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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DIANA GONZALEZ,
Plaintiff,
v.
CEVA LOGISTICS U.S., INC., et al.,
Defendants.

Case No. [16-cv-04282-WHO](#)

**ORDER DENYING MOTION TO
COMPEL ARBITRATION**

Dkt. No. 13

INTRODUCTION

The central question in defendants Real Time Staffing Services, LLC., Select Specialized Staffing, LLC (together “Real Time”), and CEVA Logistics U.S., Inc. (“CEVA”) motion to compel arbitration is the impact of the Ninth Circuit’s recent decision in *Morris v. Ernst & Young*, No. 13-16599, 2016 WL 4433080 (9th. Cir. Aug. 22, 2016) on a putative wage and hour class action where plaintiff Diana Gonzalez has signed an arbitration agreement that waives her class claims with no right to opt out and no provision requiring class arbitration. *Morris* holds that a class waiver with no opt out right is unenforceable under the NLRA, and *Stolt-Nielsen S.A. v. Animal Feeds Int’l. Corp.*, 559 U.S. 662, 684 (2010) holds that I cannot compel class arbitration where there is no agreement to do so. As a result, I cannot enforce the arbitration agreement, and defendants’ motion to compel is DENIED.

BACKGROUND

Real Time is a staffing company that provides temporary staffing for client companies in the United States. Declaration of Joshua Gleason (“Gleason Decl.”) ¶ 4 (Dkt. No. 13-1). Gonzalez worked as a non-exempt hourly employee for placement with Real Time’s clients from approximately July 2015 to December 2015. FAC ¶ 5; Gleason Decl. ¶ 12. During this time, Real Time assigned Gonzalez to work for CEVA as a routing clerk. Motion to Compel (“Mot.”) at 4

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1 (Dkt. No. 13). Gonzalez alleges that defendants failed to provide their employees with meal
 2 breaks, rest periods, overtime wages, and other protections as required under California and
 3 Federal law in violation of the (1) California Labor Code, (2) California Business and Professions
 4 Code §§ 17200, (3) Fair Labor Standards Act, and (4) the California Private Attorneys General
 5 Act (“PAGA”). First Amended Complaint (“FAC”) ¶ 1 (Dkt. No. 1-2).

6 Real Time contends that on July 7, 2015, Gonzalez submitted an online application for a
 7 position with Real Time. Mot. at 3; Gleason Decl. ¶ 11. To complete Real Time’s online
 8 application, an applicant must go to Real Time’s website and submit personal information
 9 including his or her “name, contact, information, the last four digits of their social security
 10 number, and job history.” Mot. at 2; Gleason Decl. ¶ 7. Applicants must also place an e-
 11 signature after various agreements in the “Legal Acknowledgments” section of the application
 12 which includes a “Mutual Agreement Regarding Arbitration and Class Claims” that reads:

13
 14 **MUTUAL AGREEMENT REGARDING ARBITRATION AND**
CLASS CLAIMS

15 In the event there is any dispute between Employer and I relating to
 16 or arising out of or relating to [sic] my employment or the
 17 termination of my employment, which Employer and I are unable to
 18 resolve informally through direct discussion, regardless of the kind
 19 or type of dispute, Employer and I agree to submit all such claims or
 20 disputes to be resolved by final and binding arbitration in
 21 accordance with the National Rules of the Resolution of
 22 Employment Dispute of the American Arbitration Association
 23 within the state of employment. Said disputes may include but are
 24 not limited to claims for or under: breach of contract, fraud,
 misrepresentation, defamation, personal injury, wages salary,
 wrongful termination, vacation pay, sick pay, overtime pay, the Fair
 Labor Standards Act and comparable state laws, the Civil Rights Act
 of 1965, as amended, 42 U.S.C. section 1981, the Americans with
 Disabilities Act, laws that prohibit discrimination based on religion,
 sex, age, color, nationality, physical impairment, disability, medical
 condition, marital status, or other basis, the Family and Medical
 Leave Act, the Employee Retirement Income Security Act (ERISA),
 and state laws regarding unfair competition or unfair business
 practices.

25 Any such claims must be submitted on an individual basis only and I
 26 hereby waive the right to bring or join any type of collective or class
 27 claim in arbitration, in any court, or in any other forum. This
 class/collective action waiver does not apply to claims brought
 under the National labor Relations Act (NLRA).

28 Gleason Decl. Ex. A.

1 Most of the agreements in the Legal Acknowledgments section are mandatory fields and
2 include red asterisks next to them. Gleason Decl. ¶ 6. The arbitration agreement is not mandatory
3 as it does not have a red asterisk next to it, and it is possible for an applicant to submit the
4 application without completing and e-signing the arbitration section. *Id.* Real Time contends that
5 Gonzalez voluntarily e-signed the arbitration agreement as part of completing her online
6 application. *Id.* ¶ 11.

7
8 Real Time moves to compel individual arbitration, arguing that Gonzalez is bound by the
9 arbitration agreement she initialed when she filled out Real Time’s online job application.
10 Because this arbitration agreement includes a waiver for class claims, Real Time also moves to
11 dismiss Gonzalez’s class claims and to stay her PAGA claims, which are not subject to the
12 arbitration agreement. CEVA, which is not a signatory to the arbitration agreement, joined Real
13 Time’s motion to compel and seeks to compel Gonzalez to arbitrate her claims against CEVA, to
14 dismiss Gonzalez’s class claims, and to stay the PAGA claims.

15
16 In opposition to the motion to compel, Gonzalez argues that the arbitration agreement is
17 not enforceable because (1) Real Time has failed to show that Gonzalez signed the arbitration
18 agreement or that the agreement is valid, (2) the class waiver provisions in the agreement are
19 invalid under the National Labor Relations Act (“NLRA”), and (3) the agreement’s purported
20 waiver of PAGA claims is unenforceable and invalidates the entire agreement. In opposition to
21 CEVA’s joinder, Gonzalez contends that CEVA cannot compel arbitration as it is not a signatory
22 to the agreement and Gonzalez’s claims do not arise out of the contract. I heard argument on
23 September 28, 2016, and Real Time submitted supplemental briefing on October 12, 2016.

24 25 **LEGAL STANDARD**

26 27 **I. MOTION TO COMPEL ARBITRATION**

28 Under the Federal Arbitration Act (“FAA”), a district court determines (1) whether a valid

1 agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at
2 issue. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). “To
3 evaluate the validity of an arbitration agreement, federal courts should apply ordinary state-law
4 principles that govern the formation of contracts.” *Ingle v. Circuit City Stores, Inc.*, 328 F.3d
5 1165, 1170 (9th Cir. 2003) (internal citation omitted). If the court is satisfied “that the making of
6 the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall
7 make an order directing the parties to proceed to arbitration in accordance with the terms of the
8 agreement.” 9 U.S.C. § 4. “Any doubts concerning the scope of arbitrable issues should be
9 resolved in favor of arbitration.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).

10 **II. MOTION TO STAY**

11 “Under § 3 of the FAA, if any suit or proceeding is brought in a court of the United States
12 upon any issue that is referable to arbitration under such an agreement, the court “shall . . . stay the
13 trial of the action.” 9 U.S.C. § 3; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131
14 (2011). Where plaintiffs assert both arbitrable and nonarbitrable claims, district courts have
15 “discretion whether to proceed with the nonarbitrable claims before or after the arbitration and
16 have authority to stay proceedings in the interest of saving time and effort for itself and litigants.”
17 *Nitsch v. DreamWorks Animation SKG Inc.*, 100 F. Supp. 3d 851, 870 (N.D. Cal. 2015) (internal
18 quotation omitted); *see also Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64
19 (9th Cir. 1979). “A stay is not a matter of right, even if irreparable injury might otherwise result.
20 It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the
21 circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (internal
22 quotation marks and citations omitted).

23 **III. JOINDER**

24 Arbitration is a matter of contract, and a party cannot be required to submit to arbitration
25 any dispute which he has not agreed so to submit. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122,
26 1126 (9th Cir. 2013) (internal quotation marks and citations omitted). In general, “the contractual
27 right to compel arbitration may not be invoked by one who is not a party to the agreement and
28 does not otherwise possess the right to compel arbitration.” *Id.* “The strong public policy in favor

1 of arbitration does not extend to those who are not parties to an arbitration agreement.” *Comedy*
 2 *Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009).

3 DISCUSSION

4 IV. MOTION TO COMPEL

5 A. Valid Agreement

6 Gonzalez argues that Real Time failed to show the existence of a valid arbitration
 7 agreement because it has not demonstrated that Gonzalez herself personally affixed the signature
 8 on the agreement. Opposition to Motion to Compel (“Oppo.”) at 1 (Dkt. No. 22). Real Time
 9 asserts that it has presented sufficient evidence of a valid contract because only Gonzalez could
 10 have filled out the personal information in her online application and it has ample safeguards to
 11 confirm the accuracy of the signature. Mot. at 2.

12 “The petitioner bears the burden of proving the existence of a valid arbitration agreement
 13 by a preponderance of the evidence, while a party opposing the petition bears the burden of
 14 proving by a preponderance of the evidence any fact necessary to its defense.” *Ruiz v. Moss Bros.*
 15 *Auto Group, Inc.*, 232 Cal. App. 4th 836, 842 (2014). “Authentication of a writing means (a) the
 16 introduction of evidence *sufficient to sustain a finding that it is the writing that the proponent of*
 17 *the evidence claims it is* or (b) the establishment of such facts by any other means provided by
 18 law.” *Id.* at 843. “*The act of the person may be shown in any manner*, including a showing of the
 19 efficacy of any security procedure applied to determine the person to which the electronic record
 20 or electronic signature was attributable.” Cal. Civ. Code § 1633.9(a).

21 Here, the issue is whether Real Time has met its initial burden of proof by providing
 22 adequate evidence to support the authenticity of Gonzalez’s signature. Real Time has submitted a
 23 declaration from Joshua Gleason, the Director of Human Resources at EmployBridge, Real Time’s
 24 parent company, which outlines Real Time’s procedures and process for accepting online
 25 applications. Gleason Decl. ¶ 1. Gleason declares that an online application is “electronically
 26 date and time stamped” and is unalterable once submitted. Gleason Decl. ¶ 8. Once the
 27 application is submitted, only a handful of individuals are able to access the files. *Id.* Real Time
 28 submits an authenticated copy of plaintiff’s application that states, “Diana Gonzalez initiated,

1 signed, and dated this form on the following date(s): 07/07/2015 @ 1:44: AM.” Gleason Decl. Ex.
2 C.

3 Gonzalez argues that Real Time has not shown its procedures were “such that only the
4 plaintiff could have accessed the electronic form and performed the act which constituted the
5 electronic signature.” *Espejo v. S. Cal. Permanente Med. Group*, 246 Cal. App. 4th 1047, 1060
6 (2016). In *Espejo*, the court found the defendants met their burden in showing the electronic
7 signature was authentic as the defendant “detailed [defendant]'s security precautions regarding
8 transmission and use of an applicant's unique user name and password, as well as the steps an
9 applicant would have to take to place his or her name on the signature line of the employment
10 agreement” *Id.* at 1046. The court found that the plaintiff’s name would have only been
11 entered by using the plaintiff’s unique user name and password. *Id.* Here, while Real Time’s
12 application did not require a unique username and password, it required applicants to fill out
13 detailed personal information that only the applicant would know. Gleason Decl. ¶ 11. Defendant
14 Real Time has offered adequate evidence that only Gonzalez could have filled out this form, that
15 the document could not have been altered after it was submitted, and that Gonzalez herself signed
16 the arbitration agreement.

17 Gonzalez has failed in response to allege that she did not sign the agreement or otherwise
18 call into question the authenticity of the signature.¹ Gonzalez does not dispute the accuracy of any
19 of the information in her online application or offer an explanation as to how someone else could
20 have known such information or submitted the application in her name. She merely alleges that
21 “the database could have been altered at any time.” *Oppo.* at 2. This bare allegation is insufficient
22 to undermine Gleason’s declaration that the database could not have been altered. Gleason ¶ 8.

