

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CETERA ADVISOR NETWORKS LLC,  
Plaintiff-in-Interpleader,  
v.  
PROTECTIVE PROPERTY & CASUALTY  
INSURANCE COMPANY, CAL CAPITAL  
LIMITED, and GERALD B. GLAZER,  
Defendants-in-Interpleader.

No. 2:19-cv-00299-JAM-EFB  
**ORDER GRANTING CETERA'S  
MOTION TO COMPEL ARBITRATION**

AND RELATED COUNTERCLAIMS  
AND CROSSCLAIMS

Cetera Advisor Networks LLC ("Cetera"), the custodian of a brokerage account with assets valued at over \$450,000 (the "Account"), filed this interpleader action to settle competing demands and claims of ownership over the Account by Protective Property & Casualty Insurance Company ("Protective") and Cal Capital Limited ("Cal Capital"). Compl., ECF No. 1.

Protective then filed counterclaims against Cetera for refusing Protective's recent requests for funds from the Account. Protective Answer to Cetera, ECF No. 5. Cetera moves to compel arbitration of these counterclaims. Cetera Mot., ECF No. 7.

1 For the reasons set forth below, this Court GRANTS Cetera's  
2 motion.<sup>1</sup>

3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 Gerald B. Glazer ("Glazer") was the owner of Sacramento  
5 Infiniti, an automobile dealership located in Sacramento,  
6 California. Protective Answer to Cetera, Counterclaim ¶ 3.  
7 Sacramento Infiniti offered customers the option of purchasing a  
8 vehicle service contract ("VSC"), which would cover the cost of  
9 certain vehicle repairs. Id. Glazer formed Cal Capital to  
10 manage the profits received from the sale of the VSCs. Id. ¶ 4.

11 In 2008, Cal Capital entered into a Trust Agreement with  
12 Chesterfield International Reinsurance Limited ("Chesterfield")  
13 whereby Chesterfield would process, administer, and adjudicate  
14 claims under VSCs. Counterclaim ¶ 5, n1. A trust account would  
15 be formed for which Chesterfield would serve as trustee, for the  
16 benefit of Cal Capital, and from which Chesterfield would be  
17 reimbursed for claims paid to the customers. Id. Chesterfield  
18 subsequently entered into an account agreement with Financial  
19 Network Investment Corporation ("Financial Network"), now known  
20 as Cetera, to open the trust account at issue. Id. ¶ 6.

21 In 2010, an affiliate of Chesterfield, Lyndon Property  
22 Insurance Company ("Lyndon"), now known as Protective, replaced  
23 Chesterfield as trustee of the Account. Compl. ¶ 12. In 2013,  
24 Lyndon and Cetera executed an updated Account Agreement for the  
25 Account, still held for the benefit of Cal Capital. Id. ¶ 14.

26  
27 

---

<sup>1</sup> 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 June 18, 2019.

1 Currently, Cetera holds the Account, with assets valued in excess  
2 of \$450,000, in the name of Lyndon (now Protective) as trustee  
3 for the benefit of Cal Capital. Id. ¶¶ 1, 20.

4 Under the terms of the 2013 Account Agreement, Cetera is  
5 obligated to pay amounts from the Account as requested by duly  
6 authorized entities and in the past Cetera has permitted Lyndon  
7 to withdraw from the Account. Compl. ¶ 21. However, in 2018,  
8 Lyndon and/or Protective made certain requests for withdrawals  
9 from the Account to which Glazer and/or Cal Capital objected and,  
10 given that conflict between the parties, Cetera did not make the  
11 withdrawals requested by Lyndon and/or Protective. Id. ¶ 15.

12 On February 15, 2019, pursuant to 28 U.S.C. § 1335, Cetera  
13 filed the instant Complaint-in-Interpleader naming Protective,  
14 Cal Capital, and Glazer as Defendants-in-Interpleader; depositing  
15 the Account with this Court; and requesting a determination of  
16 Protective and Cal Capital's rights to the Account. See Compl.

17 On March 13, 2019, Protective filed an Answer to Cetera's  
18 Complaint-in-Interpleader and also brought counterclaims against  
19 Cetera and crossclaims against Cal Capital and Glazer. See  
20 Protective Answer to Cetera.

21 On April 19, 2019, Cal Capital filed an Answer to Cetera's  
22 complaint (ECF No. 16) and an Answer to Protective's crossclaims  
23 (ECF No. 17). In its Answer to Protective, Cal Capital also  
24 filed crossclaims against Protective and Portfolio, an alleged  
25 business partner and alter-ego of Protective. Protective then  
26 filed an Answer to Cal Capital's crossclaims. ECF No. 24.  
27 Portfolio (formally Portfolio General Management Group, Inc.)  
28 also filed an Answer to Cal Capital's crossclaims. ECF No. 28.

1 On April 19, 2019, Glazer filed an Answer to Cetera's  
2 complaint in which he disclaimed any personal claim to the  
3 Account and denied any personal objection to specific withdrawal  
4 requests. ECF No. 14. Glazer also filed an Answer to  
5 Protective's crossclaims. ECF No. 25.

6 Cetera moves to compel arbitration of Protective  
7 counterclaims against Cetera: (1) Breach of Contract, (2) Breach  
8 of the Covenant of Good Faith and Fair Dealing, (3) Breach of  
9 Fiduciary Duty, and (4) Violation of California Business &  
10 Professions Code § 17200. Cetera Mot. Protective opposes  
11 Cetera's motion in full. Protective Opp'n, ECF No. 31. Cal  
12 Capital opposes Cetera's motion to the extent it seeks to compel  
13 arbitration of Protective's breach of fiduciary duty claim  
14 against Cetera or any of Cal Capital's crossclaims against  
15 Protective. Cal Capital Opp'n, ECF No. 32. Glazer opposes  
16 Cetera's motion only to the extent it seeks to compel arbitration  
17 of Protective's crossclaim against Glazer. Glazer Opp'n, ECF No.  
18 30.

19 II. OPINION

20 A. Arbitrability of Protective's Counterclaims

21 Section 16 of the 2013 Account Agreement (the "Arbitration  
22 Provision") provides in relevant part: "Client hereby agrees that  
23 all controversies, which arise between the parties concerning any  
24 transaction or the construction, performance, or breach of this  
25 Agreement that cannot be settled, shall be submitted to  
26 arbitration in accordance with the rules then in effect of the  
27 Financial Industry Regulatory Authority, Inc." Arbitration  
28 Provision, ECF No. 7-2, Exhibit C at 5. The Federal Arbitration

1 Act ("FAA") governs the Arbitration Provision. 9 U.S.C. §§ 2, 4.

2 Under the FAA, a court must compel arbitration if (1) a  
3 valid agreement to arbitrate exists and (2) the dispute falls  
4 within the scope of that agreement. Chiron Corp. v. Ortho  
5 Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). This  
6 Court finds the Arbitration Provision valid and enforceable.

7 Cetera and Protective agree that the counterclaims fall  
8 within the scope of the Arbitration Provision. See Cetera Mot.  
9 at 6-7; Protective Opp'n at 7. Cal Capital, however, argues the  
10 Arbitration Provision does not apply to Protective's cause of  
11 action against Cetera for breach of fiduciary duty. See Cal  
12 Capital Opp'n. This Court finds Cal Capital's argument to be  
13 without merit. Even if the Arbitration Provision is interpreted  
14 narrowly, which it need not be, it squarely covers a claim for  
15 breach of fiduciary duty related to Cetera's withholding of funds  
16 requested by Protective pursuant to the Account Agreement because  
17 it is a "controvers[y]" "concerning" Cetera's "performance" of  
18 the agreement. ECF No. 7-2, Exhibit C at 5; see Mediterranean  
19 Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th  
20 Cir. 1983) (finding breach of fiduciary duty claim to be  
21 arbitrable as related to the interpretation and performance of  
22 the contract at issue).

23 Additionally, Protective's claim is intertwined with its  
24 counterclaims for Cetera's alleged breach of the Account  
25 Agreement, the fiduciary relationship itself is predicated on the  
26 Account Agreement, and it would be inefficient and potentially  
27 prejudicial for this claim to be resolved separately from  
28 Protective's other claims.

