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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WIENDI MORGAN,

Plaintiff,

v.

AVIS BUDGET GROUP, INC., et
al.,

Defendants.

No. 2:17-cv-00869-JAM-KJN

ORDER COMPELLING ARBITRATION

16 This matter involves a \$103.15 transaction for a rental car
17 that Wiendi Morgan ("Plaintiff") reserved and subsequently
18 cancelled. Avis Budget Group, Inc., and Budget Rent A Car
19 System, Inc., ("Defendants") now seek an order compelling
20 arbitration of this dispute and dismissing the action. For the
21 reasons set forth below, Defendants' motion is granted.¹

22 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

23 On September 1, 2016, Plaintiff made a reservation online
24 for a rental car with Defendants. Compl. at ¶ 9; Declaration of
25 Marla Blume ("Blume Decl.") at ¶ 7. Plaintiff cancelled the

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for July 25, 2017.

1 rental car the next day, prior to the scheduled reservation, and
2 never picked up the car. Id. at ¶¶ 11 & 13. Plaintiff alleges
3 that Defendants still charged her card for the reservation even
4 though she never provided them with authorization to charge the
5 card. Id. at ¶¶ 10 & 13. The charge was for \$103.15. Id. at
6 ¶ 13.

7 Plaintiff became a member of Defendants' Fastbreak Program
8 after submitting an online application on July 23, 2014. Blume
9 Decl. at ¶ 6. The Fastbreak Program enables customers to bypass
10 the service counter when they rent vehicles from Defendants. Id.
11 at ¶ 3. When Plaintiff enrolled in the program, she acknowledged
12 that she had "read, understood, and agree[d] to the Budget
13 Fastbreak Global Master Rental Agreement Terms and Conditions."
14 Id. at ¶ 5, Exh. A. The Terms and Conditions Plaintiff agreed to
15 in 2014 contained a provision that Defendants have "the right to
16 change these Terms and Conditions . . . upon [Defendants] posting
17 such changes on the Budget Web site" and that "[s]uch changes
18 will apply to rentals that [one] reserve[s] after . . . the date
19 such changes are posted on the Budget Web site." Id. at ¶ 8,
20 Exh. C at ¶ 1.D. On April 22, 2016, the Terms and Conditions
21 were revised and posted on Budget's website. Id. at ¶ 9. The
22 revised Terms and Conditions contained an arbitration provision
23 which states:

24 [I]n the event of a dispute that cannot be resolved
25 informally through the pre-dispute resolution
26 procedure, all disputes between you and Budget arising
27 out of or relating to or in connection with your
28 rental of a vehicle from Budget and these Rental Terms
and Conditions shall be exclusively settled through
binding arbitration through the American Arbitration
Association ("AAA") pursuant to the AAA's then-current
rules for commercial arbitration.

1 Id., Exh. D at 11. The "Pre-Dispute Resolution Procedure"
2 requires the customer and Budget to give the other party written
3 notice of a claim thirty days before initiating a proceeding
4 (i.e. arbitration) to assert that claim and make a reasonable
5 good faith effort to resolve the claim. Id., Exh. D at 10.

6 Plaintiff alleges that she notified Defendants of her legal
7 claims through her counsel and by mail on January 6, 2017, and
8 February 10, 2017. Compl. at ¶¶ 23 & 24. She further alleges
9 Defendants did not respond to either letter. Id. Plaintiff
10 filed this action in April 2017 alleging breach of contract,
11 fraud, unfair business practices, and violations of the
12 California Consumer Legal Remedies Act.

13 II. OPINION

14 A. Subject Matter Jurisdiction

15 On July 14, 2017, the Court ordered the parties to show
16 cause why this matter should not be dismissed for lack of subject
17 matter jurisdiction. ECF No. 15. Plaintiff alleges damages in
18 excess of \$75,000. Compl. at 7. The Court noted that the
19 transaction in dispute involved a charge of \$103.15 and that
20 "[e]ven accounting for plausible attorney's fees, the amount in
21 controversy appears to be far below the required \$75,000 figure."
22 Id.

