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

TOBIN HILL,  
  
v.  
  
INSURANCE COMPANY OF THE  
WEST, et al.,  
  
Plaintiff,  
  
Defendants.

Case No. 10cv76 BTM (BLM)

**ORDER GRANTING MOTION TO  
COMPEL ARBITRATION AND STAY  
THIS ACTION**

Defendant Insurance Company of the West (“ICW”) has filed a Motion to Compel Arbitration and Stay or Dismiss this Action [Doc. 4]. For the following reasons, the Court **GRANTS** the Motion.

**I. BACKGROUND**

This is an employment dispute. Although Plaintiff alleges several claims, the primary one is that ICW failed to pay him overtime wages. But the substance of his claims are not before the Court on this Motion. Instead, the Motion addresses the arbitration agreement between the parties and whether the Court should enforce it.

The parties agree that there is a valid arbitration agreement. They disagree, however,

1 about two issues. The first issue is about whether ICW waived its right to arbitrate. Plaintiff  
2 claims ICW waived arbitration by refusing Plaintiff's request to arbitrate. ICW disagrees,  
3 arguing that it has consistently expressed its intention to arbitrate. The second issue is that  
4 Plaintiff has asserted a California Private Attorney General Act ("PAGA") claim in his  
5 Complaint. And according to Plaintiff, the Court cannot compel arbitration of this claim  
6 without California's consent. Before resolving these two issues, the Court sets forth the facts  
7 relevant to whether ICW waived its right to arbitrate.

8 In mid-October 2009, Plaintiff's attorney sent ICW a demand letter, asking for unpaid  
9 overtime, wage records, and for Plaintiff's personnel file, among other things. Plaintiff  
10 threatened suit if ICW did not respond, and added "[i]f you have an arbitration agreement .  
11 . . you must send my office a copy or waive any right to arbitrate."

12 ICW's general counsel responded by letter on November 2, 2009. The general  
13 counsel wrote that she could not release any information to Plaintiff's counsel until ICW  
14 received a representation letter with Plaintiff's original signature: "Without that I have no way  
15 of verifying that you in fact represent him." She concluded the letter by noting that Plaintiff  
16 signed an arbitration agreement when he was hired, and that she would forward a copy to  
17 Plaintiff's counsel once she received the signed representation letter.

18 Plaintiff's counsel never sent the signed representation letter. Instead, on December  
19 2, 2009, he sent a "final demand for arbitration," stating that ICW "refused to produce any  
20 arbitration agreement and refused to agree to arbitrate these claims." He repeatedly wrote  
21 that if ICW did not promptly agree to arbitrate and send all the information he requested,  
22 ICW's right to arbitrate would be waived. He finished the letter by writing that ICW's  
23 "requests for frivolous information to which you are not entitled will not be honored."

24 Defendant's outside counsel responded on January 5, 2010, and again stated that  
25 "[d]ue to privacy obligations, in the absence of an authorization from Mr. Hill, we are unable  
26 to produce" Plaintiff's personnel records and the arbitration agreement. Defendant, for the  
27 second time, raised the issue of the arbitration agreement, stating that Plaintiff was "required  
28 to adhere to the formal demand procedure outlined in the arbitration agreement."

1 It appears there was no further communication between the parties before Plaintiff  
2 filed this suit on January 11, 2010.

## 3 4 II. DISCUSSION

### 5 6 A. Defendant Did Not Waive Its Right to Arbitrate

7 Plaintiff agrees that he signed an arbitration agreement and that it covers all of  
8 Plaintiff's claims, except the PAGA claim. But the parties disagree about whether Defendant  
9 waived its right to arbitrate.

10 Waiver of the right to arbitrate is not favored. *Shinto Shipping Co., Ltd. v. Fibrex &*  
11 *Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978). "Any examination of whether the  
12 right to compel arbitration has been waived must be conducted in light of the strong federal  
13 policy favoring enforcement of arbitration agreements." *Fisher v. A.G. Becker Paribas Inc.*,  
14 791 F.2d 691, 694 (9th Cir. 1986). Thus, "any party arguing waiver of arbitration bears a  
15 heavy burden of proof." *Id.* (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d  
16 1023, 1025 (11th Cir. 1982).

17 The party seeking to establish waiver must prove "(1) knowledge of an existing right  
18 to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the  
19 party opposing arbitration resulting from such inconsistent acts." *Brown v. Dillard's, Inc.*, 430  
20 F.3d 1004, 1012 (9th Cir. 2005).

21 Here, Defendant has not acted inconsistently with its right to compel arbitration. In  
22 the first letter to Plaintiff after receiving notice of Plaintiff's claims, Defendant's general  
23 counsel reminded Plaintiff's counsel that Plaintiff had signed an arbitration agreement. And  
24 again, in a second letter, Defendant's outside counsel reminded Plaintiff of the arbitration  
25 agreement and told Plaintiff that he had to comply with its formal demand procedures.  
26 Furthermore, Defendant's counsel reasonably requested that Plaintiff's counsel send proof,  
27 in the form of Plaintiff's signature on a representation letter, that Plaintiff was indeed  
28 represented by Mr. Tracey. Plaintiff never complied with this reasonable request, and

1 Defendant therefore cannot point to anything in the record showing Defendant acted  
2 inconsistently with its right to arbitrate. In light of the strong policy favoring arbitration, the  
3 Court holds that Defendant has not waived its right to arbitrate.