23 Real Time has met its burden to show the authenticity of Gonzalez’s signature and the
24

25 ¹ In response to CEVA’s Joinder, Gonzalez submitted, for the first time, a declaration stating that
26 she has “no recollection of filling out an online form to apply for employment with Select Staffing
27 or CEVA.” Gonzalez Decl. (Dkt. No. 29-1). Real Time objects to this declaration as constituting
28 an improper Sur-reply to Real Time’s Motion to Compel and requests that I strike the declaration.
Dkt. No. 30. Because Gonzalez offers no explanation as to why she did not include this
declaration in her original response to Real Time’s Motion to Compel and Real Time was not
given an opportunity to respond to or address the declaration’s statements, I do not consider the
declaration to the extent it relates to Real Time’s Motion to Compel.

1 existence of a valid agreement.

2 **B. Class Waiver**

3 Gonzalez asserts that the class action waiver in the arbitration agreement is unenforceable
4 under the National Labor Relations Act (“NLRA”) and the Ninth Circuit’s recent decision in
5 *Morris v. Ernst & Young*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). *Oppo*. at 3;
6 Dkt. No. 27.

7 In *Morris*, Ernst & Young moved to compel arbitration of plaintiffs’ Fair Labor Standards
8 Act misclassification and wage and hour claims. *Morris*, 2016 WL 4433080, at *1. The plaintiffs
9 had signed agreements, as a condition of employment, which required employees to “(1) pursue
10 legal claims against [defendant] exclusively through arbitration and (2) arbitration only as
11 individuals and in ‘separate proceedings.’” *Id.* In opposition to the motion to compel, plaintiffs
12 argued that the arbitration agreement’s class waiver provision violated §7 of the NLRA which
13 grants employees the right to “self-organization, to form, join, or assist labor organizations, to
14 bargain collectively through representatives of their own choosing, and to engage in other
15 concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29
16 U.S.C. § 157. *Id.*

17 The *Morris* court held that “a lawsuit filed in good faith by a group of employees to
18 achieve more favorable terms or conditions of employment is ‘concerted activity’ under §7 of the
19 [NLRA].” *Morris*, 2016 WL 4433080, at *3-4 (internal quotation omitted). The court concluded
20 that Ernst & Young interfered with its employees’ substantive right to concerted activity under the
21 NLRA by requiring employees, as a condition of employment “to pursue work-related claims
22 individually.” *Id.* at 5:

23 Real Time contends that its arbitration agreement is distinguishable from the agreement in
24 *Morris* because it was not a condition of Gonzalez’s employment. Reply at 7 (Dkt. No. 28). It
25 asserts that Gonzalez was not required to sign the arbitration agreement because it was not a
26 mandatory field in the online application and Gonzalez could have submitted the form without
27 initialing that portion of the document. Gleason Decl. ¶ 6. Real Time submits that the Ninth
28 Circuit’s decision in *Johnmohammadi v. Bloomingdale’s Inc.*, 755 F. 3d 1072 (9th Cir. 2014), not
Morris, controls this case.

1 The *Morris* court specifically distinguished the holding in *Johnmohammadi* and noted that
2 an arbitration agreement does not violate the NLRA, and is not a condition of employment, when
3 employees have a meaningful opportunity to opt out of the agreement. *Morris*, 2016 WL 4433080
4 at *4 n.4. In *Johnmohammadi*, the Ninth Circuit enforced an arbitration agreement that precluded
5 collective action because employees were able to opt out of the agreement by submitting an opt-
6 out form within 30 days of hiring. *Johnmohammadi*, 755 F. 3d at 1074. The Ninth Circuit
7 concluded that under these circumstances the plaintiff “made a fully informed and voluntary
8 decision” not to opt-out of the arbitration agreement, and the agreement, therefore, did not violate
9 the NLRA. *Id.*

10 Real Time has not shown that its arbitration agreement presented applicants with the same
11 meaningful opportunity to opt out. Real Time submits that Gonzalez was not required to sign the
12 arbitration agreement, and that this was indicated by the lack of an asterisk next to the initial box
13 that followed the phrase “Please initial and consent for MUTUAL AGREEMENT TO
14 ARBITRATE section.” Gleason Decl. Ex. A; Gleason Decl. ¶ 6. Although the instructions in the
15 Employment History section of the online application indicated that mandatory fields, in that
16 section, would be marked by a red asterisk, the application did not include any explanation of the
17 significance of the asterisks generally throughout the document, did not address them in the Legal
18 Acknowledgements section, and did not explain, anywhere, that fields without an asterisk were
19 completely optional. *Id.*

20 An employer does not provide employees a meaningful opportunity to opt out of an
21 arbitration agreement when it fails to provide any opt-out procedure and does not otherwise
22 explain to employees that they may opt out. *See Gerton v. Fortiss, LLC*, No. 15-cv-04805-TEH,
23 2016 WL 613011, at *5 (N.D. Cal. Feb. 16, 2016). In *Gerton*, the court rejected the idea that
24 employees could have opted out of an agreement by simply choosing not to sign it, explaining that
25 “even assuming that failing to initial the line would suffice to opt out, such a procedure for opting
26 out is not described anywhere in the Arbitration Agreement.” *Id.* In contrast, the Ninth Circuit
27 has consistently upheld agreements where employers provide a clear, even if potentially
28 burdensome, process for opting out. *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th

1 Cir. 2002) (concluding that employee had a meaningful opportunity to opt out where he could
2 mail in opt out form within 30 days of signing agreement); *Mohamed v. Uber Tech., Inc.*, --F.3d--,
3 2016 WL 4651409, *5-6 (9th Cir. 2016) (Uber drivers had a meaningful opportunity to opt out
4 even though they were required “to opt out either in person at Uber’s San Francisco offices or by
5 overnight delivery service”); *cf. Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d 1052, 1059 (9th Cir.
6 2013) (meaningful opportunity to opt out where document explained that signatories could opt out
7 by submitting a writing, within 60 days, rejecting the arbitration provisions).

8 Absent the absence of an asterisk, Real Time’s online application did not indicate that the
9 arbitration agreement was optional and did not explain to applicants that they could opt out of the
10 agreement by choosing not to initial it. Gleason Decl. Ex. A. The lack of an asterisk does not
11 provide employees a clear and meaningful opportunity to opt out. An explanation of the
12 possibility and procedure for opting out need not be detailed or complex. “A simple sentence such
13 as, ‘If you wish to opt out of this class action waiver, do not initial this line,’ may have sufficed.”
14 *Gerton*, 2016 WL 613011, at *5. Real Time did not include any such language. Instead, the
15 agreement misleadingly instructed, “Please initial authorization and consent for MUTUAL
16 AGREEMENT TO ARBITRATE section.” Gleason Decl. Ex. A. This mirrored the language
17 used in the six required legal acknowledgment sections and signaled to applicants that they were
18 required to initial the arbitration agreement.

19 Because Real Time’s online application did not adequately notify applicants that they were
20 not required to initial the arbitration agreement, and Real Time did not provide applicants with any
21 other procedure for opting out, I conclude Gonzalez did not have a meaningful opportunity to opt
22 out of the arbitration agreement and that the agreement was effectively a condition of her
23 employment. *Morris*, not *Johnmohammadi*, is applicable to this case.

24 Real Time argues that even if *Morris* applies, its arbitration agreement is distinguishable
25 from the one in *Morris* because the class waiver does not apply to “claims brought under the
26 National Labor Relations Act (NLRA).” Reply 9. Real Time contends that under the Fifth
27 Circuit’s decision in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), a class waiver
28 is enforceable where the arbitration provision allows employees to seek redress before the NLRB.