23 In response to the Court's order, Defendants argue that
24 Plaintiff failed to provide evidence establishing it is more
25 likely than not that the amount in controversy exceeds \$75,000.
26 Def. Resp. at 2-3. Defendants point out that Plaintiff did not
27 provide any evidence to support attorneys' fees over that
28 threshold and that Plaintiff, in her Complaint, effectively

1 admits that the \$103.15 was returned to Plaintiff, which removes
2 that sum from Plaintiff's damages claim. See Compl. at ¶ 22
3 ("Defendants charged Plaintiff's credit card in the amount of
4 \$103.15—funds that were not returned to Plaintiff for several
5 weeks."). Defendants contend Plaintiff has not met her burden.

6 However, Plaintiff correctly argues that this Court must
7 apply the "legal certainty" test to determine whether the
8 complaint meets the amount in controversy requirement. P. Resp.
9 at 2; see Naffe v. Frey, 789 F.3d 1030, 1039 (9th Cir. 2015).

10 "Under this test, the sum claimed by the plaintiff controls if
11 the claim is apparently made in good faith. It must appear to a
12 legal certainty that the claim is really for less than the
13 jurisdictional amount to justify dismissal." Naffe, 789 F.3d at
14 1040 (citation and quotation marks omitted). "Only three
15 situations clearly meet the legal certainty standard: 1) when the
16 terms of a contract limit the plaintiff's possible recovery;
17 2) when a specific rule of law or measure of damages limits the
18 amount of damages recoverable; and 3) when independent facts show
19 that the amount of damages was claimed merely to obtain federal
20 court jurisdiction." Id. (citation and quotation marks omitted).

21 Plaintiff contends that the potential attorneys' fees,
22 punitive damages, statutory damages, and the value of the
23 equitable relief she seeks under California's Unfair Competition
24 Law may amount to over \$75,000. Although the Court remains
25 skeptical that the amount in controversy is met, the Court cannot
26 draw the contrary conclusion to a legal certainty based on the
27 briefs and record before it at this time. The action is not
28 dismissed on this basis.

1 B. Arbitration

2 Under the Federal Arbitration Act, the Court must compel
3 arbitration if (1) a valid agreement to arbitrate exists and
4 (2) the dispute falls within the scope of that agreement. Geier
5 v. m-Qube Inc., 824 F.3d 797, 799 (9th Cir. 2016).

6 Defendants argue that by enrolling in the Fastbreak Program,
7 Plaintiff accepted the Fastbreak Program's Terms and Conditions
8 and agreed to be bound to those terms. Mot. at 5. Additionally,
9 Plaintiff agreed to be bound to subsequent changes to those Terms
10 and Conditions as posted on the Budget Web site. Id. Therefore,
11 Defendants argue, Plaintiff is bound by the arbitration clause
12 posted on the Budget website on April 22, 2016, with respect to
13 her reservation made on September 1, 2016. Mot. at 6.

14 Plaintiff does not contend that she was unaware of the
15 arbitration clause, that she did not agree to the arbitration
16 clause, that the clause is invalid, or that her claims fall
17 outside the scope of the arbitration clause. Plaintiff instead
18 argues that Defendants waived their right to compel arbitration
19 by failing to follow the informal dispute resolution procedure
20 outlined in the Terms and Conditions. Opp. at 2-5.

21 "Waiver of the right to arbitration is disfavored[;]"
22 therefore, "any party arguing waiver of arbitration bears a heavy
23 burden of proof." Fisher v. A.G. Becker Paribas Inc., 791 F.2d
24 691, 694 (9th Cir. 1986) (citation and quotation marks omitted).
25 "A party seeking to prove waiver of a right to arbitration must
26 demonstrate: (1) knowledge of an existing right to compel
27 arbitration; (2) acts inconsistent with that existing right; and
28 (3) prejudice to the party opposing arbitration resulting from

1 such inconsistent acts." Id.

2 Plaintiff does not address this standard in her Opposition.
3 Instead, Plaintiff cites generally to the rule that "a party to a
4 contract may by conduct or representation waive the performance
5 of a condition thereof, or be held estopped by such conduct or
6 representations to deny that he has waived such performance."
7 Opp. at 2 (quoting Panno v. Russo, 82 Cal. App. 2d 408, 412
8 (1947)). Neither of the two cases cited in Plaintiff's
9 Opposition involved waiver of an arbitration provision and
10 Plaintiff provides no other authority for the proposition that
11 Defendants' alleged failure to follow the informal dispute
12 resolution procedure constitutes a waiver of the arbitration
13 provision.

