UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#94 (05/04 HRG OFF)

CIVIL MINUTES - GENERAL

Case No.	5:13-cv-01961-PSG-DTB	Date	April 29, 2015
Title	*Maria Ford, et al. v. Gary Yasuda, et al.*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **(In Chambers) Order DENYING Motion to Compel Arbitration**

Before the Court is a motion filed by Defendants Gary Yasuda and Amarillo College of Hairdressing, Inc., doing business as Milan Institute and Milan Institute of Cosmetology, ("Defendants") to compel Plaintiffs Maria Ford, Sundae Worthy, Paige Martin, and Megan Tallerico ("Plaintiffs") to engage in individual arbitration, to stay the action pending a ruling on the motion, to dismiss the action upon granting the motion, and/or to adjust the discovery schedule upon denying the motion. Dkt. # 94 ("Mot."). The Court finds the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the moving, opposing, and reply papers, the Court denies the motion.

I. Factual Background

Defendant Amarillo College of Hairdressing, Inc., doing business as Milan Institute and Milan Institute of Cosmetology, ("Milan") offers both career training in cosmetology to enrolled students and salon service for hair, skin, and body to paying clients. Dkt. # 64 ("Second Amended Complaint" or "SAC") ¶¶ 2-3. In his capacity as president and owner of Milan, Defendant Gary Yasuda controls the operations of Milan's educational programs and salons. *Id.* ¶ 19. After charging Plaintiffs to enroll in its training programs, Milan required Plaintiffs to provide service to paying clients, but failed to pay a wage for their work. *Id.* ¶¶ 1, 4.

Upon her enrollment at Milan, each Plaintiff signed an enrollment agreement containing an arbitration agreement providing in relevant part:

[A]ny dispute arising from my enrollment at Milan Institute, no matter how

> described, pleaded or styled, shall be resolved by binding arbitration, under the substantive and procedural requirements of the Federal Arbitration Act, by a single arbitrator, conducted by the American Arbitration Association (AAA) at Milan Institute, 2822 F. Street[,] Bakersfield, CA 93301, under its Commercial Rules. All determinations as to the scope, enforceability and effect of this arbitration agreement shall be decided by the arbitrator, and not by a court. The award rendered by the arbitrator may be entered in any court having jurisdiction.

Dkt. # 94-2 ("Roohparvar Dec."), Exh. A-D (collectively, "Arbitration Agreement") (italics omitted).

Plaintiffs' agreements described the terms of arbitration as follows:

1. Both Student and the College irrevocably agree that any dispute between them shall be submitted to Arbitration.

2. Neither the Student nor the College shall file or maintain any lawsuit in any court against the other, and agree that any suit filed in violation of this Agreement shall be dismissed by the court in favor of an arbitration conducted pursuant to this Agreement.

3. The costs of the arbitration filing fee, arbitrator's compensation and facilities fees will be by the School [sic].

4. The arbitrator's decision shall be set forth in writing and shall set forth the essential findings and conclusions upon which the decision is based.

5. Any remedy available from a court under the law shall be available in the arbitration.

Id.

II. Procedural History

On October 28, 2013, Plaintiffs filed a proposed class action complaint for violations of federal and state wage and hour laws. Dkt. #1 ("Cpt.") ¶¶ 45-68. On June 6, 2014, Plaintiffs filed a first amended complaint, changing the named plaintiffs and adding new state wage and hour claims. Dkt. # 42. On June 23, 2014, Defendants moved to dismiss on the grounds that

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Plaintiffs were not employees as a matter of law, and that Yasuda had no individual liability for their wage and hour claims. Dkt. #44. On July 30, 2014, the Court granted the motion to dismiss in part with leave to amend, dismissing the causes of action against Yasuda for violation of the Fair Labor Standards Act ("FLSA") (29 U.S.C. § 206), violation of the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200, *et seq.*), and declaratory relief. Dkt. # 52.

On August 29, 2014, Plaintiffs filed a second amended complaint for: (1) violation of the FLSA; (2) failure to provide minimum wages (Cal. Lab. Code § 1194); (3) failure to provide overtime wages (Cal. Lab. Code § 510); (4) failure to provide meal and rest breaks (Cal. Lab. Code §§ 226.7, 512); (5) waiting time penalties (Cal. Lab. Code §§ 201, 202, 203); (6) failure to provide itemized wage statements (Cal. Lab. Code § 226); (7) failure to reimburse business expenses (Cal. Lab. Code § 2802); (8) violation of the UCL; (9) civil penalties under the Private Attorneys General Act ("PAGA") (Cal. Lab. Code §§ 2698, *et seq.*); and (10) declaratory relief (28 U.S.C. §§ 2201-2202). SAC ¶¶ 74-164. On September 19, 2014, Defendants filed an answer, raising the issue of arbitration for the first time by pleading as an affirmative defense that:

> Plaintiffs' claims and those of some or all of the purported class or collective action members are barred, in whole or in part, because Plaintiffs and/or members of the alleged putative group are contractually bound to arbitrate any grievance and/or any dispute arising between Defendants and each Plaintiff or each putative group member.

Dkt. # 77 ¶ 15.

The parties have already begun engaging in discovery. On May 19, 2014, the Court granted the parties' joint stipulation to concentrate initial discovery on the issue of whether the proposed class members are employees. Dkt. # 39. On November 14, 2014, Plaintiffs served both Defendants with a first set of interrogatories, requests for admission, and requests for production. Dkt. # 98-1 ("Schwartz Decl.") ¶ 2. On November 28, 2014, the parties filed a joint Rule 26(f) report, noting that they had "already begun to exchange written discovery requests and notice depositions." Dkt. # 81 at 6. In a footnote of the Rule 26(f) report, Defendants alleged that:

> Defendants maintain that, as part of their enrollment at the various Milan schools, each of the Plaintiffs executed Enrollment Agreements which contain an arbitration agreement. Defendants are not waiving any rights as to the arbitration

agreements (including arbitration agreements with any putative class members).

Id. at 3 n.1.

The motion to compel asserts that "at the Scheduling Conference[,] Defendants stated that they were evaluating arbitration" (Dkt. 94-1 ("Mot. Memo.") at 8); Defendants do not cite to the record in support of this statement. In any event, on December 9, 2014, the Court entered a scheduling order for discovery and summary judgment briefing. Dkt. # 85. On February 25 and 26, 2015, Plaintiffs deposed two witnesses, including Yasuda. Dkt. # 98 ("Opp.") at 4. On March 20, 2015, more than 17 months after the filing of the complaint, Defendants moved to compel Plaintiffs to engage in individual arbitration. Dkt. # 94.

III. Legal Standard

"The 'principal purpose' of the FAA [Federal Arbitration Act] is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citations omitted). The FAA states that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

"Because the FAA mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed[,] the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (citation and internal quotation marks omitted). When deciding whether a valid arbitration agreement exists, courts generally apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Any doubts about the scope of arbitrable issues must be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

If an arbitration agreement exists and covers the dispute at issue, § 4 of the FAA "requires courts to compel arbitration 'in accordance with the terms of the agreement.'" *Concepcion*, 131 S. Ct. at 1748 (citations omitted). The court must also stay any further proceedings until the arbitration has been completed. See 9 U.S.C. § 3 ("[T]he court . . . upon being satisfied that the

issue involved . . . is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.").

IV. Discussion

Plaintiffs oppose the motion to compel, claiming that Defendants waived the right to enforce the agreement, and that its terms are procedurally and substantively unconscionable. Plaintiffs also contend that the agreement does not encompass the class and PAGA-based claims, and that Yasuda does not have standing to seek its enforcement. Because the Court finds that Defendants waived the right to arbitration, it does not address the remaining three arguments.

A. Waiver

"In the Ninth Circuit, arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that party inconsistent with such an existing right; and (3) there must be prejudice resulting from the waiving party's inconsistent acts." *United Computer Sys. v. At&T Info. Sys.*, 298 F.3d 756, 765 (9th Cir. 2002) (citation omitted). The Ninth Circuit has also expressed the test as: "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [*e.g.*, taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." *Cox*, 533 F.3d at 1124 (quoting *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1196 (2003)). "[W]aiver of the right to arbitration is disfavored because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof." *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) (citations omitted).

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1. Knowledge

"Knowledge of a contractual right to arbitrate is imputed to the contract's drafter." *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1066 (C.D. Cal. 2011). Thus, "it cannot be said

that [a defendant] lacked knowledge of the right to compel arbitration" where "[t]he contract itself called for arbitration of disputes between [the parties]." *Hoffman Constr. Co. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992).

Here, Defendants knew of the right to compel arbitration because they drafted the agreement. Indeed, Defendants follow a practice of "hav[ing] each student sign an arbitration agreement so that any dispute with them is resolved through a non-court procedure. This is a standard procedure for each campus within Milan." Dkt. # 94-3 ("Smylie Decl.") ¶ 3. Moreover, they asserted the arbitration agreement as an affirmative defense six months before they moved to compel. Dkt. #77 ¶ 15.

It is beyond dispute that Defendants knew of the right to arbitration.

2. Inconsistency

The Ninth Circuit's rulings on whether a party's actions were inconsistent with its right to arbitration have turned on the facts of the case, including whether its motion to compel would have been futile and whether it engaged in active litigation before it filed the motion. In their motion, Defendants refer to *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 695 (9th Cir. 1986), in which the Ninth Circuit held that the defendant did not waive its right to arbitration as a result of a four-year delay in filing a motion to compel because then-existing law did not support the motion, and because the defendant moved to compel as soon as the Supreme Court rendered a decision that allowed it to do so. Further, Defendants rely on *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1129 (C.D. Cal. 2011), in which the court found no waiver in a four-year delay in moving to compel because "a party does not act inconsistently with the right to arbitrate by failing to seek to enforce an arbitration agreement that would be unenforceable under existing law." In reply, Defendants refer to *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1477 (9th Cir. 1984), in which the court found no waiver because the motion to dismiss gave notice that the defendant intended to rely on an arbitration agreement.

Likewise, this circuit's other rulings on waiver of the right to arbitration have rested on facts that do not exist in the case at bar. In *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000), the Ninth Circuit held that the defendant did not waive its right to arbitration by failing to file a motion to compel before filing a motion to dismiss in which it argued that it was not a proper defendant. The circuit observed that "[b]ecause [the defendant] was not a proper defendant, it could not have invoked the arbitration clause as a defense," and that "when Chappel amended his complaint to add . . . [a second] defendant, [that defendant] promptly filed

a motion to dismiss based on the arbitration clause." *Id.* Similarly, in *United States v. Park Place Assocs.*, 563 F.3d 907, 920-21 (9th Cir. 2009), the Ninth Circuit found no waiver where a defendant that sought arbitration but lost in part asked the AAA to hold the matter in abeyance, filed suit in two courts, and later renewed its arbitration demand. The circuit explained that the defendant "has vigorously pursued its remedies, and the [plaintiff] has just as vigorously resisted its efforts at every step. [The defendant] has not abandoned its arbitration rights; it has only moved the battle from one venue to another." *Id.*

In reply, Defendants include a number of references to state and out-of-circuit federal decisions that rest on grounds which do not apply to this case. In *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 Cal. App. 3d 946, 951-52 n.2 (1980), a state court of appeal explained in a footnote that "we are not holding that the filing of a demurrer or some other motion, in addition to the complaint or answer, is all that is required to find waiver in similar situations. The trial court must still view the litigation as a whole and determine if the parties' conduct is inconsistent with a desire to arbitrate." The state court then held that the defendant *had* waived its right to arbitration because it "knew, or should have known of its arbitration rights," but nonetheless filed a notice of removal, an opposition to a class certification motion, a demurrer, and a motion to strike. In *Williams v. CIGNA Fin. Advisors*, 56 F.3d 656, 661-62 (5th Cir. 1995), the defendant "filed its motion for a stay pending arbitration as soon as it discovered that the dispute was subject to arbitration." And in *McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 858 F.2d 825, 833 (2d Cir. 1988), the defendant merely "merely responded to the plaintiffs' complaints, participated in some discovery, and spoke of the possibility of seeking summary judgment," without actually doing so.

In contrast, in *Van Ness*, the Ninth Circuit held that a defendant waived its right to arbitration by waiting two years to move to compel, noting that "[a]lthough [the defendant] answered the complaints and amended complaints, and moved to dismiss the action, it did not raise the issue of arbitration in any of its pleadings." *Id.* at 756. Similarly, in *Antuna v. Am. W. Homes, Inc.*, 232 F. App'x 679 (9th Cir. 2007), the Ninth Circuit held that the defendants "waived their right to arbitrate by actively litigating their claim in state and federal court." And in *Kelly v. Pub. Util. Dist. No. 2*, 552 F. App'x 663, 663-64 (9th Cir. 2014), perhaps its most recent ruling on the waiver issue, the Ninth Circuit found waiver because the defendants "waited eleven months after the lawsuit was filed to demand arbitration, actively litigating the case in district court," during which time "[t]he parties conducted discovery and litigated motions, including a preliminary injunction and a motion to dismiss."

Numerous federal and state courts have rendered similar rulings. *See, e.g., In Re Toyota*

Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig., 838 F. Supp. 2d 967, 978 (C.D. Cal. 2012) (11-month delay was inconsistent with arbitration); *Plows*, 812 F. Supp. 2d at 1068 (13-month delay was inconsistent with arbitration); *Kingsbury v. U.S. Greenfiber, LLC*, 2012 WL 2775022, at *6 (C.D. Cal. 2012) (Matz, J.) (The defendant's four-month "delay in seeking arbitration after *Concepcion* was decided … demonstrates a conscious decision to seek judicial judgment on the merits of [the plaintiff's] class certification motion."); *Martinez v. Welk Grp., Inc.*, 2012 WL 112535 at *3 (S.D. Cal. 2012) ("[T]here is no question that Defendants actively participated in the litigation—filing two motions to dismiss and a counterclaim, and participating in a lengthy meet and confer process."); *Guess?, Inc. v. Superior Court*, 79 Cal. App. 4th 553, 558 (2000) (A defendant that did not itself propound discovery "fully participated in the discovery process" by "objecting to [the plaintiff's] interrogatories and demands for production on a variety of grounds, but never once suggesting that discovery should be barred because this dispute had to be arbitrated.").

Like the parties in *Van Ness*, *Antuna*, *Kelly*, and other similar cases, Defendants actively litigated this case in federal court for 17 months before they filed a motion to compel. Tellingly, Defendants requested the dismissal of Plaintiffs' second amended complaint without mentioning the issue of arbitration, and instead chose to test their theories that Plaintiffs were not employees and that Yasuda was not individually liable. *See* Dkt. #44. In ruling on the motion, the Court refused to apply *Hutchison v. Clark*, 67 Cal. App. 2d 155 (1944), to hold that students of cosmetology were necessarily not employees, and thus granted the motion to dismiss *with* leave to amend. Dkt. # 52. Roughly two months after entry of that order, and 11 months since the filing of the complaint, Defendants opted to raise the arbitration agreement as an affirmative defense. Dkt. # 77 ¶ 15. Defendants then waited for six more months before moving to compel, during which time they participated in two depositions. Mot. Unlike the defendants in *Fisher*, *Chappel*, and *Park Place*, Defendants faced no precedential, procedural, or other barriers to arbitration. Indeed, to explain their delay in moving to compel, Defendants argue that they simply "focused on a motion to dismiss" — not that the motion to compel would have been futile. Mot. Memo. at 8.

Defendants' protracted silence regarding arbitration, their delay in moving to compel, and their decision to take active part in 17 months of litigation (including the resolution of a motion to dismiss) is inconsistent with a right to arbitration.

3. Prejudice

In ruling on whether a party's inconsistent actions were prejudicial, courts in the Ninth

Circuit have focused on whether the prejudice resulted from something beyond mere financial expenses, whether the parties could still benefit from the actions taken outside of arbitration, and whether the parties would be required to re-litigate matters decided on the merits by a court. Defendants cite *Quevedo* for the proposition that "[c]ourts will not find prejudice when the opponent shows only that it incurred court costs and 1ega1 expenses." 798 F. Supp. 2d at 1132. In finding an absence of prejudice, the *Quevedo* court emphasized that the defendant "has not propounded any discovery requests," that "[i]ts delay in seeking arbitration was not 'undue'" because the delay only lasted "until it became apparent that it could enforce the arbitration agreement in full," and that "there is no indication that the delay resulted in any lost evidence." *Id.* Likewise, in *Fisher* and *Park Place*, the Ninth Circuit held that a delay in moving to compel was not prejudicial merely because the parties had engaged in discovery. *Fisher*, 791 F.2d at 697; *Park Place*, 563 F.3d at 920-21. Since only a portion of the claims were subject to arbitration, the parties could still use that discovery to litigate the non-arbitrable claims. *Id.*

The five Ninth Circuit cases cited in reply also miss the mark. In *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074-75 (9th Cir. 2013), *cert. denied* 135 S. Ct. 355 (2014), the Ninth Circuit found that a plaintiff did not experience any prejudice when the district court granted a motion to dismiss without prejudice, reasoning that the district court's order did not dispose of his claims on the merits. In contrast, Plaintiffs would be prejudiced by the need to re-litigate this Court's grant of dismissal because the order resolved a crucial issue in their favor when it rejected the assertion that students of cosmetology were necessarily not employees. In *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012-13 (9th Cir. 2005) (emphasis added), this circuit had "no trouble concluding that the delay and costs incurred by [the plaintiff] *are* prejudicial" where the plaintiff "chose to arbitrate" and "was rebuffed by [the defendant]." In *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), this circuit observed that the plaintiff "has made no attempt . . . to articulate how he was prejudiced." And in *ATSA of Cal., Inc. v. Cont'l Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983), and *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412-1413 (9th Cir. 1990), the defendants did not move to dismiss at all. Instead, the defendant in *ATSA* asserted the arbitration agreement as an affirmative defense in an answer, and the defendant in *Britton* sought to avoid the need to engage discovery and moved for a stay of the action, in forma pauperis status, and a court-appointed attorney.

The state and out-of-circuit federal cases cited in reply are likewise not on point. Like the circuit in *Richards*, the court of appeal in *Groom v. Health Net*, 82 Cal. App. 4th 1189, 1194-95 (2000), denied that the plaintiffs were prejudiced by the grant of a motion to dismiss on two grounds for relief because those grounds were mere alternative legal theories based on facts that had not been litigated, and because "the superior court's opinion as to the legal validity of those theories will not be binding on the arbitrator." In *Gloster v. Sonic Auto., Inc.*, 226 Cal. App. 4th

438, 449-50 (2014), the defendants "consistently asserted their intention to arbitrate . . . in communications with [plaintiff] and his counsel even before the litigation was filed," reasonably awaited the results of a co-defendant's demurrer that "would have simplified the analysis," and "filed no motions or discovery requests of their own" in the meantime. In *Gear v. Webster*, 258 Cal. App. 2d 57, 64 (1968), the demurrers "did not touch the basic issues in the case." Indeed, the second demurrer alleged "that disputes [had to] be arbitrated." Finally, in *Salerno v. Aetna Life Ins. Co.*, 1996 U.S. App. LEXIS 5587, 3-4 (2d Cir. N.Y. Mar. 26, 1996), the defendant did not move to dismiss. Further, it was ordered to reimburse the plaintiff for $2,000 in deposition costs undertaken while it delayed in moving to compel.

In contrast, in *Hoffman*, 969 F.2d at 798-99, the Ninth Circuit held that prejudice from a 13-month delay was "apparent" as a result of the "staleness of the claim, and more importantly, the subjection of [the plaintiff] to the litigation process in State Court, the discovery process, the expense of litigation, and the judgment for $ 679,434.76." Similarly, in *Kelly*, 552 F. App'x at 663-64, the Ninth Circuit held that the plaintiffs "would be prejudiced by compelling them to arbitrate their claims" after 11 months of litigation because "[a] late shift to an arbitrator would force the parties to bear the expense of educating arbitrators," "threaten to require the [plaintiffs] to relitigate matters decided by the district judge," and "waste the time and money spent by the [plaintiffs] in federal court." The Ninth Circuit highlighted that "[a] party that is aware that it has a right to compel arbitration of a dispute cannot wait to exercise that right until the parties have expended a significant amount of time and money to litigate that dispute in federal court. This is especially true where the untimely exercise of an arbitration clause would allow a party to evade future rulings of a federal judge which it fears will be unfavorable." *Id.*

Other courts offered similar opinions. *See Van Ness*, 862 F.2d at 759 (The plaintiffs "relied to their detriment on [a defendant's] failure to move for arbitration of the arbitrable claims" for two years.); *MC Asset Recovery LLC v. Castex Energy, Inc. (In re Mirant Corp.)*, 613 F.3d 584, 591 (5th Cir. 2010) (The defendant "waited eighteen months before moving to compel arbitration while it attempted to obtain a dismissal with prejudice from the district court . . . . A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court."); *Steiner v. Horizon Moving Sys., Inc.*, 2008 WL 4822774, at *3 (C.D. Cal. Oct. 30, 2008) ("Plaintiff's delay constitutes prejudice. Plaintiff chose to bring the lawsuit in this Court and to litigate her claims instead of seeking relief through the arbitration process; only now, after over a year of litigation, and after her Motion for Remand was denied, does she seek arbitration.").

Here, Defendants failed to move to compel for 17 months: *i.e.*, for approximately six months longer than the parties in *Hoffman*, *Kelly*, and *Steiner*. It is true that Defendants have not

propounded any discovery or caused the loss of evidence. However, their delay was undue because they faced no barrier to moving to compel at the outset of this action, and (at least under Defendants' theory that the entirety of the action is arbitrable) the parties cannot profit from actions taken outside of arbitration to continue to litigate the non-arbitrable claims. More importantly, compelling arbitration would "require [plaintiffs] to relitigate matters decided by the district judge" in ruling on the motion to dismiss. Further, it would "allow [Defendants] to evade future rulings of [the] federal judge which it fears will be unfavorable": *i.e.*, rulings based on the order that "Milan's students may be properly classified as its employees, if they are within the definition of 'employment' established by the IWC." Dkt. # 52 at 6.

A party's "belated attempt to use arbitration as a method of forum shopping is prejudicial" to its opponent. *Steiner*, 2008 WL 4822774, at *3; *see, e.g.*, *St. Mary's Med. Ctr. Of Evansville, Ind. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992) ("A party may not normally submit a claim for resolution in one forum and then, when it is disappointed with the result in that forum, seek another forum."); *Kramer v. Hammond*, 943 F.2d 176, 179 (2nd Cir. 1991) ("Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration."); *Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union*, 671 F.2d 38, 43 (1st Cir. 1982) ("[T]o require that parties go to arbitration despite their having advanced so far in court proceedings before seeking arbitration would often be unfair, for it would effectively allow a party sensing an adverse court decision a second chance in another forum."). As held in *In re Mirant*:

> [Defendant] moved to compel arbitration only after the district court had partially denied its . . . motion to dismiss, despite being fully aware of its right to compel arbitration from the outset. We are not convinced that [Defendant], having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration . . . . To hold otherwise would encourage litigants to delay moving to compel arbitration until they could ascertain how the case was going in federal district court . . . . In essence, [Defendant] attempted to play 'heads I win, tails you lose,' which is the worst possible reason for failing to move for arbitration sooner than it did.

613 F.3d at 590 (internal citations and quotation marks omitted).

Granting the motion to compel after 17 months of litigation and a ruling at least partly in favor of Plaintiffs on the motion to dismiss would result in prejudice. Defendants therefore satisfy all the prongs for waiver of the right to arbitration.

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IV. Scheduling

Further, Defendants request that the Court stay the action pending a ruling on the motion to compel, dismiss the action upon granting the motion, and/or adjust the discovery schedule upon denying the motion by "extend[ing] the current discovery deadlines, set in the Court's December 9, 2014 Scheduling Older (Doc#86), by the period of time that will have elapsed between the filing of the arbitration motion and the Court's issuance of its decision on the motion." Mot. Memo." at 13-14.

The Court denies as moot the requests to stay the action pending a ruling on the motion to compel and to dismiss the action upon granting the motion. Further, given that this action has been pending for more than one and one-half years, and that both the parties and the Court have devoted substantial resources to creating the case management plan in effect for the last 6 months, the Court declines to disturb the current discovery schedule merely because Defendants opted to file an ill-timed arbitration motion.

V. Conclusion

For the reasons above, Defendants' motion to compel arbitration, to stay the action, to dismiss the action, and/or to adjust the discovery schedule is DENIED.

IT IS SO ORDERED.

Initials of Preparer XT