S. 63, 67 (2010))).

6 Accordingly, when deciding whether to enforce arbitration agreements, courts
7 and arbitrators must “give effect to the contractual rights and expectations of the
8 parties.” *Volt Info. Scis.*, 489 U.S. at 479. “[I]t follows that a party may not be
9 compelled under the FAA to submit to class arbitration unless there is a contractual
10 basis for concluding that the party agreed to do so.” *Stolt-Nielsen*, 559 U.S. at 684
11 (emphasis in original); see also *Oxford Health Plans LLC v. Sutter*, 569 U.S. ---, 133
12 S.Ct. 2064, 2066 (2013) (“An arbitrator may employ class procedures only if the
13 parties have authorized them.”). Thus, if the “arbitration agreement is silent as to
14 whether class arbitration is permitted, it should not be presumed that the parties agreed
15 to submit to class arbitration.” *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d
16 1298, 1302 (N.D. Cal. 2013) (finding that the arbitration agreement did not provide
17 for class arbitration when there was no evidence that the parties intended to include
18 class arbitration in the terms of their agreement), order vacated on other grounds on
19 reconsideration at 2014 WL 12611301 (N.D. Cal. Nov. 7, 2014).

20 For instance, in *Stolt-Nielsen*, the parties “stipulated that the arbitration clause
21 was ‘silent’ with respect to class arbitration.” 559 U.S. at 668. “[T]he term ‘silent’ did
22 not simply mean that the clause made no express reference to class arbitration,” but
23 rather that “there’s been no agreement that has been reached on that issue.” *Id.* at 668–
24 69. Thus, because the parties stipulated there was no contractual basis for authorizing
25 class arbitration, the Supreme Court held they could not “be compelled to submit their
26 dispute to class arbitration.” *Id.* at 687.

27 The Ninth Circuit reached the same result in *Morris* for a different reason.
28 There, Ernst & Young’s concerted action waiver expressly required employees to

1 “arbitrate only as individuals and in ‘separate proceedings.’” *Morris*, 834 F.3d at 979.
2 Consequently, there was not a contractual basis for concluding the parties agreed to
3 permit class arbitration, but rather the opposite—they affirmatively agreed to forbid
4 class arbitration. See *id.* at 979, 989.

5 The Mandatory Arbitration Agreement signed by Plaintiff makes no reference
6 to class proceedings. There is no “separate proceedings” clause like that encountered
7 in *Morris*. But at the same time, unlike *Stolt-Nielsen*, the parties have not stipulated
8 the agreement is “silent”—as that term is used in *Stolt-Nielsen*—on whether class
9 arbitration is available.

10 The result is still the same. There is no “contractual basis” for concluding the
11 parties agreed to permit class arbitration. See *Stolt-Nielsen*, 599 U.S. at 684. In
12 addition to the Agreement not mentioning class proceedings, neither party submits
13 evidence that the parties expected or intended class arbitration to be authorized. If
14 anything, the language in the Agreement suggests a presumption of individual
15 arbitration. It identifies that “any dispute or controversy which would otherwise
16 require or allow [or] resort to any court or other governmental dispute resolution
17 forum, between myself and STAFFWORKS . . . shall be submitted to and determined
18 by binding arbitration.” (Milana-Slater Decl. ¶ 7, Ex. A (emphasis added).)
19 Accordingly, the Court finds class arbitration is not available because there is no
20 contractual basis for concluding the parties agreed to authorize it. See *Stolt-Nielsen*,
21 599 U.S. at 684.

22
23 **C. Under the NLRA and *Morris*, the Arbitration Agreement Is Illegal**
24 **and Unenforceable.**

25 The Court’s analysis above brings this case within the scope of the Ninth
26 Circuit’s decision in *Morris*. The Mandatory Arbitration Agreement (1) limits
27 Plaintiff to pursuing claims only in arbitration and (2) does not allow her to act in
28 concert in that forum because the Agreement does not permit class arbitration.

1 Nonetheless, Defendant advances several arguments for why it believes this case is
2 distinguishable from *Morris*, all of which the Court finds unconvincing.

