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

JOE FINCH,

vs.

AMERICAN GENERAL FINANCE
MANAGEMENT CORPORATION, and
DOES 1 through 50, inclusive,

Defendants.

CASE NO. 08cv1151-LAB (AJB)

**ORDER DENYING MOTION TO
STAY ACTION AND ORDER RE:
CLASS CLAIMS**

Pending before the Court is Plaintiff Joe Finch’s motion to stay his lawsuit, pending resolution of a separate arbitration proceeding filed by James Rupp against the same defendant. The lawsuit is (at present) a putative class action where the class of plaintiffs includes “All California based Branch Managers who worked at any time during the four years” for Defendants before Finch filed the Complaint and “up until the date of class certification.” (Compl., ¶12.)

I. Facts and Procedural History

Finch worked as a Branch Manager for Defendant American General Finance Management Corp. (AGF), a consumer financing company. Although California labor laws typically require employers to pay overtime and require rest and meal breaks, employees may be exempt under certain circumstances. Cal. Lab. Code §§ 510, 1194; 8 Cal. Code

1 Reg. §11070. According to the Complaint, AGF wrongfully classified Finch and other Branch
2 Managers as “exempt” employees, and thus failed to pay him and all other Branch Managers
3 overtime as required by law. (Compl. at 2-3, ¶3.) Further, AGF may be liable because it did
4 not permit the Bank Managers to take rest or meal breaks. (*Id.*)

5 When they were hired, all potential class members agreed to an Employment Dispute
6 Resolution Program, which “is intended to create an exclusive, procedural mechanism fo the
7 final resolution of all disputes falling within its terms.” (Doc. No. 19-2, Ex. 1 at 1.) The
8 agreement states that all disputes “shall be finally and conclusively resolved through
9 arbitration under the Program, which provides the exclusive, final and binding method by
10 which Disputes are resolved.” (*Id.* at 3.) Further, “[e]ach Dispute shall be arbitrated on an
11 individual basis,” and neither party “may pursue any Dispute on a class action . . . basis.”
12 (*Id.*)

13 Despite these provisions in the Dispute Resolution Program, Finch filed the Complaint
14 on May 28, 2008 in California Superior Court. (Doc. No. 1, Ex. A.) On June 26, 2008, AGF
15 removed the lawsuit to the federal court, establishing jurisdiction under 28 U.S.C. § 1332(d),
16 the Class Action Fairness Act (CAFA). (Doc. No. 1.) AGF did not seek to enforce the
17 arbitration provision. The parties began discovery, and the Court set January 18, 2010 as
18 the deadline to file the class certification; to date, Finch has not filed for certification.

19 Meanwhile, another Branch Manager, James Rupp, sought arbitration for similar
20 claims under the Employment Dispute Resolution Program. The same law firm represents
21 both Rupp and Finch in these parallel proceedings. Rupp seeks to represent a class of
22 Branch Managers through the arbitration process, despite the provision in the Employment
23 Dispute Resolution Program. Finch now seeks to stay his lawsuit, presumably to join the
24 class of Branch Managers in the arbitration proceeding. Finch claims to have discovered the
25 arbitration provision only recently which is why he did not seek arbitration in the first place.
26 (Doc. No. 19 at 3). On March 1, 2010, Finch filed this motion to stay the lawsuit pending
27 resolution of the class certification question in the Rupp arbitration. The motion is heavily
28 briefed, and the briefing includes the motion, an opposition, a reply, and a sur-reply.

1 **II. Discussion**

2 **A. Motion to Stay**

3 Finch first argues that 9 U.S.C. § 3 requires the Court to stay the lawsuit. This statute
4 requires a court to stay an action if “any issue [is] referable to arbitration under a written
5 arbitration agreement,” but only if the Court is “satisfied that the issue involved in such suit
6 or proceeding is referable to arbitration under such an agreement.” 9 U.S.C. § 3. He argues
7 that because the class certification issue in the Rupp arbitration is practically identical to the
8 class certification in his lawsuit, he has an interest in the Rupp arbitration and “it makes
9 sense to allow that proceeding to run its course.” (Doc. No. 19 at 5.)

10 AGF argues, in response, that Finch has no interest in the Rupp arbitration because
11 “Section 3 has no application to ‘issues’ in cases between different parties.” (Doc. No. 21 at
12 8 (internal citations removed).) That is, 9 U.S.C. § 3 would only apply if Finch were seeking
13 arbitration, but he is not; rather, he wants to wait and see if Rupp’s request to represent a
14 class of Branch Managers is granted. It is possible to construe Finch as a party to the Rupp
15 arbitration because Finch may be included in the potential class (if the class is, in fact,
16 certified). Nothing the parties have filed shows whether the arbitrator has yet ruled on
17 whether to certify the class. If the arbitrator has denied class certification, then Finch’s
18 motion must be denied because there is no possibility he could join Rupp’s arbitration
19 proceeding. And if at some point the arbitrator grants class certification and circumstances
20 change, Finch is not foreclosed from seeking a stay a second time.