1 *Id.* In *Murphy Oil*, the Fifth Circuit held that an arbitration agreement with a class waiver did not
 2 constitute an unfair labor practice under § 8 of the NLRA because it clearly stated that employees
 3 were not barred from “participating in proceedings to adjudicate unfair labor practice[] charges
 4 before the” NLRB. *Id.* at 1018.

5 While Real Time’s agreement may satisfy the *Murphy Oil* court, it does not satisfy the
 6 Ninth Circuit’s holding in *Morris*. The right to bring claims before the NLRB is separate and
 7 additional to the rights outlined in *Morris*. Allowing employees to pursue claims before the
 8 NLRB is not enough – under *Morris*, employers must also allow employees some forum to
 9 “pursue work-related legal claims together.” *Morris*, 2016 WL 4433080, at *2. Real Time’s
 10 NLRA-claim carve out does not bring it into compliance with *Morris*.

11 Real Time also argues that its agreement is distinguishable from that in *Morris* because it
 12 does not require employees to bring claims in “separate proceedings.” Real Time has attempted to
 13 limit the impact of *Morris* to employment agreements which require “separate proceedings” and
 14 argued that because there is no “separate proceedings” language in its agreement and Gonzalez
 15 could theoretically pursue her individual arbitration claims together with other plaintiffs in one
 16 proceeding, the Real Time agreement does not prohibit all concerted activity in violation of the
 17 NLRA. That argument ignores that both the majority and dissent in *Morris* refer to the “separate
 18 proceedings” clause at issue there as a class action waiver, which is what is at issue here. *Morris*
 19 *v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *2 n.1 & *4 n.3 (9th Cir. Aug. 22,
 20 2016); *see also id.* at *11, 12 (dissent). In addition, the majority affirmed the NLRB’s
 21 determination that any agreement that precludes employees from filing “joint, class, or collective
 22 claims” violates the NLRA. *Id.* at * 2, 5.² Finally, even if *Morris* could be so limited, and I am
 23 not finding that it can, the Real Time agreement itself requires that parties to the agreement agree
 24 that “claims must be submitted on an individual basis only and I hereby waive the right to bring or
 25

26 ² As the *Morris* court noted, § 7 of the NLRA protects concerted action for the purpose of
 27 “collective bargaining or other mutual aid or protection.” *Id.* at *3 (quoting 29 U.S.C. § 157). By
 28 the nature of the rules and statutes creating them, class and collective actions are appropriate only
 where they serve the “mutual aid” of the other class members. *See* Fed. R. Civ. P. 23(a) & (b)(3);
 29 U.S.C § 216(b) (allowing employees to initiate a collective action on behalf of “similarly
 situated” employees).

1 join any type of collective or class claim in arbitration.” Gleason Decl. Ex. A. That provision
2 arguably requires separate initiation of arbitration proceedings, and does not expressly permit
3 employees to join together to arbitrate their individual claims. Real Time’s argument that its
4 agreement preserves a limited right to concerted action is without support.

5 I am bound by the Ninth Circuit's holding in *Morris* and conclude that an arbitration
6 agreement that employees cannot meaningfully opt out of, and that waives all joint, collective, and
7 class claims, is not permitted under § 7 of the NLRA. Real Time's class waiver is unenforceable.

8 **C. Severability and Enforcement of Class Arbitration**

9 The next issue to consider is whether the entire arbitration agreement is unenforceable, or
10 whether the unlawful class waiver can be severed from the rest of the agreement. Under the Ninth
11 Circuit’s ruling in *Morris*, a district court must determine whether to sever an invalid class waiver
12 prior to enforcing an arbitration agreement. 2016 WL 4433080, at *11. “It is well established that
13 a federal court has a duty to determine whether a contract violates the law before enforcing it.” *Id.*
14 (remanding to the district court “to determine whether the ‘separate proceedings’ clause is
15 severable from the contract”). I must therefore decide whether to strike the class waiver from Real
16 Time’s agreement and compel arbitration of Gonzalez’s class claims, or decline to enforce the
17 agreement at all.

18 In its supplemental brief, Real Time argues that, if the class waiver is found unenforceable,
19 the court cannot compel arbitration of the class claims under the Supreme Court’s holding in *Stolt-*
20 *Nielsen S.A. v. Animal Feeds Int’l. Corp.*, because the parties did not contract to submit to class
21 arbitration. 559 U.S. 662, 684 (2010). I agree.

22 As the Court affirmed in *Stolt-Nielsen*, “a party may not be compelled under the FAA to
23 submit to class arbitration unless there is a contractual basis for concluding that the party agreed to
24 do so.” *Id.* In *Stolt-Nielsen*, the Court considered whether there was a contractual basis to compel
25 arbitration of class claims where the arbitration agreement was silent on class and collective
26 actions. *Id.* at 685. The Court determined that where the agreement was silent and the parties
27 stipulated that they had “no agreement” on the issue, an arbitrator overstepped his authority by
28 concluding that the parties had “agreed to authorize class arbitration” and compel arbitration of
class claims. *Id.* at 687.

1 There is no contractual basis to conclude that Real Time and its employees “agreed to
2 authorize class arbitration” because the arbitration agreement specifically attempts to waive the
3 right to bring such claims. Unlike the agreement in *Stolt-Nielsen*, Real Time’s arbitration
4 agreement is not silent on class claims and instead explicitly aims to prevent them. Although I
5 have concluded that this provision is unenforceable under *Morris*, this language unambiguously
6 precludes a finding that the parties intended to agree to authorize arbitration of class claims. The
7 express language of the agreement indicates that they intended the opposite. Because the parties
8 did not agree to arbitrate class claims, they “cannot be compelled under the FAA to submit to class
9 arbitration.” *Id.* at 684.

10 Enforcing Real Time’s arbitration agreement, without the class waiver, would still run
11 afoul of *Morris* because the parties cannot be compelled to submit to class arbitration. There is no
12 contractual basis for compelling Real Time and its employees to arbitrate joint, collective, and
13 class claims because the arbitration agreement affirmatively attempts to bar them. An arbitrator
14 would overstep her authority by compelling the parties to submit to arbitration on such claims.
15 This means that if the arbitration agreement is enforced, even without the class waiver, Gonzalez
16 would still be limited to pursuing individual actions in arbitration. And under *Morris*, such a
17 procedure would violate the NLRA by preventing Gonzalez from pursuing her employment claims
18 through collective action.

19 Because enforcement of Real Time’s arbitration agreement without the class waiver would
20 still violate *Morris*, I conclude that the class waiver provision cannot be severed from the
21 agreement and that the entire arbitration agreement is unenforceable. I DENY Real Time’s
22 motion to compel arbitration and DENY its motion to dismiss class claims.

23 **V. MOTION TO STAY PAGA CLAIM**

24 Real Time moves to stay Gonzalez’s PAGA claim until the arbitral claims have been
25 completed. Mot. at 16. Because the motion to compel arbitration is denied, this motion is
26 DENIED as MOOT.

27 **VI. CEVA’S MOTION TO JOIN DEFENDANT’S MOTION TO COMPEL 28 ARBITRATION**

Co-defendant CEVA moves to join Real Time’s Motion to Compel Arbitration. Joinder at

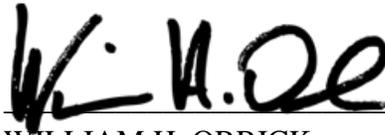
1 1 (Dkt. No. 24). CEVA’s Joinder motion is DENIED as MOOT.

2 **CONCLUSION**

3 Because the class waiver provision in Real Time arbitration agreement violates the NLRA,
4 Real Time’s Motion to Dismiss Class Claims is DENIED. Because the parties cannot be
5 compelled to arbitrate Gonzalez’s class claims, Real Time’s Motion to Compel Arbitration is
6 DENIED and its Motion to Stay PAGA Claims is DENIED as MOOT. CEVA’s Joinder of Real
7 Time’s Motion to Compel is DENIED as MOOT.

8 **IT IS SO ORDERED.**

9 Dated: October 31, 2016



10
11 WILLIAM H. ORRICK
United States District Judge

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United States District Court
Northern District of California