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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRANK MILES,

Plaintiff,

v.

BRUSCO TUG & BARGE, INC. and
RONALD BRUSCO, JR.,

Defendants.

No. 2:18-cv-02860-TLN-AC

ORDER

This matter is before the Court on Defendant Brusco Tug & Barge, Inc.’s (“Defendant”) Motion to Compel Arbitration. (ECF No. 16.) Plaintiff Frank Miles (“Plaintiff”) filed an opposition. (ECF No. 17.) Defendant filed a reply. (ECF No. 20.) For the reasons set forth below, the Court DENIES Defendant’s motion.

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiff initiated this action in Sacramento County Superior Court on September 14,
3 2018. (ECF No. 1 at 11.) Plaintiff alleges he was employed by Defendant and asserts a number
4 of wage and hour violations. (*See id.* at 11–21.) Defendant removed the action to this Court on
5 October 26, 2018, on the basis of diversity jurisdiction (ECF No. 1 at 2), and on March 9, 2020,
6 filed the instant motion to compel arbitration and stay the action (ECF No. 16). In its motion,
7 Defendant states that while Plaintiff was employed with Defendant, he was a member of the
8 International Organizations of Masters, Mates & Pilots, Pacific Maritime Region (the “Union”)
9 and his employment was governed by successive collective bargaining agreements (“CBAs”)
10 between Defendant and the Union. (ECF No. 16-1 at 2.) Defendant argues therefore that
11 “because the CBAs require that Plaintiff’s claims be resolved under and in accordance with their
12 procedures for the settlement of grievances and disputes in arbitration, Plaintiff must be
13 compelled to arbitrate his dispute.” (*Id.*)

14 **II. STANDARD OF LAW**

15 The parties do not dispute that the Federal Arbitration Act (“FAA”) governs Defendant’s
16 motion. 9 U.S.C. §§ 1–16. In deciding whether to compel arbitration, a district court typically
17 determines two gateway issues: (1) whether a valid agreement to arbitrate exists; and, if it does,
18 (2) whether the agreement encompasses the dispute at issue. *Lifescan, Inc. v. Premier Diabetic*
19 *Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). “To evaluate the validity of an arbitration
20 agreement, federal courts ‘should apply ordinary state-law principles that govern the formation of
21 contracts.’” *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (citing *First*
22 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). If the court is “satisfied that the
23 making of the arbitration agreement or the failure to comply with the agreement is not in issue,
24 the court shall make an order directing the parties to proceed to arbitration in accordance with the
25 terms of the agreement.” 9 U.S.C. § 4. “[A]ny doubts concerning the scope of arbitrable issues
26 should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*
27 *Corp. (Moses H. Cone)*, 460 U.S. 1, 24–25 (1983). If a court “determines that an arbitration
28 clause is enforceable, it has the discretion to either stay the case pending arbitration, or to dismiss

1 the case if all of the alleged claims are subject to arbitration.” *Hoekman v. Tamko Bldg. Prod.,*
2 *Inc.*, No. 2:14-cv-01581-TLN-KJN, 2015 WL 9591471, at *2 (E.D. Cal. Aug. 26, 2015) (citation
3 omitted).

4 There is an “emphatic federal policy in favor of arbitral dispute resolution.” *Mitsubishi*
5 *Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 631 (1985). As such, ““any doubts
6 concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the
7 problem at hand is the construction of the contract language itself or an allegation of waiver,
8 delay, or a like defense to arbitrability.”” *Id.* at 626 (quoting *Moses H. Cone*, 460 U.S. 1 at 24–
9 25). “Because waiver of the right to arbitration is disfavored, ‘any party arguing waiver of
10 arbitration bears a heavy burden of proof.’” *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691,
11 694 (9th Cir. 1986) (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023,
12 1025 (11th Cir. 1982), *abrogated on other grounds by Dean Witter Reynolds, Inc. v. Byrd*, 470
13 U.S. 213 (1985)). Therefore, an arbitration agreement may only “be invalidated by ‘generally
14 applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that
15 apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate
16 is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011) (quoting *Doctor’s*
17 *Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Courts may not apply traditional
18 contractual defenses, like duress and unconscionability, in a broader or more stringent manner to
19 invalidate arbitration agreements and thereby undermine FAA’s purpose to “ensur[e] that private
20 arbitration agreements are enforced according to their terms.” *Id.* at 1748 (quoting *Volt Info.*
21 *Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

22 **III. ANALYSIS**

23 Defendant argues a valid and enforceable arbitration agreement exists between Plaintiff
24 and Defendant, Plaintiff’s claims are within the scope of the CBA’s arbitration agreement, and
25 Defendant has acted consistent with an intent to arbitrate. (See ECF No. 16-1 at 8–12.)
26 Plaintiff’s argument in opposition is not whether the arbitration agreement encompasses the
27 dispute at issue, but rather whether a valid arbitration agreement exists. (See ECF No. 17.)
28 Plaintiff argues Defendant’s motion fails because: (1) Defendant has waived the right to enforce

1 the arbitration agreement through unreasonable delay and by failing to follow the grievance
2 procedure of the CBA; (2) the CBA does not cover Plaintiff's claims; and (3) the arbitration
3 agreement is unconscionable and therefore invalid. (*See id.*) Because the Court finds that
4 Defendant waived the right to enforce the arbitration agreement by failing to follow the grievance
5 procedure of the CBA, the Court will address that issue alone and declines to address Defendant's
6 remaining arguments.

7 Plaintiff argues Defendant waived its right to compel arbitration by failing to follow the
8 grievance and arbitration procedures set forth in the CBA as Defendant "failed to enforce steps 1–
9 3 of the grievance process since Plaintiff's initial [C]omplaint was filed." (ECF No. 17 at 5–6.)
10 Plaintiff asserts a California state court in *Knutsson v. KTLA, LLC*, 228 Cal. App. 4th 1118, 1133
11 (2014), denied a motion to compel arbitration based on the defendant's failure to compel
12 compliance with steps one and two of the CBA's three-step grievance process. (*Id.* at 6.) In
13 reply, Defendant argues *Knutsson* is inapplicable because in that case "the court recognized that
14 procedural questions which grow out of a dispute and bear on its final disposition are
15 presumptively for an arbitrator to decide" and "Plaintiff's 'forfeiture' argument invites the
16 [C]ourt to both interpret and apply the [CBA], which is the sole province of the arbitrator." (ECF
17 No. 20 at 7.) Defendant argues whether grievance procedures "have been followed or excused, or
18 whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be
19 answered without consideration of the merits of the dispute which is presented for arbitration."
20 (ECF No. 20 at 7 (citing *Livingston v. John Wiley & Sons, Inc. (John Wiley)*, 376 U.S. 543, 555–
21 59 (1964)).) Defendant contends "asking the Court to interpret the grievance-arbitration
22 machinery . . . invites serious legal error," as "it is the arbitrator's role to interpret and apply the
23 CBAs." (*Id.* at 7–8.)

24 Here, the Court agrees with Plaintiff and finds *Knutsson* relevant to the instant case.
25 While acknowledging "there is no direct federal decisional authority" regarding whether a right to
26 compel compliance with a grievance procedure "may be forfeited," the court found the
27 defendants forfeited the right to compel arbitration because they did "not seek to enforce steps 1
28 and 2, the contractually established precursors of a duty to arbitrate under step 3." 228 Cal. App.

1 4th at 1130. Steps 1 and 2 of the relevant grievance procedure required that an attempt be made
2 to resolve the dispute by discussion with a supervisor and if the employee is dissatisfied with the
3 supervisor's disposition to be issued within ten working days of being presented with the
4 complaint, the union may formally present the grievance to the department manager. *Id.* at 1129.
5 The court noted that "[a]t no time in the trial court did defendant[s] argue that plaintiffs must
6 engage in the employee/supervisor discussion required by step 2" and "never sought to compel
7 compliance with step 2." *Id.* Because the defendants failed to compel compliance with steps 1
8 and 2, the court found they forfeited the right to do so. *Id.*

9 As in the instant case, the defendant in *Knutsson* relied on *John Wiley* to argue that the
10 question of "an obligation to arbitrate this dispute" must be decided by the arbitrator. *Id.* at 1134.
11 The *Knutsson* court noted that the Supreme Court in *John Wiley* held "the issue of whether the
12 dispute must be arbitrated is decided by the court." *Id.* at 1133. The *Knutsson* court
13 distinguished *John Wiley* by noting that *John Wiley* "arose out of a dispute whether a [CBA] was
14 still enforceable after two entities merged" and the union argued that the time limitations in the
15 grievance procedures were not controlling because the defendant employer's violations of the
16 CBA were "continuing." *Id.* The Supreme Court "concluded the issue of whether there had been
17 union compliance with the grievance procedures was inextricably caught up in the arbitration's
18 merits" as to the background of the merger and the negotiations surrounding it. *Id.* (citing *John*
19 *Wiley*, 376 U.S. at 556–57). The *Knutsson* court noted that the defendant in *Knutsson* could not
20 compel the plaintiffs to arbitrate because there was "no enforceable arbitration agreement" due to
21 defendant's failure to compel compliance with the grievance process and therefore "the
22 procedural arbitrability issued addressed in *John Wiley* . . . becomes irrelevant." *Id.* (internal
23 citation omitted).

24 Here, the relevant CBA provides that "all disputes, controversies or disagreements arising
25 out of the interpretation or application of this Agreement, or because the Union or Employee feels
26 aggrieved by the treatment of the Employer, shall be resolved in accordance with the provisions
27 of this Article." (ECF No. 16-2 at 49.) The CBA also lays out a multi-step grievance procedure.
28 The relevant provision states:

1 25.03 Union Steward/Employer Resolution- As the initial step in the
2 adjustment of a grievance, it shall be presented in writing to the
3 Employer by the Steward or an authorized Union Representative.
4 The grievance must be presented initially within thirty (30) working
5 days after the date of the action complained of or the date the Regular
6 Employee became aware of the incident that gave rise to the
7 grievance. The Employer shall make its reply within five (5)
8 working days to the authorized person presenting the grievance.
Within five (5) days of the Union's receipt of this response, the
Steward or Representative and the Employer will meet to review and
discuss the circumstances and facts concerning the grievance and
will, to the best of their abilities, attempt to settle and resolve the
grievance on an informal basis. Any demand for arbitration must be
made within twenty (20) days of the meeting or arbitration will be
waived.

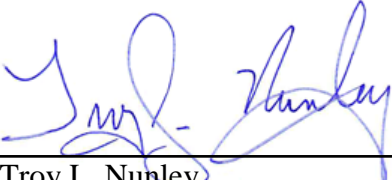
9 (*Id.* at 50.) Similar to the grievance procedure in *Knutsson*, this procedure requires the following
10 prior to arbitration: (1) the grievance be presented to the Employer in writing; (2) for the
11 Employer to then issue a reply; and (3) for the Union to review and discuss the grievance and
12 attempt to settle informally. Like the defendant in *Knutsson*, Defendant has not presented the
13 argument to this Court that Plaintiff is required to comply with the requirement to formally
14 present a grievance to Defendant. (*See* ECF Nos. 16-1, 20.) Because Defendant never sought to
15 compel compliance with these three steps, "the contractually established precursors of a duty to
16 arbitrate," the Court finds that Defendant has forfeited its right to compel arbitration. *See*
17 *Knutsson*, 228 Cal. App. 4th at 1131.

18 IV. CONCLUSION

19 Based on the foregoing, the Court hereby DENIES Defendant's Motion to Compel
20 Arbitration. (ECF No. 16.)

21 IT IS SO ORDERED.

22 DATED: March 29, 2022

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Troy L. Nunley
United States District Judge
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