4 Plaintiff relies primarily on *Brown v. Dillard's, Inc.* to support his waiver argument.  
5 That case, however, is distinguishable. Brown had signed an arbitration agreement with  
6 Dillard's, and she filed a notice of intent to arbitrate with the American Arbitration Association  
7 ("AAA") in compliance with the agreement. 430 F.3d at 1005. She also paid a \$100 filing  
8 fee. *Id.* at 1008. But "Dillard's refused to participate in the arbitration proceedings." *Id.* at  
9 1005. It failed to pay its portion of the filing fee or otherwise respond to AAA's letters or  
10 requests for information. *Id.* at 1008–09. Then, Brown tried to contact Dillard's for over two  
11 months with no success. *Id.* at 1009. Finally, a Dillard's representative told Brown that her  
12 suit had no merit and they would not arbitrate. *Id.* So Brown filed suit. *Id.*

13 *Brown v. Dillard's, Inc.* is different from this case in several obvious ways. Put simply,  
14 Dillard's explicitly and repeatedly rejected Brown's request to arbitrate. *See id.* at 1006–09.  
15 In sharp contrast, Defendant twice reminded Plaintiff's counsel of the arbitration agreement,  
16 and merely requested that Plaintiff's counsel confirm that he represented Plaintiff before  
17 sending Plaintiff's full personnel file—a reasonable request given that it likely contains  
18 confidential information. Importantly, unlike in *Brown*, Plaintiff did not proceed with the  
19 arbitration demand and initiation procedures set forth in paragraphs 2 and 3 of the arbitration  
20 agreement. Thus, *Brown* provides no support for finding a waiver here.

21  
22 **B. PAGA Claims May Be Arbitrated**

23 Plaintiff asserts PAGA claims in his Complaint. A plaintiff suing under the PAGA  
24 "does so as the proxy or agent of the state's labor law enforcement agencies." *Arias v.*  
25 *Superior Court*, 46 Cal. 4th 969, 986 (2009). Thus, plaintiff argues, because the state of  
26 California was not party to the arbitration agreement, the PAGA claims are not subject to  
27 arbitration. The Court disagrees.

28 Plaintiff cites no case law for this novel theory. The claims do not "belong [solely] to

1 the State of California” as Plaintiff argues. (Opp. at 11.) They also belong to Plaintiff.  
2 California Labor Code § 2699(a) explicitly gives aggrieved employees the right to pursue a  
3 cause of action for Labor Code violations. And because Plaintiff has agreed to arbitrate  
4 claims against Defendant arising out of his employment, the PAGA claims are subject to  
5 arbitration. *Cf. Franco v. Athens Disposal Co., Inc.*, 171 Cal. App. 4th 1277, 1300 (2009)  
6 (discussing, in dicta, possibility of sending PAGA claims to arbitration).

7 Plaintiff also asks that the Court stay this case so that Plaintiff may assign his rights  
8 to a newly created corporation, which would not be subject to the arbitration agreement.  
9 Given that Plaintiff asks the Court to delay this case while he creates a corporation to subvert  
10 Defendant’s contractual rights, it is not surprising that Plaintiff fails to cite case law supporting  
11 its request. In any event, any assignment would include the obligation to arbitrate the  
12 assigned claims. The request is denied.

### 14 **C. Plaintiff’s Request for a Jury Trial Is Denied**

15 Lastly, Plaintiff asks the Court for a jury trial under 9 U.S.C. § 4 to determine disputed  
16 issues of fact regarding the applicability of the arbitration agreement. Although that statute  
17 requires a jury trial upon demand “[i]f the making of the arbitration agreement or the failure,  
18 neglect, or refusal to perform the same be in issue,” 9 U.S.C. § 4, courts have interpreted  
19 that provision to require a jury trial “only if there is a triable issue concerning the existence  
20 or scope of the agreement.” *Saturday Evening Post Co. v. Rumbleseat Press*, 816 F.2d  
21 1191, 1196 (7th Cir. 1987); *accord Doctor’s Ass’ns Inc. v. Distajo*, 107 F.3d 126, 129–30 (2d  
22 Cir. 1997). Here, for the reasons described above, there is no triable issue regarding the  
23 existence or scope of the arbitration agreement. Moreover, there is no triable issue  
24 regarding waiver, given that Plaintiff has provided no evidence showing Defendant acted  
25 inconsistently with its right to arbitrate.

## 27 **III. CONCLUSION**

28 For the foregoing reasons, Defendant’s motion to stay this case and compel arbitration

1 is **GRANTED**. The Court **STAYS** this case pending the outcome of the arbitration under 9  
2 U.S.C. § 3 (requiring district court to stay action pending arbitration). Plaintiff shall comply  
3 with the arbitration procedures set forth in the agreement. The Court retains jurisdiction to  
4 enforce an arbitration award, if any.

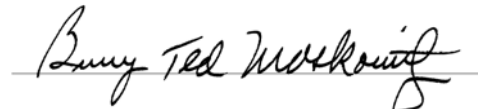
5 The Court sets a status conference for **November 5, 2010 at 12:00 p.m.** No personal  
6 appearances are necessary, and the parties shall submit in writing an update on the status  
7 of the arbitration.

8 **IT IS SO ORDERED.**

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10 DATED: April 26, 2010

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Honorable Barry Ted Moskowitz  
United States District Judge

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