3 Initially, Defendant argues that the holding in *Morris* is limited to instances
4 where employers attempt to circumvent the NLRA via an express concerted action
5 waiver. (Reply 1:27–2:3.) Then, in attempting to distinguish this case, Defendant
6 states: “Without putting too fine a point on it, [Defendant] is not seeking the
7 enforcement of a concerted action waiver, because no such waiver exists here.
8 [Defendant] is simply asking the Court to enforce the parties’ agreement and require
9 [Plaintiff] to arbitrate her claims.” (Id. 2:12–15.) This is a hollow distinction.
10 Defendant is seeking to not only compel arbitration, but also strike Plaintiff’s class
11 claims. Thus, even if the Agreement does not contain an express concerted action
12 waiver, Defendant is seeking to obtain the same result that was forbidden in *Morris*—
13 an order (1) limiting Plaintiff to arbitration and (2) precluding her from engaging in
14 concerted activity in arbitration. See 834 F.3d at 979, 983–84. In other words,
15 Defendant’s motion is an unlawful attempt to circumvent the NLRA.

16 The National Labor Relations Board’s decisions are in accord.³ It “has
17 repeatedly held that a mandatory arbitration agreement is unlawful if, despite its
18 silence regarding class or collective actions, the employer has used the agreement to
19 preclude employees from pursuing class or collective employment related claims in
20 any forum.” *Select Temps., LLC*, 31-CA-157821, 2016 WL 4772318 (N.L.R.B. Div.
21 of Judges Sept. 13, 2016). For example, in *Countrywide Financial Corp.*, 362
22 N.L.R.B. No. 165 (Aug. 14, 2015), the Board found that by filing a motion to compel
23 individual arbitration, the respondents effectively applied an illegal construction of
24 the arbitration agreement that required the employees to resolve all employment
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26
27 ³ When examining the NLRA’s provisions, the “Board’s reasonable interpretations of the
28 NLRA command deference.” *Morris*, 834 F.3d at 981; see also *N.L.R.B. v. City Disposal Sys. Inc.*,
465 U.S. 822, 829 (1984) (“[T]he task of defining the scope of § 7 ‘is for the Board to perform in
the first instance as it considers the wide variety of cases that come before it.’” (quoting *Eastex*, 437
U.S. at 568)).

1 claims through individual arbitration. “By taking steps to enforce the Agreement in
2 Federal district court when the employees filed their collective claims . . . the
3 respondents maintained and enforced the Agreement in violation of Section 8(a)(1).”
4 Countrywide Fin. Corp., 362 N.L.R.B. No. 165, at *6; see also D. R. Horton, Inc.,
5 357 N.L.R.B. 2277, 2288 (2012) (“[E]mployers may not compel employees to waive
6 their NLRA right to collectively pursue litigation of employment claims in all forums,
7 arbitral and judicial.”); c.f. *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. No. 75
8 (Nov. 19, 2004) (acknowledging that a workplace rule that does not explicitly restrict
9 protected activity can be unlawful if the rule is applied to restrict the exercise of
10 Section 7 rights).

11 Similarly here, by moving to compel individual arbitration and strike Plaintiff’s
12 class claims, Defendant is seeking to enforce a construction of the Agreement that
13 violates Section 8 of the NLRA. Denying Plaintiff the opportunity to pursue her class
14 claims would implicate the antithesis of Section 7’s substantive right to pursue
15 concerted work-related legal claims. Thus, the Agreement as sought to be enforced is
16 illegal under Section 8 for the same reasons articulated in *Morris* and the Board’s
17 decisions discussed above. Accordingly, the Court is unpersuaded by Defendant’s
18 initial argument that the outcome in this case should be different than *Morris* simply
19 because the Agreement does not contain an express concerted action waiver.

20 In addition, Defendant cites to *Stolt-Nielson* and *Johnmohomadi v.*
21 *Bloomington’s, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014), to argue that Plaintiff
22 could waive her right to engage in concerted activity. (Reply 2:4–8.) But both these
23 cases are distinguishable. *Stolt-Nielson* involved an arbitration agreement in the
24 context of an antitrust suit alleging owners of international parcel tankers engaged in
25 price fixing. 559 U.S. at 667. The case therefore did not implicate employees’ right
26 under the NLRA to engage in concerted activity—the lynchpin of this case and
27 *Morris*.

28

1 As for Johnmohommadi, that decision analyzed an arbitration agreement that
2 was voluntary. 755 F.3d at 1077. The Ninth Circuit noted that the plaintiff “had the
3 right to opt out of the arbitration agreement, and had she done so she would be free to
4 pursue this class action in court.” Id. Thus, the court reasoned that the plaintiff,
5 “[h]aving freely elected to arbitrate employment-related disputes on an individual
6 basis, without interference from [the employer],” could not claim the agreement
7 violated the NLRA. Id. The same cannot be said here. Defendant’s policy required
8 Plaintiff to come into its office to complete “the initial paperwork,” including the
9 “**MANDATORY ARBITRATION AGREEMENT.**” (Milana-Slater Decl. ¶¶ 6–7,
10 Ex. A.) Further, nothing in the Agreement indicates Plaintiff had the right to opt out.
11 (See id. Ex. A.) See also *Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966-LHK, 2017
12 WL 1862509, at *4 (N.D. Cal. May 9, 2017) (Koh, J.) (“Neither party has presented
13 any evidence here that Plaintiff was provided an opportunity to opt out of the
14 Arbitration Agreement Nor does the Arbitration Agreement itself contain a
15 procedure for opting out.”). Accordingly, Johnmohommadi is also distinguishable.
16 See *Morris*, 834 F.3d at 982 n.4 (explaining that “there was no § 8 violation in
17 Johnmohammadi . . . because the employee there could have opted out of the
18 individual dispute resolution agreement and chose not to”).

19 Last, Defendant cites to an unpublished Ninth Circuit decision, *Eshagh v.*
20 *Terminix International Co.*, 588 F. App’x 703, 704 (9th Cir. 2014), to support its
21 belief that this Court can strike Plaintiff’s class claims and compel individual
22 arbitration. (Reply 2:16–20.) The Court is again unconvinced. *Eshagh* is not binding
23 precedent on this Court. See 9th Cir. R. 36-3. Moreover, *Eshagh* predates the decision
24 in *Morris* and does not discuss Section 7 or Section 8 of the NLRA. *Morris*, 834 F.3d
25 at 982–83.

26 Accordingly, Plaintiff’s action falls within the scope of *Morris*, and the Court
27 finds Defendant’s attempts to distinguish this case unpersuasive. The Agreement is
28 therefore unenforceable. See 29 U.S.C. § 158; *Morris*, 834 F.3d at 990; *Pataky v.*

1 Brigantine, Inc., No. 17-cv-00352-GPC-AGS, 2017 WL 1682681, at *8 (S.D. Cal.
2 May 3, 2017) (Curiel, J.) (denying motion to compel individual arbitration based on
3 Morris); accord Ross v. P.J. Pizza San Diego, LLC., No. 16-cv-02330-L-JMA, 2017
4 WL 1957584, at *2 (S.D. Cal. May 11, 2017) (Lorenz, J.).

5
6 **IV. CONCLUSION & ORDER**

7 In sum, Section 7 of the NLRA affords Plaintiff the right to engage in concerted
8 activity, and Section 8 forbids Defendant from interfering with this right. Based on
9 Morris, an employer violates Section 8 when it limits employees to pursuing
10 employment claims in one forum and precludes them from acting in concert in that
11 forum. Although there is no express concerted action waiver in the Agreement,
12 Defendant's attempt to compel arbitration and strike class claims is an attempt to limit
13 Plaintiff to arbitration and prevent her from acting in concert in arbitration. To do so
14 would violate her Section 7 rights. Because Defendant is seeking to enforce the
15 Agreement in violation of Section 8, this Court finds the Agreement to be illegal and
16 unenforceable.

17 In light of the foregoing, the Court **DENIES** Defendant's motion to compel
18 arbitration, strike class claims, and stay litigation (ECF No. 6).

19 **IT IS SO ORDERED.**

20
21 **DATED: July 21, 2017**


22 **Hon. Cynthia Bashant**
23 **United States District Judge**