21 AGF also argues that Finch waived his right to arbitrate. To show that Finch waived
22 his contractual right to arbitrate, AGF must prove “(1) knowledge of an existing right to
23 compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party
24 opposing arbitration resulting from such inconsistent acts.” *AT&T Corp. v. Vision One*
25 *Security Sys.*, 914 F. Supp. 392, 395-96 (S.D. Cal. 1995) (*quoting Britton v. Co-Op Banking*
26 *Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)). AGF points out that Finch knew about his right
27 to arbitrate when he signed the Employment Dispute Resolution Program in 2001, and he
28 was reminded of his right to arbitrate when AGF produced a copy of the Program on June

1 2009. (Doc. No. 21 at 4.) Then, from June 2009 through October 2009, Finch made no
2 requests to arbitrate his claims and instead continued discovery. (*Id.* at 6.) By continuing
3 to pursue discovery in the district court and failing to request arbitration for at least one and
4 a half years, Finch was taking actions inconsistent with his right to arbitrate, despite his
5 knowledge of that right. See *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759
6 (9th Cir. 1989) (plaintiff waived its right to compel arbitration by pursuing discovery for two
7 years before requesting arbitration). As a result, AGF was adversely affected because it had
8 to comply with extensive discovery, rather than beginning the arbitration process sooner.
9 See *id.* (finding prejudice to the party opposing the motion to stay because the moving party
10 failed to invoke its right to arbitration for 2 years).

11 Finch urges the Court to reject this argument, because “the issue has not been
12 briefed by either party before this . . . Court. Therefore, it would not be appropriate to deny
13 Plaintiff’s request for a stay on [these] grounds.” (Doc. No. 22 at 4.) But AGF did brief the
14 issue, at length, in its response to Finch’s motion to stay. The only reason the issue is not
15 fully briefed is because Finch didn’t respond. Finch didn’t deny his knowledge of the
16 Employment Dispute Resolution Program nor did he offer alternative arguments why he has
17 not waived his right to arbitrate. In any case, the Court prefers to know whether a class has
18 been certified in the Rupp arbitration before deciding whether Finch waived his right to
19 arbitration.

20 Finch’s second argument is that the Court should choose to stay the lawsuit “under
21 a discretionary standard of review,” even if the Court is not required to do so under 9 U.S.C.
22 § 3. (Doc. No. 19 at 2.) Finch, as the moving party, has the burden of establishing the need
23 for a stay. *Clinton v. Jones*, 520 U.S. 681, 708 (1997). Finch argues that granting the stay
24 will conserve judicial resources because it “will obviate later arguments about whether the
25 trial court has jurisdiction to rule over these claims.” (Doc. No. 19 at 5.) Finch, however,
26 makes this exact argument in his reply brief, forcing the Court to deal with the issue now.
27 In any event, without an update on the Rupp arbitration the Court will not exercise its
28 discretion to stay this action.

1 **B. Jurisdiction**

2 Finch, in a very conclusory fashion in his reply brief, argues that this Court no longer
3 has jurisdiction over his individual claims because he is no longer pursuing class certification.
4 What he means, apparently, is that he failed to move for class certification when ordered to
5 do so and does not now intend to remedy his default. Even if this argument were correct,
6 the remedy would be remand, not a stay.

7 Post-removal amendments do not deprive the Court of jurisdiction. *Williams v. Costco*
8 *Wholesale Corp*, 471 F.3d 975, 976 (9th Cir.2006) (“We have long held that post-removal
9 amendments to the pleadings cannot affect whether a case is removable, because the
10 propriety of removal is determined solely on the basis of the pleadings filed in state court.”)
11 The Ninth Circuit, relying on this general principle, recently held that a district court does not
12 lose jurisdiction under CAFA when class certification is denied in a removed putative class
13 action. *United Steel, Paper & Forestry v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir.
14 2010).

15 **III. Conclusion**

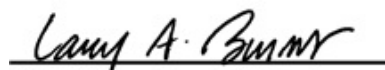
16 The Motion to Stay is **DENIED WITHOUT PREJUDICE**. If because of developments
17 in the arbitration proceeding either or both parties wish to seek a stay in the future they are
18 not precluded from doing so. Finch is **ORDERED** to file a notice updating the Court on the
19 Rupp arbitration proceeding.

20 The Court accepts Finch’s representation that he intends to pursue his own claims
21 only, and not to seek class certification. He is therefore **ORDERED** to file an amended
22 complaint within 14 calendar days of the date this order is issued, omitting class allegations.

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24 DATED: November 8, 2010

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HONORABLE LARRY ALAN BURNS
United States District Judge

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