

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 MIGUEL RODRIGUEZ,  
12 Plaintiff,  
13 v.  
14 JEROME'S FURNITURE  
15 WAREHOUSE,  
16 Defendant.

Case No.: 3:17-cv-00460-L-NLS

**ORDER (1) DENYING MOTION TO  
COMPEL ARBITRATION; (2)  
DENYING MOTION TO DISMISS;  
AND (3) GRANTING MOTION TO  
STAY**

17  
18 Pending before the Court is Defendant Jerome Furniture Warehouse's  
19 ("Defendant") motion [Doc. 14] to compel Plaintiff Miguel Rodriguez ("Plaintiff") to  
20 submit his claims to arbitration, dismiss the complaint for refiling in state court, or stay  
21 litigation pending a forthcoming Supreme Court decision. The Court decides the matter  
22 on the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the  
23 reasons stated below, the Court **DENIES** Defendant's motions to compel and dismiss and  
24 **GRANTS** Defendant's motion to stay.

25 //

26 //

27 //

28 //

1 **I. BACKGROUND**

2 Plaintiff served as a non-exempt employee for Defendant from approximately July  
3 25, 2005 until June 2016. During his employment, Plaintiff alleges he often worked  
4 more than eight hours a day and forty hours a week without receiving overtime  
5 compensation. Plaintiff also alleges he was not provided required meal periods and did  
6 not receive compensation for these missed meal periods. Because of these violations,  
7 Plaintiff alleges Defendant failed to provide him properly itemized wage statements or  
8 prompt payment of all wages due upon separation.

9 Plaintiff entered into an Arbitration Agreement [Doc. 12-2 Ex. B]<sup>1</sup> with Defendant  
10 in 2013. The Arbitration Agreement provides that the parties shall submit all disputes  
11 that arise out of the employment context to binding arbitration. (Arbitration Agreement.)  
12 The Arbitration Agreement also contains a Class Action Waiver [Arbitration Agreement  
13 § g] which provides

14 THE COMPANY AND I AGREE THAT EACH OF US MAY BRING  
15 CLAIMS AGAINST THE OTHER ONLY IN OUR INDIVIDUAL  
16 CAPACITIES, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN  
17 ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.

18 (Class Action Waiver.)

19 On September 23, 2016, Plaintiff filed a demand for class wide arbitration with  
20 JAMS.<sup>2</sup> (Demand [Doc. 12-3 Ex. E].) The Demand alleged violations of the California  
21 Labor Code and California’s Unfair Competition Law (the “UCL”), Cal Bus. & Prof.  
22 Code §17200 *et seq*, in the form of failure to pay overtime; failure to provide meal  
23 periods or premium pay; failure to provide accurate wage statements; and failure to  
24 promptly pay owed wages upon separation. (See Demand.) Defendant filed a motion  
25 with the arbitrator objecting to class wide arbitration, instead seeking to compel

26  
27 <sup>1</sup> Plaintiff entered into another arbitration agreement in 2015, however, the full copy of the 2015  
28 agreement is not on file and there is no dispute that the two agreements are substantively identical as  
pertains to the present dispute. (See Mot. 2:22 n.2.)

<sup>2</sup> JAMS is a company that provides arbitration and other alternative dispute resolution services.

1 individual arbitration. (Tesauro Decl. [Doc. 12-3] ¶ 5.) Plaintiff subsequently dismissed  
2 his demand.

3 On December 5, 2016, Plaintiff filed a PAGA, Cal Lab. Code § 2698 *et seq.*, claim  
4 with the California Superior Court, County of San Diego. (Doc. 12-4 Ex. F.) The state  
5 court PAGA claim does not allege failure to pay overtime. (See *Id.*) Otherwise, it  
6 alleges substantially the same claims based on the same conduct as alleged in the  
7 Demand, but on a representative basis. (See *Id.*) Subsequently, on March 7, 2017,  
8 Plaintiff filed a class and collective action Complaint with this Court alleging  
9 substantially the same claims based on the same conduct as alleged in the Demand, but  
10 with the addition of a Fair Labor Standards Act (“FLSA”) claim under 29 U.S.C. § 207.  
11 (Complaint [Doc. 1].) Defendant now moves the Court to either (1) compel arbitration;  
12 (2) dismiss the Complaint for refile in state court; or (3) stay this litigation pending the  
13 Supreme Court’s decision on a Ninth Circuit case that is dispositive of this motion. (Mot.  
14 [Doc. 12].) Plaintiff opposes. (Opp’n [Doc. 13].)

## 15 16 **II. MOTION TO COMPEL ARBITRATION**

17 There is no dispute as to the fact that the Federal Arbitration Act (“FAA”) governs  
18 here. Under the FAA, a Court need consider only two questions to determine whether to  
19 compel arbitration: (1) is there a valid agreement to arbitrate? And, if so, (2) does the  
20 agreement cover the matter in dispute? *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*,  
21 207 F.3d 1126, 1130 (9th Cir. 2000). The Arbitration Agreement clearly covers the  
22 matters in dispute here. Accordingly, the Court need only consider whether the  
23 Arbitration Agreement is valid.

24 An agreement to arbitrate is “valid, irrevocable, and enforceable, save upon such  
25 grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.  
26 Under California law, the elements of a valid contract are (1) parties capable of  
27 contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. Cal. Civ. Code  
28 § 1550. However, a court will not enforce an otherwise valid contract if there exists a

1 viable defense, such as illegality. 1 Witkin, Summary 10th (2005) Contracts, § 331, p.  
2 365.

3 Plaintiff argues that the Arbitration Agreement is illegal, and therefore invalid,  
4 because the Class Action Waiver violates the National Labor Relations Act (“NLRA”).  
5 Section 7 of the NLRA provides that

6 [e]mployees shall have the right to self-organization, to form, join, or assist  
7 labor organizations, to bargain collectively through representatives of their  
8 own choosing, and to engage in other concerted activities for the purpose of  
collective bargaining or other mutual aid or protection. . .”

9 29 U.S.C. § 157. Plaintiff argues that this language creates a federal substantive right on  
10 behalf of employees to join together in class action litigation to prosecute employment  
11 disputes. In support, Plaintiff cites *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir.  
12 2016), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16–300).

13 In *Morris*, Plaintiff Morris filed class and collective action claims against his  
14 employer, Ernst & Young, alleging that it violated the Fair Labor Standards Act and  
15 California labor laws by misclassifying him and others similarly situated as exempt  
16 employees to avoid paying them overtime. *Morris*, 834 F.3d at 979. Because Morris had  
17 signed an arbitration agreement purporting to require him to bring all legal claims against  
18 Ernst & Young via arbitration as an individual and in separate proceedings, Ernst &  
19 Young moved to compel arbitration. *Id.* Morris opposed by arguing that the arbitration  
20 agreement, by requiring only individual prosecution of employment claims, violated his  
21 federal substantive rights under the NLRA to engage in “concerted action” against his  
22 employer. *Id.* at 979–80. The Ninth Circuit agreed. *Id.* at 990.

23 The parties are in disagreement as to whether the Ninth Circuit’s decision in  
24 *Morris* compels the finding that the Class Action Waiver at issue here violates the  
25 NLRA. Defendant presents two arguments as to why *Morris* does not compel such a  
26 holding. First, Defendant seems to argue that *Morris* is not controlling because (1) other  
27 federal circuits have held that the Fair Labor Standards Act does not create a substantive  
28 right to concerted action and (2) the Supreme Court has granted *certiorari* on the *Morris*

1 decision. This argument is problematic because, regardless of what other circuit courts  
2 may have decided on an issue, it is hornbook law that this Court is bound by a published  
3 Ninth Circuit decision unless and until it is overturned by Congress, the Ninth Circuit, or  
4 the Supreme Court. *See United States v. Frank*, 956 F.2d 872, 882 (9th Cir. 1991).

5 Accordingly, the Court finds that the Class Action waiver is illegal and therefore invalid.

6 Where an arbitration agreement contains an illegal term, that “term may excised, or  
7 the district court may decline enforcement of the contract altogether.” *Morris*, 834 F.3d  
8 at 985 (internal citations omitted). Excising the Class Action Waiver would amount to  
9 compelling arbitration on a class wide basis. In *Stolt-Nielsen S.A. v. Animal Feeds Int’l*  
10 *Corp.*, the Supreme Court affirmed that “a party may not be compelled under the FAA to  
11 submit to class arbitration unless there is a contractual basis for concluding that the party  
12 agreed to do so.” 559 U.S. 662, 684 (2010). Because the Arbitration Agreement  
13 explicitly purports to prohibit class arbitration, it is clear that the parties did not contract  
14 to submit to class arbitration. *See Gonzalez v. Ceva Logistics, U.S., Inc.*, 2016 WL  
15 6427866 \*7 (N.D. Cal. 2016) (same holding). It follows that the illegality of the Class  
16 Action Waiver renders the entire arbitration agreement invalid.

17 Next, Defendant argues at length that, by initiating class wide arbitration, Plaintiff  
18 waived its right to object to the Arbitration Agreement. (MTD 6:9–9:11; Reply 2:2–5:9.)  
19 It is clearly established law that the doctrine of waiver can defeat a motion to compel  
20 arbitration. *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016). Defendant therefore  
21 argues that “it stands to reason that there can be a similar waiver of objections to  
22 arbitration agreements.” (Mot. 6:25–26.) However, (1) Defendant fails to cite *a single*  
23 *authority* in either its Motion or Reply that supports this proposition; (2) the Court does  
24 not believe such authority exists; and (3) it would seem plainly offensive to the public  
25 policies underpinning the NLRA to deny Plaintiff the right to contest this illegal contract.  
26 For these reasons, the Court finds the waiver argument unpersuasive.

27 Lastly, Defendant argues that, even if the Arbitration Agreement is invalid,  
28 Plaintiff’s conduct of filing a demand for class wide arbitration created a valid arbitration

1 agreement between the parties. (Mot. 10:1–21.) Furthermore, Defendant contends that,  
2 under this agreement, the issue of arbitrability is for the arbitrator, not the Court. (Id.  
3 citing JAMS Rule 11.) The Court disagrees.

4 Had Defendant agreed to Plaintiff’s Demand for class wide arbitration, this  
5 argument might have merit. But Defendant did not agree to class wide arbitration.  
6 Rather, Defendant rejected the class wide arbitration Demand by filing a motion with the  
7 arbitrator to compel individual arbitration. (Tesauro Decl. [Doc. 12-3] ¶ 5.) Plaintiff  
8 subsequently dismissed his Demand. Construing Plaintiff’s Demand for class wide  
9 arbitration as an offer to contract, Defendant simply never accepted this offer. Thus, the  
10 parties’ conduct before the arbitrator did not establish the mutual consent necessary for  
11 contract formation. Accordingly, the Court **DENIES** Defendant’s motion to compel  
12 arbitration.

### 13 14 **III. MOTION TO DISMISS**

15 Defendant also argues that this Court should dismiss this case for refileing in the  
16 California Superior Court. More specifically, Defendant argues that Plaintiff’s PAGA  
17 claim, pending in the California Superior Court, substantially overlaps, both factually and  
18 legally, with the issues presented by Plaintiff’s Complaint filed with this Court. Thus,  
19 Defendant argues, dismissing this case for refileing in state court would conserve judicial  
20 resources as multiple courts would not have to expend energy considering the same  
21 issues.

22 The Court agrees with Defendant that combining the two proceedings into one  
23 consolidated action would serve the public interest by conserving scarce judicial  
24 resources. That said, federal courts have a “virtually unflagging obligation . . . to  
25 exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. U.S.*,  
26 424 U.S. 800, 817 (1976) (internal citations omitted). Thus, a “substantial doubt as to  
27 whether the state court proceeding will resolve the federal action” precludes a federal  
28

1 court from abstaining jurisdiction. *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d  
2 908, 913 (9th Cir. 1983).

3 Here, resolution of the state court proceeding would not resolve the case before  
4 this Court. The Complaint filed with this Court presents Fed. R. Civ. P. 23 class action  
5 issues that the state court PAGA action will not even touch upon. *See Bauman v. Chase*  
6 *Inv. Servs. Corp.*, 747 F.3d 1117, 1124 (9th Cir. 2014) (Stating “in the end, Rule 23 and  
7 PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement  
8 action filed on behalf of and for the benefit of the state, not a claim for class relief.”).  
9 Accordingly, the Court **DENIES** Defendant’s motion to dismiss.

#### 10 11 **IV. MOTION TO STAY**

12 Defendant also moves to stay this litigation until the Supreme Court decides  
13 *Morris*. If the Supreme Court reverses *Morris*, Plaintiff would have to bring his claims  
14 via individual arbitration. If the Supreme Court affirms, Plaintiff would be able to bring  
15 his claims in this Court on a collective and class wide basis. Thus, the outcome of *Morris*  
16 will be dispositive as to whether arbitration or litigation in court is the proper method of  
17 dispute resolution here.

18 This Court has discretion to grant this stay. *Landis v. North American Co.*, 299  
19 *U.S.* 248, 256 (1936). However, doing so requires consideration of three factors: (1) the  
20 possible damage from granting the stay; (2) possible hardship or inequity of denying the  
21 stay; and (3) the orderly course of justice. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th  
22 Cir. 1962); *McElrath v. Uber Technologies*, 2017 WL 1175591 \*5 (N.D. Cal 2017).

23 Here, the possible damage from granting the stay is minimal. The Supreme Court  
24 will decide *Morris* this term, meaning the stay would be less than one year. Further, the  
25 only harm Plaintiff is likely to suffer as a result of this short stay is a delay in monetary  
26 recovery. Defendant, by contrast, will certainly incur significant legal fees and costs if  
27 forced to continue litigating in this Court. If the Supreme Court reverses the Ninth  
28 Circuit’s decision in *Morris*, such fees and costs would largely constitute waste. So too

1 would the scarce judicial resources that continued litigation would consume.  
2 Accordingly, the Court finds a stay pending the Supreme Court's decision in *Morris* is  
3 warranted and **GRANTS** Defendant's motion to stay.

4  
5 **V. CONCLUSION AND ORDER**

6 For the foregoing reasons, the Court **DENIES** Defendant's motion to compel  
7 arbitration and motion to dismiss for refiling in state court and **GRANTS** Defendant's  
8 motion to stay pending the outcome of *Morris*. All litigation is hereby stayed until  
9 further order from this Court. The parties are ordered to jointly notify the Court within  
10 five days of the Supreme Court's decision in *Ernst & Young v. Morris*, 137 S.Ct. 809  
11 (2017).

12 **IT IS SO ORDERED.**

13 Dated: July 24, 2017

14   
15 Hon. M. James Lorenz  
16 United States District Judge  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28