



1           **I.       FACTUAL BACKGROUND**

2           Plaintiffs allege that Plaintiff Omar Jay On (“Plaintiff On”) was employed as a Physician  
3 Assistant by SAVI from January 1, 2007 to October 2010. (ECF No. 17 ¶¶ 3, 7, 10.) Plaintiff On  
4 alleges that in October 2010, SAVI transferred its obligations to him under a written employment  
5 agreement to NVDC, a medical partnership created by former defendant Dr. Vannucci and others  
6 not individually named in the instant suit. (ECF No. 17 ¶ 11.) Plaintiff On alleges he continued  
7 his employment following the transfer to NVDC. (ECF No. 17 ¶ 11.)

8           Plaintiffs attached as Exhibit A, a copy of an employment agreement between Plaintiff On  
9 and SAVI (“Employment Agreement”). (Employment Agreement, Ex. A, ECF No. 17-1.)  
10 Plaintiff On alleges his pay was based on the number of patients he treated and the services he  
11 provided. (ECF No. 17 ¶ 12.) Plaintiff On alleges he noticed in September 2011 his income  
12 declined although he treated more patients. (ECF No. 17 ¶ 15.) Plaintiff On alleges he made  
13 several requests to review the practice’s financial records. (ECF No. 17 ¶¶ 15–16.) Plaintiff On  
14 alleges around July 2013 he was forced to give notice of termination to NVDC because he was  
15 denied access to review financial records. (ECF No. 17 ¶¶ 17.)

16           Plaintiffs allege they hired Dennis Diver, a certified forensic accountant, in July 2013 to  
17 determine why Plaintiff On’s income had declined. (ECF No. 17 ¶ 19.) Plaintiffs state Mr. Diver  
18 contacted NVDC “to obtain disclosure of financial records relating to Plaintiff’s employment,  
19 earnings, and compensation.” (ECF No. 17 ¶ 19.) Plaintiffs allege when NVDC received Mr.  
20 Driver’s request, NVDC’s office manager, Ronnie Boongaling “immediately” admitted to NVDC  
21 he had been embezzling money. (ECF No. 17 ¶ 19.) Plaintiffs allege they made several requests  
22 for financial records but Defendants failed to provide those records. (ECF No. 17 ¶ 22.)

23           Plaintiffs allege Plaintiff On filed a complaint against Dr. Vannucci in December 2013 in  
24 Butte County Superior Court seeking the employment records. (ECF No. 17 ¶ 23.) Plaintiffs  
25 allege Plaintiff On filed a complaint against Dr. Vannucci in February 2014 in Butte County  
26 Superior Court seeking declaratory relief that Dr. Vannucci may not deduct operating expenses  
27 from Plaintiff On’s compensation and that the arbitration clause of the Employment Agreement  
28 was void and unenforceable. (ECF No. 17 ¶ 25.)

1 Plaintiffs then filed suit in this Court on November 17, 2014, naming Dr. Vannucci and  
2 NVDC as defendants. (ECF No. 1 at 1). Dr. Vannucci and NVDC filed a Motion to Partially  
3 Dismiss several of Plaintiffs' claims pursuant to Rule 12(b)(6) and an agreement for "binding  
4 arbitration." ("2015 Motion," ECF No. 7 at 1–2.) This Court dismissed several counts as to any  
5 violations occurring prior to September 27, 2011, without leave to amend, dismissed other counts  
6 with leave to amend, and denied dismissal of some counts. (ECF No. 15 at 14.)

7 Plaintiffs filed their First Amended Complaint ("FAC") on June 15, 2016, naming as  
8 defendants Dr. Vannucci, NVDC, and adding SAVI, and alleging 13 violations of California law  
9 and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA").  
10 (ECF No. 17 at 1–2.) Plaintiffs voluntarily dismissed Dr. Vannucci from the suit. (ECF No. 19  
11 at 1.) The remaining defendants, SAVI and NVDC, move to dismiss in favor of compulsory  
12 arbitration under 9 U.S.C. § 3. (ECF No. 23 at 1-2; ECF No. 25 at 1–2.) Plaintiffs oppose the  
13 motion and Defendants filed a reply. (ECF Nos. 26 & 27.)

## 14 II. STANDARD OF LAW

15 "[T]he federal law of arbitrability under the Federal Arbitration Act ("FAA") governs the  
16 allocation of authority between courts and arbitrators." *Cox v. Ocean View Hotel Corp.*, 533 F.3d  
17 1114, 1119 (9th Cir. 2008). There is an "emphatic federal policy in favor of arbitral dispute  
18 resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 631 (1985). As  
19 such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of  
20 arbitration, whether the problem at hand is the construction of the contract language itself or an  
21 allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 626 (*quoting Moses H. Cone*  
22 *Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

23 Generally, in deciding whether a dispute is subject to an arbitration agreement, the Court  
24 must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the  
25 agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207  
26 F.3d 1126, 1130 (9th Cir. 2000). The Court's role "is limited to determining arbitrability and  
27 enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the  
28 arbitrator." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991).

1            “In determining the existence of an agreement to arbitrate, the district court looks to  
2            ‘general state-law principles of contract interpretation, while giving due regard to the federal  
3            policy in favor of arbitration.’” *Botorff v. Amerco*, 2012 WL 6628952, at \*3 (E.D. Cal. Dec. 19,  
4            2012) (quoting *Wagner v. Stratton*, 83 F.3d 1046, 1049 (9th Cir. 1996)). An arbitration  
5            agreement may only “be invalidated by ‘generally applicable contract defenses, such as fraud,  
6            duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their  
7            meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v.*  
8            *Concepcion*, 131 S.Ct. 1740, 1746 (2011) (quoting *Doctor’s Assocs. Inc. v. Casarotto*, 517 U.S.  
9            681, 687 (1996)). Therefore, courts may not apply traditional contractual defenses, such as  
10            unconscionability and duress, in a broader or more stringent manner to invalidate arbitration  
11            agreements and thereby undermine FAA’s “principal purpose” to “ensure that private arbitration  
12            agreements are enforced according to their terms.” *Id.* at 1748 (quoting *Volt Info. Scis., Inc. v.*  
13            *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

14            However, the right to arbitration can be waived. *United States v. Park Place Assocs., Ltd.*,  
15            563 F.3d 907, 921 (9th Cir. 2009) (citing *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d  
16            754, 758–59 (9th Cir. 1988)). The “waiver of the right to arbitration is disfavored because it is a  
17            contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof.”  
18            *Van Ness Townhouses*, 862 F.2d at 758 (internal quotations omitted). To prove waiver of the  
19            right to arbitrate, a party must show: “(1) knowledge of an existing right to compel arbitration; (2)  
20            acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration  
21            resulting from such inconsistent acts.” *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016)  
22            (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)).

23            If the right to arbitration has not been waived and a court decides to compel arbitration,  
24            the court may stay or dismiss the action. *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635,  
25            638 (9th Cir. 1988). If the arbitration agreement encompasses all claims, dismissal is proper.  
26            *Horne v. Starbucks Corp*, 2017 WL 2813170, at \*3 (E.D. Cal. June 29, 2017).

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1           **III. ANALYSIS**

2           Defendants argue “the parties agreed to binding arbitration of all disputes arising from  
3 [Plaintiff] On’s employment, that all Plaintiffs’ claims arise from his employment, and that the  
4 Federal Arbitration Act preempts contrary California law regarding various alleged Labor Code  
5 violations.” (ECF No. 23 at 2.) Defendants argue the substantive prerequisites for arbitration,  
6 therefore, exist. (ECF No. 23-1 at 6.) Generally, in deciding whether a dispute is subject to an  
7 arbitration agreement, the Court must determine: “(1) whether a valid agreement to arbitrate  
8 exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Chiron Corp.*  
9 *v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

10           Plaintiffs do not disagree that the Employment Agreement<sup>1</sup> contained an arbitration  
11 provision that encompasses the issues in dispute between the parties in the instant case. Rather,  
12 Plaintiffs argue Defendants waived enforcement of arbitration because the parties litigated state  
13 court proceedings before Plaintiffs filed this suit and because the parties litigated this suit in this  
14 Court for years. (ECF No. 26 at 5.) Plaintiffs add that Defendants “took full advantage in this  
15 Court” by moving to dismiss and only sought to enforce the arbitration clause after the Court did  
16 not grant the 2015 Motion in full. (ECF No. 26 at 5.) Plaintiffs further argue Defendants’  
17 conduct of actively participating in this litigation waived any right to compel arbitration and  
18 prejudiced Plaintiffs by causing delay. (ECF No. 26 at 5.)

19           The right to arbitration can be waived. *Park Place Assocs., Ltd.*, 563 F.3d at 921 (citing  
20 *Van Ness Townhouses*, 862 F.2d at 758–59). The “waiver of the right to arbitration is disfavored  
21 because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy  
22 burden of proof.” *Van Ness Townhouses*, 862 F.2d at 758 (internal quotations omitted). To prove  
23 waiver of the right to arbitrate, a party must show all three elements from *Fisher*: “(1) knowledge  
24 of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3)  
25 prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Martin*, 829  
26 F.3d at 1124.

27           <sup>1</sup> Both parties refer to the unsigned Employment Agreement that Plaintiffs attached to their FAC, (ECF No.  
28 17-1, Ex. A), as the relevant agreement and arbitration provision. A court may properly consider an exhibit attached  
to the complaint if its authenticity is not questioned. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

1                   A. Defendant SAVI

2                   Plaintiffs first added SAVI to this suit in Plaintiffs’ FAC filed June 15, 2016. (ECF No.  
3 17 at 1; *see also* ECF No. 1 at 1.) On August 3, 2016, Defendants filed their answer, asserting as  
4 their Ninth Affirmative Defense the Employment Agreement’s “binding arbitration” clause.  
5 (ECF No. 21 ¶¶ 82–85.) On October 14, 2016, Defendants filed the instant motion to compel  
6 arbitration. (ECF No. 23 at 1–2.)

7                   Plaintiffs argue Defendants are in default in arbitration and waived any right to compel  
8 arbitration by actively participating in the litigation. (ECF No. 26 at 11.) Plaintiffs, however, do  
9 not cite to any facts from the record to support their argument that either of the Defendants are “in  
10 default.” (ECF No. 26 at 10–11.) Plaintiffs cite *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197  
11 (9th Cir. 2003) in which one of the parties subject to an arbitration provision was required to pay  
12 the cost of the arbitration, did not make payment, did not make alternate arrangements, did not  
13 give notice it would be unable to pay, and was found to be in default. *Id.* at 1199-1200. Plaintiffs  
14 do not explain how the citation applies to either defendant in this matter. Instead, Plaintiffs argue  
15 Defendants are in default because they have waived the right to compel arbitration and they have  
16 waived the right to compel arbitration because they are in default. (ECF No. 26 at 11.)

17                   Plaintiffs also argue Defendants waived their right to compel arbitration because  
18 Defendants’ actions were inconsistent with that right, the second *Fisher* element. (ECF No. 26 at  
19 12.) Plaintiffs state Defendants’ “three-year delay in compelling arbitration clearly indicates a  
20 conscious decision to seek judgment on the merits of arbitrable claims.” (ECF No. 26 at 12.)  
21 Plaintiffs add, “[s]eeking a decision *on the merits* of the case,” such as filing a motion to dismiss  
22 pursuant to Rule 12(b)(6), “has been repeatedly found to satisfy this element.” (ECF No. 26 at  
23 13) (citing *Martin*, 829 F.3d at 1126, in which the defendants sought judgment on the merits,  
24 stated they did not plan to compel arbitration for strategic reasons, then asserted arbitration).

25                   Here, SAVI was brought into this case in Plaintiffs’ FAC, after the Court ruled on the  
26 2015 Motion brought by Dr. Vannucci and NVDC. SAVI filed only an answer asserting “binding  
27 arbitration” as an affirmative defense and the motion to compel arbitration—within four months  
28 of being added to the suit. Plaintiffs have not shown SAVI’s actions were inconsistent.

1 Plaintiffs argue they have been prejudiced by having to oppose the 2015 Motion and meet  
2 and confer with opposing counsel, the third element from *Fisher*. (ECF No. 26 at 15–16.)  
3 NVDC and Dr. Vannucci filed the 2015 Motion after Plaintiffs filed their original complaint but  
4 before Plaintiffs filed their FAC adding SAVI to the suit. Any expense Plaintiffs incurred in  
5 relation to the 2015 Motion occurred before SAVI was a party.

6 Plaintiffs cannot satisfy the second or third elements from *Fisher* in relation to SAVI.  
7 *Martin*, 829 F.3d at 1124 (“(2) acts inconsistent with that existing right; and (3) prejudice to the  
8 party opposing arbitration resulting from such inconsistent acts”). SAVI did not file the 2015  
9 Motion and did not engage in actions inconsistent with a right to compel arbitration. Plaintiffs  
10 have not shown they were prejudiced by the four month period between the date Plaintiffs filed  
11 their FAC adding SAVI to this case and the date Defendants filed their motion to compel.

12 B. Defendant NVDC

13 Plaintiffs argue NVDC has waived its right to compel arbitration because its “three-year  
14 delay in compelling arbitration” and its filing of a 12(b)(6) motion indicate “a conscious decision  
15 to seek judicial judgment on the merits of arbitrable claims...[and] is inconsistent with an intent  
16 to arbitrate those claims.” (ECF No. 26 at 12.)

17 i. *Plaintiffs have not shown NVDC delayed its right to compel*  
18 *arbitration for three years.*

19 Plaintiffs appear to refer to state court litigation, which they allege began “nearly three  
20 years ago,” when they describe Defendants’ “three-year delay in compelling arbitration.” (ECF  
21 No. 26 at 12.) In doing so, Plaintiffs conflate remaining and former defendants in this matter.  
22 Neither SAVI nor NVDC were parties in those state court cases. (ECF No. 26 at 12.) Former  
23 defendant Dr. Vannucci, who is no longer a party to this suit, was the only defendant in those  
24 state court cases. (ECF No. 26 at 12.) Plaintiffs both acknowledge and airily dismiss this point.  
25 (ECF No. 26 at 12 n.9) (“The fact that Dr. Vannucci, as an individual, was the sole defendant in  
26 the prior state court claims is of no moment. He was represented by the same law firm that  
27 represents defendants in the present federal court action, and the arbitration clause defendants are  
28 asserting in this case is the same clause he acknowledged through his attorneys in the state court

1 claims.”). Plaintiffs cite no authority for the proposition that the period when Defendants could  
2 have moved to compel arbitration begins when Plaintiffs filed suits in a state court against a  
3 defendant who is not a party to this action. The fact that Defendants in this matter employ the  
4 same attorneys as the defendant in the state court actions doesn’t help Plaintiffs’ argument.

5 Further, the arbitration issue was raised prior to the instant motion. On February 3, 2015,  
6 Dr. Vannucci and NVDC filed their Motion to Partially Dismiss some claims pursuant to Rule  
7 12(b)(6) and to dismiss claims 9, 14, 15, and 16 in favor of arbitration. (ECF No. 7-1 at 1, 19.)  
8 In that motion, Dr. Vannucci and NVDC also stated they intended to assert enforceability of other  
9 claims under the Federal Arbitration Act (“FAA”) once NVDC had gathered the required  
10 evidence of the impact of its business on interstate commerce. (ECF No. 7-1 at 19 n.12.) This  
11 Court declined to address the issue at that time. (ECF No. 15 at 14.) Instead, the Court gave  
12 Plaintiffs leave to amend a number of claims in their complaint, and “invited” NVDC and Dr.  
13 Vannucci to file a “motion addressing arbitration of the remaining claims under both state law  
14 and the FAA.” (ECF No. 15 at 14.) The parties then did just that. (ECF Nos. 17, 19, 21, & 23.)

15 *ii. Plaintiffs have not shown NVDC’s acts were inconsistent with any*  
16 *right to arbitrate.*

17 Plaintiffs argue NVDC’s act of filing a 12(b)(6)motion is inconsistent with its right to  
18 compel arbitration and NVDC has, therefore, waived that right. (ECF No. 26 at 12–15.) “There  
19 is no concrete test to determine whether a party has engaged in acts that are inconsistent with its  
20 right to arbitrate.” *Martin*, 829 F.3d at 1125. The element is satisfied, however, “when a party  
21 chooses to delay his right to compel arbitration by actively litigating his case to take advantage of  
22 being in federal court.” *Id.* “[E]xtended silence and delay in moving for arbitration may indicate  
23 a ‘conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable  
24 claims,’ which would be inconsistent with a right to arbitrate.” *Id.* A court must assess “the  
25 totality” of a party’s actions. *Id.* at 1126. Waiver is disfavored “because it is a contractual right,  
26 and thus any party arguing waiver of arbitration bears a heavy burden of proof.” *Van Ness*  
27 *Townhouses*, 862 F.2d at 758. There is an “emphatic federal policy in favor of arbitral dispute  
28 resolution.” *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 631 (1985).

1 Plaintiffs argue Defendants sought judgment on the merits in federal court before deciding  
2 whether court or arbitration would be advantageous. (ECF No. 26 at 14.) Defendants, however,  
3 did not move for judgment on the merits on the majority of claims in Plaintiffs' FAC. Plaintiffs  
4 FAC contains 13 claims, five of which are brought pursuant to ERISA and eight of which are  
5 brought pursuant to California state laws. (ECF No 17 at 1–2.) Plaintiffs' five ERISA claims  
6 were not subjects of the 2015 Motion, as neither NVDC nor Dr. Vannucci moved for dismissal of  
7 Plaintiffs' ERISA claims in the 2015 Motion. (ECF No. 7 at 2.)

8 The remaining eight claims in the FAC are state law claims. (ECF No. 17 at 1–2.) Three  
9 of those claims were not in Plaintiffs' original complaint but were added in the FAC and therefore  
10 were not subjects of the 2015 Motion. Plaintiffs added in their FAC claim 10 for improper wage  
11 deduction under California Labor Code §§ 221-223, claim 11 for failure to provide meal periods,  
12 and claim 12 for failure to provide rest periods. (ECF No. 1 at 1–2; ECF No. 17 at 1–2.) Two  
13 other claims in the FAC were among the claims NVDC and Dr. Vannucci asked the Court to  
14 dismiss in favor of arbitration in the 2015 Motion, in addition to arguing that those claims failed  
15 to state a claim: claim six for conversion and claim 13 for violation of unfair competition. (ECF  
16 No. 1 at 1–2; ECF No. 7-1 at 2, 19.)

17 The cases Plaintiffs cite do not support their position that NVDC's actions were  
18 inconsistent with its right to arbitrate. In *Van Ness Townhouses*, the Ninth Circuit found the  
19 defendant waived arbitration where “[a]lthough [the defendant] answered the complaints and  
20 amended complaints, and moved to dismiss the action, it did not raise the issue of arbitration in  
21 any of its pleadings.” *Van Ness Townhouses*, 862 F.2d at 756, 758–59. The court in *Van Ness*  
22 even issued a pre-trial order for the trial scheduled to begin just a few months later. *Id.*

23 In contrast, NVDC raised arbitration in each of its filings. NVDC moved for dismissal of  
24 some claims in favor of binding arbitration in the 2015 Motion and stated in that motion it would  
25 assert its right to arbitrate other claims once it could evaluate evidence required for that motion.  
26 (ECF No. 7-1 at 19–20, n.12.) NVDC asserted binding arbitration as an affirmative defense in its  
27 answer to Plaintiffs' FAC. (ECF No. 21 ¶¶ 82–85.) NVDC then moved to compel arbitration  
28 after the Court declined to address the issue when deciding the 2015 Motion and gave Plaintiffs

1 leave to file their FAC and Defendants the opportunity to respond to the FAC. (ECF No. 15 at  
2 14; ECF No. 21 ¶¶ 82–85; ECF No. 23 at 1–2.) Plaintiffs have not shown NVDC delayed or  
3 attempted to benefit from judicial rulings before deciding to arbitrate.

4 *Kelly v. Pub. Util. Dist. No. 2*, 552 Fed App’x 663 (9th Cir. 2014), is also distinguishable.  
5 Both defendants in *Kelly* actively litigated the case for eleven months before moving to compel  
6 arbitration, including conducting discovery and litigating multiple motions that included both a  
7 motion to dismiss and a preliminary injunction. *Id.* at 664. Here, NVDC moved for a stay of  
8 discovery pending the Court’s decision on its motion to compel arbitration. (ECF No. 29 at 1–2.)  
9 *See Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1067–68 (C.D. Cal. 2011) (finding the  
10 defendant’s acts had been inconsistent when, among other things, the defendant participated in  
11 discovery that would not have been available under the arbitration agreement). NVDC did not  
12 attempt to benefit from discovery prior to filing its motion.

13 The defendants in *Martin* “spent seventeen months litigating the case,” “devot[ed]  
14 ‘considerable time and effort’ to a joint stipulation structuring the litigation, fil[ed] a motion to  
15 dismiss on a key merits issue, [and] enter[ed] into a protective order.” *Martin*, 829 F.3d at 1126.  
16 The *Martin* court noted the parties had expended resources propounding and “answering  
17 discovery, and preparing for and conducting a deposition.” *Id.* The court added that the  
18 “defendants did not even note their right to arbitration until almost a year into the litigation and  
19 did not move to enforce that right until well after that time.” *Id.* In fact, when the district judge  
20 warned the defendants about the waiver issue, the defendants’ counsel explained they had taken a  
21 strategic decision they were “probably better off just being here in the court with the procedures  
22 of Rule 23 and discovery and federal practice than handling it in arbitration.” *Id.* at 1122, 1126.  
23 Plaintiffs have not shown NVDC delayed asserting its right to compel arbitration.

24 *iii. Plaintiffs have not shown they have been prejudiced.*

25 Plaintiffs argue they have been prejudiced by opposing the 2015 Motion and filing an  
26 amended complaint. (ECF No. 26 at 16.) To establish prejudice, the plaintiffs must show the  
27 defendants’ delay caused the plaintiffs “to incur costs they would not otherwise have incurred,” to  
28 “re-litigate an issue on the merits on which they have already prevailed in court,” or “the

1 defendants have received an advantage from litigating in federal court that they would not have  
2 received in arbitration.” *Martin*, 829 F.3d at 1126–27 (citing *Richards v. Ernst and Young*, 744  
3 F.3d 1072, 1075 (9th Cir. 2015), noting a plaintiff can show prejudice if the opposing party  
4 “gained information about the other side’s cases that could not have been gained in arbitration”).

5 In *Martin*, the court found “dispositive” the fact that the plaintiffs had litigated and  
6 prevailed on an important point at the district court level. *Martin*, 829 F.3d at 1128. The district  
7 court found the California legislature could have included in the Cosmetology Act a class of  
8 persons in a category of individuals who may practice cosmetology without being paid but chose  
9 not to do so. *Id.* at 1121. The district court held that the Cosmetology Act, therefore, did not  
10 preclude the plaintiffs’ arguments that the students were employees under state wage laws and the  
11 parties could proceed. *Id.* The Ninth Circuit found the plaintiffs would be prejudiced if they had  
12 to re-litigate “a key legal issue on which the district court [had] ruled in their favor.” *Id.* at 1128.  
13 Here, Plaintiffs do not argue that they have prevailed on any issue. Rather, Plaintiffs argue they  
14 have been prejudiced by having to oppose the 2015 Motion and by having to file an amended  
15 complaint.

16 As noted, NVDC did not challenge on the merits eight of the 13 claims in Plaintiffs’ FAC.  
17 Further, in the 2015 Motion NVDC challenged two additional claims on both the grounds that  
18 they were subject to binding arbitration on the merits, and it asserted its right to compel  
19 arbitration in relation to the remaining three claims once it gathered the required evidence related  
20 to interstate commerce. (ECF No. 7-1 at 19, n.12.) In the interim, Defendants moved to stay  
21 discovery. (ECF No. 29.) Plaintiffs have not shown Defendants received an advantage from  
22 litigating in federal court. Nor have Plaintiffs shown they incurred additional costs as NVDC has  
23 not moved for judgment on the majority of Plaintiffs’ remaining claims; NVDC moved to dismiss  
24 in favor of binding arbitration or asserted its right to do so in the earliest filing as to each of  
25 Plaintiffs’ remaining claims. *Cf. Martin*, 829 F.3d at 1128 (finding the plaintiffs were prejudiced  
26 where the defendants did not note their right to arbitration until one year into litigation and told  
27 the district judge and opposing counsel that defendants were probably “better off” in court).

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C. Dismissal is appropriate.

Plaintiffs ask that if the Court grants Defendants’ motion, the Court stay this matter rather than dismiss the case. (ECF No. 26 at 16-17.) Defendants oppose a stay. (ECF No. 27 at 11.) If a court “determines that an arbitration clause is enforceable, it has the discretion to either stay the case pending arbitration, or to dismiss the case if all of the alleged claims are subject to arbitration.” *Delgadillo v. James McKaone Enters., Inc.*, 2012 WL 4027019, at \*3 (E.D. Cal., Sept. 12, 2012). Each of plaintiff’s claims are encompassed by the arbitration agreement between the parties. The Court finds no reason for a stay rather than dismissal. Accordingly, the Court will dismiss this matter rather than stay the case pending arbitration. *Horne*, 2017 WL 2813170 at \*3 (E.D. Cal. June 29, 2017) (finding dismissal is proper if the arbitration agreement encompasses all claims).

V. CONCLUSION

Accordingly, the Court hereby GRANTS Defendant’s Motion to Dismiss in Favor of Compulsory Arbitration (ECF No. 23). The Clerk of the Court is directed to close the case.

IT IS SO ORDERED.

Dated: January 18, 2018

  
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Troy L. Nunley  
United States District Judge