

1 **WO**

2

3

4

5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8

9 Noodles Development, LP,)

No. CV-09-01094-PHX-NVW

10 Plaintiff,)

ORDER

11 vs.)

12)

13 Latham Noodles, LLC; Clifton Park)

14 Noodles, LLC; Jennifer Matteo; Chris)

15 Holmes; Todd Leach; Todd Bronson;)

16 Mark Matteo,)

17 Defendants.)

18)

19 Before the Court is Plaintiff’s Motion to Reopen Case and Proceed with Litigation.
20 (Doc. 35.) The Court will grant the motion.

21 Plaintiff Noodles Development (“Franchisor”) filed suit in May 2009 against
22 Defendants, claiming trademark and trade dress infringement, trade secret misappropriation,
23 and breach of contract. Defendants collectively moved to compel arbitration, and this Court
24 granted their motion in August 2009. (See Doc. 27.) This Court stayed the case, but
25 Franchisor did not file a demand for arbitration until January 2010, and may not have timely
26 paid its share of the arbitration fees. These delays prompted this Court to enter final
27 judgment requiring arbitration. (See Docs. 30, 34.)

28 Franchisor now informs this Court that it has paid its share of the arbitration fees.
Further, Franchisor states that, soon after it initiated arbitration, Defendants’ arbitration
counsel (Mario Herman) stopped representing all Defendants save for Chris Holmes and

1 Todd Leach. Holmes and Leach answered the demand for arbitration, but refused to pay
2 their share of the arbitration fees. The remaining Defendants did not answer the demand or
3 otherwise appear. Franchisor therefore filed the motion to reopen at issue here, asking this
4 Court to declare that all Defendants have waived their right to arbitrate.

5 Before responding, Defendants' litigation counsel (Mario Herman and Lang Baker
6 & Klain) withdrew, through appropriate procedures, from representing all Defendants except
7 Leach. Leach then filed a response to Franchisor's motion to reopen. Leach asserted that,
8 about a week after Franchisor filed its motion, he paid his share of the arbitration fees. No
9 other Defendant responded to Franchisor's motion (although Latham Noodles and Clifton
10 Park Noodles could not do so because they are not natural persons, and therefore incapable
11 of representing themselves *pro se*).

12 All Defendants except Leach — which the Court will refer to as the unrepresented
13 Defendants — have waived their right to arbitrate. “To demonstrate waiver of the right to
14 arbitrate, a party must show: (1) knowledge of an existing right to compel arbitration; (2) acts
15 inconsistent with that existing right; and (3) prejudice to the party opposing arbitration
16 resulting from such inconsistent acts.” *United States v. Park Place Assocs., Ltd.*, 563 F.3d
17 907, 921 (9th Cir. 2009) (internal quotation marks omitted). First, the unrepresented
18 Defendants moved to compel arbitration, demonstrating their knowledge of such a right.
19 Second, they acted inconsistently with that right by failing to respond to the demand for
20 arbitration, or (in Holmes's case) responding but otherwise stalling by refusing to pay
21 required fees. Third, Franchisor has suffered prejudice — the unrepresented Defendants
22 forced Franchisor out of this Court and into arbitration, and then refused to arbitrate, causing
23 Franchisor to incur additional costs (such as the cost of this motion) and otherwise delaying
24 and frustrating Franchisor's right to resolve its grievances. Franchisor itself caused some
25 delay when it waited four months to file an arbitration demand, but the unrepresented
26 Defendants conduct since that time nonetheless shows that they have waived their right to
27 arbitrate.

28

1 Whether Leach also waived is somewhat more difficult because Leach has now begun
2 paying arbitration fees. However, Ninth Circuit precedent indicates that this has little effect
3 on the waiver analysis if the allegedly waiving party did not begin participating until after
4 it faced the prospect of being forced back into court. In *Brown v. Dillard's, Inc.*, 430 F.3d
5 1004 (9th Cir. 2005), the Ninth Circuit resolved a case in which Dillard's had required its
6 employees to agree to arbitrate employment disputes such as wrongful termination.
7 Sometime later, Dillard's fired employee Stephanie Brown, and Brown demanded arbitration,
8 alleging wrongful termination. Dillard's refused to answer the demand or pay its share of the
9 arbitration fees, so Brown filed suit. In response, Dillard's moved to compel arbitration. *Id.*
10 at 1006–09. The district court denied Dillard's motion, and the Ninth Circuit found two bases
11 for affirming. First, Dillard's had defaulted in its obligation to arbitrate, thus bringing the
12 case within the Federal Arbitration Act's exception for cases in which “the applicant for the
13 stay [of litigation in favor of arbitration] is . . . in default in proceeding with such arbitration.”
14 *See id.* at 1009–12; 9 U.S.C. § 3. Second, Dillard's had waived its right to arbitrate by
15 knowing that it had such a right, refusing to participate when Brown demanded arbitration,
16 and causing prejudice to Brown through delay and unnecessary costs. *Brown*, 430 F.3d at
17 1012–13.

18 Like Dillard's, Defendant Leach expressed his preference to arbitrate, then refused to
19 participate when Franchisor actually demanded arbitration. When Franchisor moved to
20 reopen, Leach finally paid up and returned to this Court to say that he is *now* ready to
21 arbitrate. Dillard's may also have been ready to arbitrate after Brown filed suit, but just as
22 it was too late for Dillard's then, it is too late for Leach now. *See also Sink v. Aden Enters.,*
23 *Inc.*, 352 F.3d 1197, 1201 (9th Cir. 2003) (refusing to compel arbitration where party had
24 failed to pay fees and arbitrator had declared default; expressing concern that compelling
25 additional arbitration “would also allow a party refusing to cooperate with arbitration to
26 indefinitely postpone litigation” and frustrate Federal Arbitration Act's purpose to promote
27 “efficient and expeditious resolution of claims”). Leach knew of his right to arbitrate, acted
28

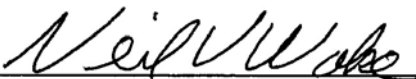
1 inconsistently with that right by failing to pay arbitration fees, and prejudiced Franchisor
2 through delay and extra costs. Leach therefore waived his right to arbitrate.

3 IT IS THEREFORE ORDERED that Plaintiff's Motion to Reopen Case and Proceed
4 with Litigation (Doc. 35) is GRANTED.

5 IT IS FURTHER ORDERED that this Court's Judgment (Doc. 34) is VACATED.
6 Given that all Defendants have already answered Plaintiff's complaint (*see* Doc. 16), the
7 Court will soon issue an order setting a scheduling conference.

8 DATED this 19th day of January, 2011.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Neil V. Wake
United States District Judge