1 B. Waiver of Right to Compel Arbitration

2 While Protective concedes its counterclaims would normally  
3 be subject to arbitration, Protective argues Cetera waived its  
4 right to arbitrate the counterclaims by filing the interpleader  
5 action and failing to timely address Protective's demands for  
6 payments. Protective Opp'n at 7-13. This Court disagrees.

7 Under the FAA, there is a clear "federal policy favoring  
8 arbitration" and "as a matter of federal law, any doubts  
9 concerning the scope of arbitrable issues should be resolved in  
10 favor of arbitration, whether the problem at hand is the  
11 construction of the contract language itself or an allegation of  
12 waiver, delay, or a like defense to arbitrability." Moses H.  
13 Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25  
14 (1983). Thus, while the "right to arbitration, like any other  
15 contract right, can be waived," "waiver of the right to  
16 arbitration is disfavored" and "'any party arguing waiver of  
17 arbitration bears a heavy burden of proof.'" United States v.  
18 Park Place Assocs., Ltd., 563 F.3d 907, 921 (9th Cir. 2009)  
19 (quoting in part Fisher v. A.G. Becker Paribas Inc., 791 F.2d  
20 691, 694 (9th Cir. 1986)). "A party seeking to prove waiver of a  
21 right to arbitration must demonstrate: (1) knowledge of an  
22 existing right to compel arbitration; (2) acts inconsistent with  
23 that existing right; and (3) prejudice to the party opposing  
24 arbitration resulting from such inconsistent acts." Fisher, 791  
25 F.2d at 694.

26 First, Cetera has not acted inconsistent with any right to  
27 compel arbitration by filing the interpleader action. Cetera has  
28 not filed an action seeking damages from Protective. Contra

1 Hebei Hengbo New Materials Tech. Co. v. Apple, Inc., 344 F. Supp.  
2 3d 1111, 1122 (N.D. Cal. 2018). Cetera is essentially a neutral  
3 in this interpleader action, simply holding the property subject  
4 to a dispute between Protective and Cal Capital.

5 Second, Protective has not been prejudiced by Cetera filing  
6 the interpleader action. Protective complains of the added costs  
7 of potentially duplicative filings, but does not explain why  
8 then, in the first instance and given its arguments, it did not  
9 seek to dismiss the interpleader action under the Arbitration  
10 Provision. See Martin v. Yasuda, 829 F.3d 1118, 1126 (9th Cir.  
11 2016) (discussing lack of prejudice from "self-inflicted wounds"  
12 incurred from continuing to litigate in federal court prior to  
13 moving to compel arbitration). Nor is this Court persuaded by  
14 Protective's arguments surrounding delay, as Protective could  
15 have compelled arbitration against Cetera for these very  
16 counterclaims once it determined a settlement was not viable.  
17 See Arbitration Provision. Cetera is properly seeking to avoid  
18 being held doubly liable for any distribution decision; Cetera is  
19 not trying to manipulate the process or forum shop.

20 Thus, this Court finds that Cetera has not waived its right  
21 to compel arbitration of Protective's counterclaims.

22 C. Stay of Claims

23 Having concluded that Protective's counterclaims against  
24 Cetera are subject to the Arbitration Provision and that Cetera  
25 has not waived its right to compel arbitration, this Court stays  
26 Protective's counterclaims against Cetera. 9 U.S.C. § 3. This  
27 Court has not compelled arbitration of Protective's crossclaims  
28 or the interpleader action itself, and thus declines to dismiss


1 the counterclaims. Contra Sparling v. Hoffman Const. Co., 864  
2 F.2d 635, 638 (9th Cir. 1988). Moreover, dismissal of the  
3 counterclaims on the theory of failure to exhaust non-judicial  
4 remedies is not appropriate as an unenumerated Rule 12(b) motion.  
5 Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014).

6 III. ORDER

7 For the reasons set forth above, this Court GRANTS Cetera's  
8 Motion to Compel Arbitration (ECF No. 7), and hereby STAYS  
9 Protective's counterclaims against Cetera pending the outcome of  
10 the arbitration.

11 IT IS SO ORDERED.

12 Dated: July 15, 2019

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE