UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FGI INDUSTRIES, INC., f/k/a FOREMOST GROUPS, INC.

Plaintiff,

v.

TANGSHAN AYERS BATH EQUIPMENT CO., LTD.

Defendant.

Case No. 2:14-cv-00188-HDV-RZx

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION [DKT. NO. 130]

I. INTRODUCTION

This action arises out of a commercial dispute that has been hotly contested in various courts for well over a decade. Now, for the first time, Defendant Tangshan Ayers Bath Equipment Co., Ltd.'s ("Tangshan") seeks to compel arbitration of the claims in Plaintiff Foremost's Third Amended Complaint ("TAC") [Dkt. No. 129] and dismiss the action with prejudice, or in the alternative, compel the matter to arbitration and stay the action pending the outcome of arbitration ("Motion") [Dkt. No. 130].

Tangshan's Motion offers too little and comes too late. A party seeking to compel arbitration based on a contractual agreement generally waives that right when it "(1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (internal quotation omitted). Tangshan made that strategic decision not to compel arbitration, and actively sought to litigate the underlying merits (again and again), when it filed five motions to dismiss and a host of other procedural and substantive motions in the intervening 12 years prior to seeking arbitration in 2023. For the reasons discussed below, the Court finds that Tangshan has waived its right to arbitrate these claims and on that basis ***denies*** the Motion in its entirety.

II. BACKGROUND

The case involves the sale of ceramic bathroom products. On October 20, 2000, Plaintiff FGI Industries, Inc., f/k/a Foremost Groups, Inc. ("Foremost") entered into an agreement with the Chinese manufacturer, Tangshan Huida Ceramic Group Co., Ltd. ("Huida"). TAC ¶ 11; *see also* Declaration of Kellen Ressmeyer ("Ressmeyer Decl."), Exhibit B ("Agreement") [Dkt. No. 131-2].[1]

[1] Tangshan provided a certified translation of the Agreement by Lan Sung, *see* Dkt. No. 131-2, and included a sworn declaration of Lan Sung, which included their qualifications. Foremost provided an alternative translation of the Agreement, *see* Declaration of Frank Velocci ("Velocci Decl."), Exhibit C [Dkt. No. 31-2], translated by Prestige Translation Service, which fails to list the translator and includes an indecipherable signature of the translator. No declaration from Foremost's translator was included in any filings. Examining the two translations, the Court finds that they do not differ substantively for purposes of the Motion and uses Tangshan's translation given that Foremost's translation fails to even include its translator's name. "Witness testimony from a foreign language must be properly authenticated and any interpretation must be shown to be an accurate translation

Under the Agreement, Foremost enjoyed the exclusive right to distribute all products manufactured by Huida in the United States and Canada. TAC. ¶ 12. The Cooperation Agreement, written in Mandarin, also contains an arbitration clause that governs disputes under the Agreement. A certified translation of the clause states:

> Any dispute between Party A and Party B during the performance of this Agreement shall be resolved through negotiation and, if it cannot be resolved through negotiation, both Parties agree to submit the dispute to the China International Arbitration Commission, Shenzhen Branch, for arbitration.

Agreement ¶ 13 ("Arbitration Clause"); *see also* Declaration of Lan Sung ("Sung Decl.") ¶ 4 (listing the original arbitration clause in Mandarin, as well as various translations) [Dkt. No. 141].[2]

a. The Ayers Bath Litigation

Foremost alleges that in 2011, Ayers Bath USA ("Ayers Bath") interfered with the Agreement by offering to sell Huida Products at a lower price than Foremost, thus violating the exclusive distribution right outlined in the Agreement. TAC ¶¶ 69–72. On September 12, 2011, Foremost filed a complaint against Ayers Bath (the "Ayers Bath Litigation") asserting the following

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done by a competent translator." *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 659 (N.D. Cal. 1994) (finding that party failed to lay a proper foundation for the admission of the translated affidavits).

[2] The translation of the Agreement provided by Plaintiff Foremost states:

> If any disputation aroused during the execution of this agreement shall be solved by negotiation, if in vain, both Party A and Party B agree to be arbitrated by the Shenzen Branch of China Trade Arbitrating Committee of International and Economic Trading.

Velocci Decl., Exhibit C at ¶ 13. Plaintiff argues that the term "during the execution of this agreement" limits the scope of the arbitration clause to just the signing of the agreement that does not cover acts "nearly 11 years later." Opposition at 14 [Dkt. No. 137]. The Court disagrees. The Agreement only becomes operative when the parties sign and assent to it, so having an arbitration clause that governs the *signing* of the Agreement makes no sense. Defendant's translation, as well as a Google translation of the text, indicates that it is to apply to any dispute during the *performance* of the Agreement. Both common sense and circumstantial evidence demonstrate that the arbitration clause is to apply to disputes arising from the performance of the Agreement.

claims: (1) Infringement on Exclusive Right of Distribution; (2) Intentional Interference with Prospective Economic Advantage; (3) Negligent Interference with Prospective Economic Advantage; (4) Tortious Interference with Contractual Relations; (5) Federal Unfair Competition; (6) Unfair Competition Under California's UCL; (7) Unfair Competition Under State Law; (8) Unjust Enrichment; (9) Infringement of Unregistered Trademark; and (10) Slander of Title. *See* Ressmeyer Decl., Exhibit K.[3] Plaintiff also sought a preliminary injunction to bar Ayers Bath from selling, distributing, or offering for sale Huida parts and products in the United States and Canada. TAC ¶ 71. Judge Feess granted Plaintiff's application and issued the preliminary injunction. *Id.* ¶ 78. At no point in its opposition to application of preliminary injunction did Ayers Bath file a motion to compel arbitration or request the Court to invoke the Arbitration Clause. *See* Ayers Bath Litigation [Dkt. No. 16].[4]

b. Ayers Bath Bankruptcy

After the preliminary injunction was issued, Ayers Bath was unable to operate, as its only business activity was selling alleged Huida Products. TAC ¶ 79. As a result, Ayers Bath filed for bankruptcy under chapter 7 of title 11 of the United States Code on March 22, 2013 ("Ayers Bath Bankruptcy"). *Id.* ¶ 82; *see also* Ressmeyer Decl., Exhibit P.[5] As part of the bankruptcy litigation,

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[3] *See Foremost Groups, Inc. v. Ayers Bath (U.S.A.) Co., Ltd.*, Case No. 2:11-cv-07473-GAF-E (C.D. Cal. filed Sept. 12, 2011) ("Ayers Bath Litigation") [Dkt. No. 1].

[4] *See also* September 22, 2015 Motion to Dismiss Oral Argument at 6:23–7:12 [Dkt. No. 44]:

> The Court: Did Judge Feess engage in the issue of whether this lawsuit was an effort to circumvent the arbitration clause in the agreement between Tangshan Huida and Foremost?
> Mr. Velocci [For Foremost]: Well, Your Honor, that's interesting because he –
> The Court: Did he or didn't he?
> Mr. Velocci: He didn't because it wasn't raised.
> The Court: I see. Okay.
> Mr. Velocci: Ayers USA, who now raises it through Tangshan Ayers, didn't take that position.
> The Court: Why isn't that a … serious position?
> Mr. Velocci: Well, Your Honor, I think it's been waived, number one.…

[5] *See In re Ayers Bath*, Case No. 2:13-bk-17409-RK (Bankr. C.D. Cal. filed Mar. 22, 2013) [Dkt. No. 2].

Foremost conducted a Rule 2004 Exam of Ayers Bath's executives on November 12, 2013 and allegedly learned that it was grossly undercapitalized and had significant overlap of directors and officers with Defendant Tangshan. TAC ¶ 89.

On December 12, 2013, Foremost filed a proof of claim against Ayers Bath for $5,265,000 for damages incurred by Foremost as a result of Ayers Bath's alleged interference with its contractual relationship and pursuit of prospective economic advantage. TAC ¶¶ 90–91. The proof of claim was unobjected to and deemed allowed for the full amount on April 14, 2015. *Id.* ¶¶ 90–93. But at the close of the proceeding, Plaintiff received a distribution of only $7,757.24, just 0.14% of its allowed claim. *Id.* ¶ 95.

c. Tangshan Ayers Litigation

While the Ayers Bath Bankruptcy was ongoing and after it learned about the overlapping corporate officers between Tangshan and Ayers Bath, Foremost filed the present action against Defendant Tangshan on January 9, 2014. *See* Complaint [Dkt. No. 1]. Plaintiff made similar allegations to those averred in the Ayers Bath Litigation, asserting claims for: (1) Intentional Interference with Prospective Economic Advantage; (2) Tortious Interference with Contractual Relations; (3) Unfair Competition under the California UCL; and (4) Unfair Competition under state law. Complaint ¶¶ 81–110. These causes of action were based on Ayers Bath's conduct, and Foremost essentially sought to hold Tangshan liable under an alter ego theory of liability. *Id.* at ¶¶ 85, 94, 100, 108. Originally, Tangshan did not appear until May 26, 2015, after default had been entered against it. [Dkt. No. 24]. After the Court granted the parties' joint stipulation to set aside default, Defendant Tangshan filed a motion to dismiss Foremost's original complaint. [Dkt. Nos. 25, 26].

i. The Court's First Dismissal

On June, 8, 2015, Defendant Tangshan first moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(7), and 19, arguing that Foremost failed to add Huida as a necessary party and that the Court lacked subject matter jurisdiction over Tangshan—noting that "this Court can apply the federal equitable estoppel doctrine which allows [Tangshan] to compel arbitration of this case under the Agreement by and between Foremost and Huida." [Dkt. No. 26 at 21]. But

Tangshan chose not file a motion to compel arbitration and did not explicitly request the Court to compel arbitration.

At oral argument or the motion on August 31, 2015, the Court stated that Foremost appeared to be attempting to take a proof of claim and enforce it against an alleged alter ego. [Dkt. No. 38 at 15]. The Court added:

> "Then here's the thing. Then make a 12(b)(6) motion. You've made everything but a 12(b)(6) motion. You made a 12(b)(1) motion. You made a 12(b)(7) motion. Make a 12(b)(6) motion, and I will hear it."

Id. at 16:16–19. The Court set a new briefing schedule, and on September 10, 2015, Defendant Tangshan filed a new motion to dismiss under 12(b)(6). [Dkt. No. 40]. Tangshan argued that Foremost was impermissibly claim splitting, that the lawsuit was essentially a duplication of the Ayers Bath litigation, and requested dismissal with prejudice. *Id.* at 7–19. Tangshan again did not file a motion to compel arbitration.

On October 19, 2015, the Court granted Defendant Tangshan's motion to dismiss. [Dkt. No. 49]. Plaintiff's claims were dismissed under Rule 12(b)(6) with leave to amend. *Id.* at 9. The Court denied Tangshan's 12(b)(7) and 12(b)(1) motions "as moot." *Id.*

ii. The Court's Second Dismissal

On November 17, 2015, Plaintiff Foremost filed its First Amended Complaint ("FAC"), which asserted claims for (1) alter ego; (2) action on judgment; and (3) execution of judgment pursuant to Federal Rule of Civil Procedure 69. *See* FAC ¶¶ 59–74 [Dkt. No. 50]. On December 8, 2015, Tangshan filed a motion to dismiss the FAC under Federal Rules of Civil Procedure 4(m), 12(b)(1), and 12(b)(6). [Dkt. No. 52-1]. Tangshan argued that the allegations were insufficient to plead an alter ego liability under 12(b)(6), *see id.* at 8–11, that equitable estoppel applied to enforce the arbitration clause in this dispute, *see id.* at 11–13, 18–19, that Foremost's claims are barred through the claims splitting doctrine and res judicata, *see id.* at 19–22, and that the lawsuit should be dismissed for deficient service under Rule 4(m), *see id.* at 22–24. Once again, Tangshan did not file a motion to compel arbitration.

On January 6, 2016, the Court dismissed Foremost's FAC in part, holding that (1) California

law did not recognize a substantive alter ego claim; and (2) enforcement of a judgment under Federal Rule of Civil Procedure 69(a) is a procedural rule and does not provide a substantive claim. [Dkt. No. 57]. The Court denied Tangshan's Rule 4(m) motion to dismiss with prejudice and denied its 12(b)(1) motion as moot. *Id.* at 1.

iii. Stay and Referral to the Bankruptcy Court

On January 25, 2016, Foremost then filed its Second Amended Complaint ("SAC") asserting just one cause of action: Action on a Judgment [Dkt. No. 57]. On February 8, 2016, Tangshan filed a motion to dismiss the SAC under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting lack of jurisdiction due to the province of the bankruptcy court and "[t]he doctrines of collateral estoppel, issue preclusion, claim preclusion, and against claims splitting." [Dkt. No. 59 at 10, 6–21]. At no point in the motion did Tangshan request the Court to compel arbitration.

On March 8, 2016, the Court stayed the proceedings noting that "as a first measure, Foremost should seek an amended judgment through the bankruptcy court." [6] [Dkt. No. 65]. Then on November 1, 2017, the Court lifted the stay and clarified that the Court intended to recommend the issue of whether Ayers Bath was the alter-ego of Tangshan to the bankruptcy court. [Dkt. No. 78].

Almost four years later, the bankruptcy court issued its report and recommendation ("R&R") on October 20, 2021. *In re Ayers Bath (U.S.A.), Co., Ltd.*, No. 2:13-BK-17409-RK, 2022 WL 4349020, at *1 (Bankr. C.D. Cal. Sept. 19, 2022). Objections were levied and on October 11, 2022, the bankruptcy court submitted a second R&R noting that Plaintiff's objections were considered in the original R&R. [Dkt. No. 90].

The bankruptcy court's R&R recommended that Plaintiff not be allowed to amend the judgment of the bankruptcy court for two independent reasons. *In re Ayers Bath (U.S.A.), Co. Ltd.*, No. 2:13-Bk-17409-RK, 2021 WL 4317321 (Bankr. C.D. Cal. Sept. 22, 2021), *supplemented by* No.

[6] The Court also previewed that Foremost was not likely to win in bankruptcy: "The Ayers Bath bankruptcy court did not determine the validity and amount of Foremost's claim after a contested evidentiary hearing. Rather, the bankruptcy court simply deemed the claim approved." *Id.* at 11. Further, "Foremost was in possession of all these alleged facts [related to alter ego concerns] prior in time to when it filed the proof of claim in the Ayers Bath bankruptcy on December 12, 2013." [Dkt. No. 65 at 15].

2:13-BK-17409-RK, 2022 4349020 (Bankr. C.D. Cal. Sept. 19, 2022). First, a proof of claim was not a money judgment under Federal Rule of Civil Procedure 69(a) and thus could not be enforced under that rule. *Id.* at *4, *23–43. Second, even if the proof of claim was a money judgment, it could not be amended under California Code of Civil Procedure § 187 because Foremost had failed to demonstrate that Tangshan "controlled" the Ayers Bath Litigation and thus failed the second requirement of Section 187. *Id.* at *4, *44–53. The Court adopted both grounds. *See* Order Accepting R&R [Dkt. No. 91].

iv. Aftermath of Bankruptcy Court's R&R

After the Court adopted the R&R, the Court issued an order to show cause as to why the case should not be dismissed with prejudice, given the Court's adoption of the bankruptcy court's R&R. *See* Order Accepting R&R. Plaintiff's responses noted that the Court had yet to rule on Tangshan's motion to dismiss Foremost's SAC. [Dkt. No. 92]. Given the length of time that had passed since the Court's referral to the bankruptcy court, the Court ordered the parties to renew their motions and oppositions. [Dkt. No. 93].

On December 17, 2022, Tangshan filed its renewed motion to dismiss Foremost's SAC. [Dkt. No. 104]. Tangshan moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the proof of claim is not an enforceable money judgment against Tangshan and that Foremost was foreclosed from enforcing the allowed proof of claim against Tangshan for lack of due process. *See id.* 10–14. Again, Tangshan did not file a motion to compel arbitration; instead, it asked the Court to dismiss the matter with prejudice. In response, Foremost filed a cross-motion for leave to amend its SAC. [Dkt. No. 106]. On February 23, 2023, the Court ordered supplemental briefing from Plaintiff regarding the issue of arbitrability. [Dkt. No. 113]. Specifically, the Court asked Plaintiff to submit a supplemental reply brief addressing the following issue:

> Whether Plaintiff can be compelled to arbitrate their claims against Defendant, under a theory of equitable estoppel, rendering their amendment futile? Or put differently, why the doctrine of equitable estoppel would not compel Plaintiff to arbitrate, given that the claims in the proposed third amended complaint rely on the existence of a contract containing an arbitration clause?

Id. at 1. Foremost then filed a supplemental reply brief in support of its cross-motion for leave to amend the SAC, including similar waiver arguments as indicated in its opposition to this Motion. [Dkt. No. 116]. But again, Tangshan did not file a motion to compel arbitration.

On May 3, 2023, the Court granted Plaintiff's motion to file a Third Amended Complaint ("TAC"), denying Tangshan's motion to dismiss as moot. [Dkt. No. 124]. The Court recognized that while arbitrability may be grounds to finding an amendment futile, "the Court finding amendment futile based on arbitrability is inappropriate on this record." *Id.* at 11. Importantly, the Court noted the following, previewing the current motion before the Court:

> First, there is no pending motion to compel arbitration. Without a pending motion to compel arbitration, there is still a possibility that Defendant could waive arbitration. *See Inteliclear, LLC v. ETC Glob. Holdings, Inc.*, No. 2:18-CV-10342-RGK-SK, 2021 WL 2370617, at *3 (C.D. Cal. Feb. 2, 2021) ("That the claims may be arbitrable does not affect this analysis since Defendant could waive arbitration. The proper procedure would therefore be to allow Plaintiff to amend; then Defendant can move to compel arbitration on those claims.")
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> Second, Plaintiff's supplemental response raises several issues, which call into question whether Plaintiff may be compelled to arbitrate in the first place. These include: (1) whether Defendant would be time-barred from compelling arbitration; (2) whether Defendant waived its right to arbitrate; (3) whether Chinese or California law applies; and (4) if Chinese law does apply, whether Chinese law recognizes the doctrine of equitable estoppel.… Without resolving these questions, the Court recognizes that these issues would require more extensive motion practice that are more appropriately address[ed] through a motion to compel.

Id.

On June 28, 2023, Tangshan filed for the first time this Motion to Compel Arbitration currently before the Court. *See* Motion. Foremost filed its Opposition ("Opp.") [Dkt. No. 137] on September 28, 2023, and Tangshan filed its Reply [Dkt. No. 140] on November 16, 2023. The Court heard oral argument on January 18, 2024 and took the matter under submission [Dkt. No. 144].

III. DISCUSSION

Tangshan's position is that equitable estoppel applies and that the claims asserted by Foremost are arbitrable. *See* Motion at 16–22. Foremost argues that Tangshan waived any right to compel arbitration through its litigation conduct. Opp. at 14–18. Beyond delay, Foremost argues that Tangshan waived its right to arbitrate by litigating multiple motions to dismiss, engaging in fact and expert discovery, and taking multiple depositions. *Id.* at 16.

No "concrete test" for waiver exists, so to assess whether a party "took acts inconsistent with its right to arbitration, 'we consider the totality of the parties' actions.'" *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1014–15 (9th Cir. 2023) (quoting *Hill v. Xerox Bus. Servs.*, 59 F.4th 457, 471 (9th Cir. 2023)). There is "[n]o longer … a 'special rule' favoring arbitration." *Id.* at 1014. "Rather, courts 'must hold a party to its arbitration contract just as the court would to any other kind' but 'may not devise novel rules to favor arbitration over litigation.'" *Id.* (quoting *Morgan v. Sundance, Inc.*, 596 U.S. 411, 412 (2022)). "In short, contractual waiver generally requires 'an existing right, a knowledge of its existence, and an actual intention to relinquish it, **or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished**,' with no required showing of prejudice." *Id.* (quoting *United States ex rel. Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1387 (9th Cir. 1986) (emphasis added).

A party asserting waiver in this context must demonstrate: "(1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with that existing right." *Armstrong*, 59 F.4th at 1014–15 (recognizing that after the Supreme Court's *Morgan* decision, the Ninth Circuit no longer requires a showing of prejudice to find waiver of the right to compel arbitration). Under Ninth Circuit precedent, "a party ***generally*** 'acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.'" *Id.* at 1015 (citation omitted) (emphasis added). "Although the party opposing arbitration still bears the burden of showing waiver, the burden is no longer 'heavy.' Instead the burden for establishing waiver of an arbitration agreement is the same as the burden for establishing waiver in any other contractual context." *Id.* at 1014–15.

Reviewing the over-a-decade-long record here, the Court finds[7] that Defendant waived its right to compel arbitration by having knowledge of an existing right to compel arbitration and exhibiting "conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." *Armstrong*, 59 F.4th at 1014. As outlined in Section I, Tangshan filed ***five*** motions to dismiss[8], four of which moved under Rule 12(b)(6) and addressed the underlying issues and merits of the case. These specifically include the following:

- On June 8, 2015, Tangshan filed a Motion to Dismiss under Federal Rules of Procedure

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[7] The issue of waiver is a "question of arbitrability" that is presumptively for a court to decide. *Martin v. Yasuda*, 829 F.3d 1118, 1123 (9th Cir. 2016). Although the parties may choose to have an arbitrator decide that issue by including "clear and unmistakable language to that effect" in the arbitration agreement, *id.* at 1124, here they have not done so. *See Slaten v. Experian Info. Sols., Inc.*, No. 21-cv-09045-MWF, 2023 WL 6890757, at *3–4 (C.D. Cal. Sept. 6, 2023) (determining that an identical arbitration provision failed to clearly and unmistakably delegate the issue of waiver to the arbitrator); *DeVries v. Experian Info. Sols., Inc.*, No. 16-cv-02953-WHO, 2017 WL 733096, at *10 (N.D. Cal. Feb. 24, 2017) (same).

[8] The Court also notes that on October 27, 2011, Tangshan's alleged alter ego Ayers Bath also filed an opposition to the application for preliminary injunction in the Ayers Bath Litigation ***on the merits***, failed to ask the Court to invoke the Arbitration Clause, and failed to file any motion to compel arbitration, despite possibly having knowledge that collateral estoppel applied to the action. *See* Ayers Bath Litigation [Dkt. No. 16]; *see also* September 22, 2015 Motion to Dismiss Oral Argument at 6:23–7:12 [Dkt. No. 44] (emphasis added):

> The Court: Did Judge Feess engage in the issue of whether this lawsuit was an effort to circumvent the arbitration clause in the agreement between Tangshan Huida and Foremost?
> Mr. Velocci [For Foremost]: Well, Your Honor, that's interesting because he –
> The Court: Did he or didn't he?
> Mr. Velocci: He didn't **because it wasn't raised.**
> The Court: I see. Okay.
> Mr. Velocci: Ayers USA, who now raises it through Tangshan Ayers, didn't take that position.
> The Court: Why isn't that a … serious position?
> Mr. Velocci: Well, Your Honor, **I think it's been waived**, number one.…

This indicates that Tangshan-related entities have potentially availed themselves of federal courts and jurisdiction for ***over 12 years***. The Court does not make any definitive findings on alter ego, but includes this discuss to underscore the fact that the merits of the underlying dispute (which both parties agree relate to both the Ayers Bath Litigation and the Tangshan Litigation) have been litigated in federal courts for more than a decade.

12(b)(1), 12(b)(7), and 19, arguing that Foremost failed to add Huida as a necessary party and that the Court lacked subject matter jurisdiction over it, noting that "this Court can apply the federal equitable estoppel doctrine which allows [Tangshan] to compel arbitration of this case under the Agreement by and between Foremost and Huida." [Dkt. No. 26 at 21]. And while this was noted to the Court, Tangshan never moved the Court to compel arbitration or specifically requested the Court to compel arbitration.

- On September 10, 2015, Tangshan filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) arguing that Foremost was impermissibly claim splitting and that the lawsuit was essentially a duplication of the Ayers Bath litigation. [Dkt. No. 40 at 7–19].
- On December 8, 2015, after Foremost was granted leave to file its FAC, Tangshan filed a Motion to Dismiss the FAC under Fed. Rs. Civ. P. 4(m), 12(b)(1), and 12(b)(6), arguing that the allegations were insufficient to plead an alter ego liability under 12(b)(6), *see* Dkt. No. 52-1 at 8–11, that equitable estoppel applied to enforce the arbitration clause in this dispute, *see id.* at 11–13, 18–19, that Foremost's claims are barred through the claims splitting doctrine and res judicata, *see id.* at 19–22, and that the lawsuit should be dismissed for deficient service under Rule 4(m), *see id.* at 22–24.
- On February 8, 2016, Tangshan filed a motion to dismiss Plaintiff's SAC under Federal R. Civ. P. 12(b)(1) and 12(b)(6), asserting lack of jurisdiction due to the province of the bankruptcy court and "[t]he doctrines of collateral estoppel, issue preclusion, claim preclusion, and against claims splitting." [Dkt. No. 59 at 10, 6–21].
- On December 17, 2022, Tangshan filed its renewed motion to dismiss Foremost's SAC pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the proof of claim is not an enforceable money judgment against Tangshan and that Foremost is foreclosed from enforcing the allowed proof of claim against Tangshan for lack of due process. [Dkt. No. 105 at 10–14].

Only ***after*** the Court explicitly ordered supplemental briefing from Plaintiff on the issue of arbitrability did Tangshan finally move to compel arbitration. Although some of the motions to dismiss discussed the right to arbitration—which satisfies the knowledge prong of the waiver inquiry—a motion to compel arbitration was never filed, despite many opportunities to do so. As the

Ninth Circuit has noted: "A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Yasuda*, 829 F.3d at 1125; *see also In re Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584, 591 (5th Cir. 2010) ("A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court."). Instead, Plaintiff Foremost made a conscious decision to continue to seek judicial judgment on an arbitrable claim.

Tangshan argues that it "sought arbitration of the TAC's claims at its first opportunity, both in its 2015 motion to dismiss such claims from Foremost's original complaint, and when Foremost revived those claims in June 2023." Reply at 8.

But this simply is not true. While the Court acknowledges that Tangshan noted in its initial motion to dismiss that "this Court can apply the federal equitable estoppel doctrine … to compel arbitration of this case," Dkt. No. 26 at 21, when the Court allowed Tangshan to instead file a 12(b)(6) motion to address the fact that Foremost appeared to be attempting to take a proof of claim and enforce it against an alleged alter ego, *see* Dkt. No. 38 at 15–16, Tangshan availed itself of this federal court by filing its motion to dismiss under 12(b)(6), seeking dismissal with prejudice. [Dkt. No. 40 at 15]. Tangshan was not forced file a 12(b)(6) motion and could have filed a motion to compel arbitration instead. The Court granted Tangshan's motion, dismissing under the "doctrine of *res judicata*" which "will not allow a plaintiff to both vindicate its underlying claims and seek to enforce a judgment." [Dkt. No. 49 at 8–9]. Tangshan's motion, which ultimately benefited Tangshan, included ***no mention*** of arbitrability. *See id.* While the Ninth Circuit has previously opined that "moving to dismiss an action on jurisdictional or res judicata grounds is not inconsistent with a known right to compel arbitration because such motions do not seek a judicial determination on the merits," *see Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 942 n.10 (9th Cir. 2019), no "concrete test" exists for accessing whether Tangshan took acts inconsistent with its right to arbitrate. *Armstrong*, 59 F.4th at 1015. Here, "consider[ing] the totality of the parties' actions," Tangshan has acted inconsistently with its right to arbitrate, especially given the many motions to dismiss filed and the fact and expert discovery already completed. *Id.*

Tangshan also argues that all parties agreed that bankruptcy proceedings for Foremost's

intervening claim to enforce the Proof of Claim were not arbitrable and should not be held against it for waiver purposes. Motion at 21. But even assuming that this is true, when Foremost filed its cross-motion for leave to file its TAC to add back its original claims, Tangshan could have filed a motion to compel arbitration. Instead Tangshan filed a reply to its Motion to Dismiss the SAC, arguing that the proposed TAC should be dismissed, not just because of arbitration, but also because the proposed TAC was futile, the proposed amendments were time-barred, and the proposed amendment was prejudicial and in bad faith. [Dkt. No. 107 at 13–22]. Tangshan sought dismissal, and waited nearly a decade to finally seek arbitration after Plaintiff's claims have been sanded down.

Nor has the past decade been a passive one. In fact, both parties admitted in its Joint Case Management Statement last year that the details of the underlying case have been unearthed and examined through litigation: "Over the past nine years, the Parties have engaged in extensive fact and expert discovery. It is Foremost's position that only limited discovery remains to be taken on Foremost's tort claims." [Dkt. No. 134 at 4]. The five motion to dismiss under Fed. Rs. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7), 4(m), and 19 demonstrate that Tangshan has unreasonably tried to hedge its judicial bets and to save arbitration as a last resort, unused for a decade.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Tangshan has waived its right to arbitrate. The Motion to Compel Arbitration is denied.

Dated: February 13, 2024

Hernán D. Vera
United States District Judge