14 The Court rejects Plaintiff's waiver argument for two
15 reasons. First, Plaintiff has not carried her "heavy burden" in
16 meeting the waiver elements outlined in Fisher. She has not
17 shown that Defendants acted "inconsistently" with the right to
18 arbitrate. Extended engagement in litigation despite the
19 presence of an arbitration provision would constitute such
20 inconsistent behavior. See, e.g., In re Toyota Motor Corp. Brake
21 Mktg., Sales, Practices & Prods. Liab. Litig., No. 8:10-ML-02172-
22 CJC(RNBx), 2011 WL 13160304 (C.D. Cal. Dec. 20, 2011) (finding
23 Toyota had acted inconsistently with its right to arbitrate by
24 vigorously litigating the federal court action for nearly two
25 years). Here, in contrast, Defendants invoked the arbitration
26 clause at the first opportunity. Furthermore, Plaintiff has not
27 shown prejudice. The expense incurred in filing a lawsuit in
28 court when one is party to an arbitration agreement is a "self-

1 inflicted" wound and does not demonstrate prejudice. See Martin
2 v. Yasuda, 829 F.3d 1118, 1126 (9th Cir. 2016) ("To prove
3 prejudice, plaintiffs must show more than 'self-inflicted' wounds
4 that they incurred as a direct result of suing in federal court
5 contrary to the provisions of an arbitration agreement.") (citing
6 Fisher, 791 F.2d at 698). "Such wounds include costs incurred in
7 preparing the complaint, serving notice, or engaging in limited
8 litigation regarding issues directly related to the complaint's
9 filing, such as jurisdiction or venue." Id. Defendants did not
10 cause Plaintiff's expenses. Rather than allowing litigation to
11 drag on and forcing Plaintiff to expend considerable time and
12 funds in pursuit of her claims, Defendants moved to compel
13 arbitration in their first responsive filing in this case. Cf.
14 Martin, 829 F.3d at 1127 (finding prejudice after seventeen
15 months of litigation in which the district court had ruled in the
16 plaintiff's favor on several legal issues); Gutierrez v. Wells
17 Fargo Bank, NA, 704 F.3d 712, 721 (9th Cir. 2012) (finding
18 prejudice where the defendant moved for arbitration five years
19 into litigation, once the case was already in appellate
20 proceedings). The requisite prejudice is not present.

21 Second, the discussion of the facts of this case that
22 Plaintiff includes in her Opposition omits any mention of
23 Defendants' response to Plaintiff's initial letter to Defendants.
24 Plaintiff's letter, titled "THIS IS AN OFFER OF COMPROMISE PRIOR
25 TO SUIT" and dated October 12, 2016, asked Defendants to pay
26 Plaintiff \$75,000 in settlement. Declaration of Maytak Chin
27 ("Chin Decl."), Exh. 1. Defendants responded to her demand with
28 a letter, dated November 14, 2016, informing her that the charge

1 would be credited to her MasterCard account in the amount of
2 \$103.15, that three free rental day certificates would be issued
3 to her Fastbreak profile, and that Budget denied her request for
4 a financial settlement. Chin Decl., Exh. 2. This letter is
5 consistent with paragraph 22 of the Complaint, in which Plaintiff
6 states that the \$103.15 was "not returned to Plaintiff for
7 several weeks." It appears, then, that rather than ignoring
8 Plaintiff's "pre-litigation communications" entirely, see Opp. at
9 5, Defendants unequivocally told Plaintiff they would not offer
10 her a financial settlement. Thus, the facts do not support
11 Plaintiff's waiver argument.

12 The Court finds that Defendants did not waive their right to
13 arbitration and Plaintiff is bound to the arbitration clause.
14 While the Court is authorized to stay the action, 9 U.S.C. § 3,
15 there is no apparent reason to stay the case rather than
16 dismissing the action as Defendants request. See Horne v.
17 Starbucks Corp., No. 2:16-cv-02727-MCE-CKD, 2017 WL 2813170 (E.D.
18 Cal. June 29, 2017) (compelling arbitration and dismissing the
19 action).

20 III. ORDER

21 For the reasons set forth above, the Court GRANTS
22 Defendants' Motion to Compel Arbitration and dismisses the
23 action.

24 IT IS SO ORDERED.

25 Dated: August 2, 2017

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE