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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA and THE
STATE OF NEVADA ex rel. MARY KAYE
WELCH,

Plaintiffs,

v.

MY LEFT FOOT CHILDREN'S THERAPY,
LLC, ANN MARIE GOTTLIEB, and
JONATHAN GOTTLIEB

Defendants.

Case No. 2:14-cv-01786-MMD-GWF

ORDER

(Defs.' Motion to Compel Arbitration and
to Stay – ECF Nos. 20, 21.)

I. SUMMARY

Relator Mary Kaye Welch alleges that Defendants My Left Foot Children's Therapy, LLC ("MLF"), Ann Marie Gottlieb, and Jonathan Gottlieb violated the federal False Claims Act ("FCA") — and its Nevada equivalent — by unnecessarily treating and overbilling patients. (ECF No. 15.) Welch, who worked as a speech and language pathologist for MLF, brought suit on behalf of the United States and the State of Nevada. (ECF No. 1.) Although both declined to intervene (ECF No. 9), Welch continues to maintain the action on their behalf. See 31 U.S.C. § 3730(b)(1); NRS §§ 357.080, 357.130. Defendants, however, insist that Welch's claims are subject to an arbitration agreement she signed while applying to work for MLF. (ECF No. 20.) They accordingly move to compel arbitration and stay this litigation. (ECF Nos. 20, 21.) The Court has reviewed the parties' response and reply briefs. (ECF Nos. 23, 24, 25, 29.) For the reasons discussed below, the Motion to Compel Arbitration and Stay Action ("Motion") (ECF Nos. 20, 21) is denied.

1 **II. BACKGROUND**

2 MLF, which is co-owned by Ann Marie and Jonathan Gottlieb, provides therapy
3 services to children throughout Las Vegas. (ECF No. 15 at 2; ECF No. 22 at 2.) Welch
4 worked for MLF as a speech and language pathologist between September 2013 and
5 November 2014. (ECF No. 15 at 4; ECF No. 22 at 2.) During that period, Welch claims to
6 have observed the improper treatment and billing practices underlying this lawsuit, which
7 Welch initiated on behalf of the United States and the State of Nevada in October 2014.
8 (See ECF No. 15 at 4.)

9 The Complaint¹ recounts several allegations of fraudulent treatment practices.
10 Defendants, for example, allegedly provide unnecessary speech and language therapy
11 to patients who cannot benefit from the treatment because of severe medical or cognitive
12 impairments, or to patients who no longer exhibit functional impairments or lack any
13 speech or language problem. (*Id.* at 29-70.) Next, Welch claims that Defendants require
14 their therapists to draft inaccurate progress reports to ensure that patients continue
15 receiving medically unnecessary treatment. (*Id.*) If they attempt to discharge patients,
16 therapists are threatened with discipline. (*Id.*) MLF also allegedly requires therapists to
17 use a single billing code for all therapeutic services, even if the services rendered would
18 fall into a different code. (*Id.*)

19 According to the Complaint, Defendants use these policies and practices to
20 charge the Nevada Medicaid program and Tricare — which offers Medicaid-like benefits
21 to service members — for care that is not medically necessary. (*Id.* at 7-8.) Welch brings
22 twelve claims under the FCA, 31 U.S.C. § 3729(a)(1)(A)-(B), and the analogous Nevada
23 False Claims Act (“NFCA”), NRS § 357.040(a)-(b) (together, the “*qui tam* claims”),
24 asserting that Defendants made (or caused to be made) false records that were used to
25 present fraudulent claims to Medicaid and Tricare. (ECF No. 15 at 29-70.)

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28 ¹Welch filed an Amended Complaint (ECF No. 15) on September 28, 2015. For ease of reference, in discussing “the Complaint,” the Court will cite to ECF No. 15.

1 Welch initiated this action by filing a sealed complaint on October 28, 2014. (ECF
2 No. 1.) On May 29, 2015, after an investigation, both the United States and the State of
3 Nevada (“the government”) declined to intervene. (ECF No. 9.) The government,
4 however, retained its right to intervene for good cause at a later point in this litigation. (*Id.*
5 at 3-4.) The government also stressed that the FCA and the NFCA provide for the
6 government to object to any settlement or dismissal of the lawsuit. (*Id.* at 3 (citing 31
7 U.S.C. § 3730(b)(1); NRS § 357.080(1); *United States ex rel. Killingsworth v. Northrop*
8 *Corp.*, 25 F.3d 715, 723-25 (9th Cir. 1994)).)

9 III. LEGAL STANDARD

10 The *qui tam* provisions of the FCA enable private parties to “bring a civil action for
11 a violation of [31 U.S.C. § 3729, which prohibits making false or fraudulent claims to the
12 government,] for the person and for the United States Government.” 31 U.S.C.
13 § 3730(b)(1). A private party bringing a *qui tam* action is known as a “relator.” Any action
14 initiated under this provision must “be brought in the name of the Government,” and may
15 be dismissed only upon the consent of the court and the Attorney General. 31 U.S.C.
16 § 3730(b)(1). After a relator commences a *qui tam* action, “the United States is given 60
17 days to review the claim and decide whether it will ‘elect to intervene and proceed with
18 the action.’” *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932
19 (2009) (quoting 31 U.S.C. § 3730(b)(2), (b)(4)). The NFCA similarly allows a private
20 plaintiff to bring a false claims action “on his or her own account and that of the State
21 [and/or] a political subdivision.” NRS § 357.080(1). The Nevada Attorney General also
22 has 60 days to determine whether to intervene in the action.² NRS § 357.080(4).

23 When *qui tam* actions fall within the scope of an arbitration agreement, courts
24 have, in some cases, referred them to arbitration. *See, e.g., United States v. Bankers*
25 *Ins. Co.*, 245 F.3d 315, 324-25 (4th Cir. 2001) (holding that a *qui tam* claim was subject
26 to an arbitration provision that appeared in the government’s contract). Section 2 of the

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28 ²As noted above, neither the United States nor the State of Nevada has
intervened in this action. (ECF No. 9.)

1 Federal Arbitration Act (“FAA”) provides that private arbitration agreements are
2 considered “valid, irrevocable, and enforceable, save upon such grounds as exist at law
3 or in equity for the revocation of any contract.” 9 U.S.C. § 2; see *AT&T Mobility LLC v.*
4 *Concepcion*, 563 U.S. 333, 339 (2011) (describing this provision as a “liberal federal
5 policy favoring arbitration” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*
6 *Corp.*, 460 U.S. 1, 24 (1983))). The Supreme Court has interpreted Section 2 as
7 requiring courts to “place arbitration agreements on an equal footing with other
8 contracts.” *Concepcion*, 563 U.S. at 339. It is well settled, however, that “[o]nly the
9 parties to an arbitration agreement are bound by it.” *In re EPD Inv. Co., LLC*, --- F.3d ---,
10 Nos. 14-55740, 14-56478, 2016 WL 2620300, at *4 (9th Cir. May 9, 2016).

11 **IV. ANALYSIS**

12 Welch signed an arbitration agreement with MLF while applying for the speech
13 pathologist position.³ (ECF No. 22 at 2, 6.) The agreement indicates that Welch and MLF
14 will arbitrate “all disputes that may arise out of the employment context,” including claims
15 based on “state or federal law or regulation . . . with exception of claims arising under the
16 National Labor Relations Act,” state workers compensations laws, “or as otherwise
17 required by state or federal law.” (*Id.* at 4.) The agreement further provides that MLF and
18 Welch will arbitrate “any claim, dispute, and/or controversy” that “aris[es] from, [is]
19 related to, or ha[s] any relationship or connection whatsoever with [Welch’s] seeking
20 employment by, or employment or other association with [MLF].” (*Id.*) Defendants insist
21 that Welch’s *qui tam* claims fall within the broad scope of the arbitration agreement
22 because they are state and federal law claims arising from Welch’s alleged observations
23 and experiences as an MLF employee. (See ECF No. 20 at 3.) Welch counters by
24 pointing out that the government is the real party in interest to her action, and that the
25 government never agreed to arbitrate its claims. (See ECF No. 23 at 3-4.) Because the
26 government never signed the arbitration agreement, Welch contends that even the

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28 ³MLF requires prospective and current employees to agree to binding arbitration “[a]s a condition of initial employment and/or continued employment.” (ECF No. 22 at 4.)

1 FAA's policy of favoring arbitration does not demand arbitration here. (*See id.*) The Court
2 agrees with Welch.

3 **A. Scope and Validity of the Arbitration Agreement**

4 The FAA applies to arbitration agreements that, like the document at issue here,
5 are "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2; *Chiron*
6 *Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Once in play,
7 the FAA "leaves no place for the exercise of discretion by a district court, but instead
8 mandates that district courts *shall* direct the parties to proceed to arbitration on issues as
9 to which an arbitration agreement has been signed." *Chiron Corp.*, 207 F.3d at 1130
10 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). Moreover, when
11 a contract includes an arbitration clause, it is an "established principle[]" to presume
12 "arbitrability in the sense that 'an order to arbitrate the particular grievance should not be
13 denied unless it may be said with positive assurance that the arbitration clause is not
14 susceptible of an interpretation that covers the asserted dispute.'" *IATSE Local 720 v.*
15 *InSync Show Prods., Inc.*, 801 F.3d 1033, 1041-42 (9th Cir. 2015) (quoting *AT&T*
16 *Techs., Inc. v. Comm'cns Workers of Am.*, 475 U.S. 643, 650 (1986)).

17 Neither party disputes that the arbitration agreement is a valid contract between
18 Welch and MLF. Instead, Welch objects to Defendants' reading of the agreement's
19 scope and import — that is, whether the agreement even covers the *qui tam* claims, and,
20 assuming it does, whether those claims may be sent to arbitration. (ECF No. 23 at 3-5.)
21 As to the agreement's scope, Welch asserts that the *qui tam* claims do not, as stated in
22 the arbitration agreement, "arise out of the employment context," or "aris[e] from, relate[]
23 to, or hav[e] any relationship or connection whatsoever with [her] seeking employment
24 by, or employment or other association with [MLF]." (ECF No. 22 at 4.) Welch insists that
25 the *qui tam* claims are unrelated to her association with Defendants, and instead focus
26 on Defendants' allegedly fraudulent billing practices. (ECF No. 23 at 5.)

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1 Welch construes the arbitration agreement too narrowly. While it is true that the
2 *qui tam* claims focus on Defendants' allegedly fraudulent provision of unnecessary
3 therapy and improper billing practices, the Complaint states that Welch became aware of
4 those practices through her work at MLF. (See ECF No. 15 at 4 ("Welch has intimate
5 knowledge of Defendants' fraudulent conduct through her professional responsibilities at
6 MLF.")) And the arbitration agreement covers, with limited exceptions not applicable
7 here, any claim under federal or state law that "aris[es] out of 'or [is] related to' the
8 employment relationship," or that "has any relationship or connection whatsoever" to
9 Welch's employment. (ECF No. 22 at 4.) The Complaint makes clear that the *qui tam*
10 claims arise from observations Welch made while employed by MLF. (See, e.g., ECF
11 No. 15 at 32, 35, 39, 42-43, 46, 49, 52, 56, 60, 63, 66, 69 (alleging, for each count of
12 fraudulent conduct, that Welch noticed the conduct while she was an MLF employee).)
13 Thus, although the *qui tam* claims are neither grounded in employment law nor directly
14 based on Welch's former position at MLF, they are connected to her employment there.⁴
15 Welch's claims are within the broad scope of the arbitration agreement.

16 **B. Whether the Arbitration Agreement Extends to the Government**

17 Even a broadly worded arbitration agreement, however, applies only to the parties
18 who agreed to its terms. *In re EPD Inv. Co.*, 2016 WL 2620300, at *4. Welch emphasizes
19 that neither the federal nor state government signed the arbitration agreement, and that
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21 ⁴Welch compares this case to *Mikes v. Strauss*, 889 F. Supp. 746, 754-55
22 (S.D.N.Y. 1995), where a court in the Southern District of New York held that a former
23 employee's *qui tam* action was beyond the scope of an arbitration clause that appeared
24 in her employment agreement. The arbitration clause applied to "any disagreements,
25 claims, questions or controversies which may arise out of or relate to this Agreement or
26 out of its interpretation or any alleged breach thereof." *Id.* at 754. The court stressed that
27 the plaintiff's "*qui tam* claims in no way impinge[d] on her employee status," and that the
28 plaintiff could have brought the *qui tam* suit "[e]ven if [she] had never been employed by
defendants." *Id.* MLF's arbitration agreement is broader, covering not only disputes
arising from Welch's employment agreement, but any claim connected to her
employment in general. (See ECF No. 22 at 4.) While it is true that a plaintiff need not be
an employee of an entity to initiate an FCA action against it, see 31 U.S.C. § 3730(b),
Welch disclosed in her Complaint that she knew about the alleged fraud precisely
because of her employment with MLF. (See ECF No. 15 at 4.) Thus, with regard to the
scope of the arbitration agreement at issue, the *Mikes* decision is distinguishable.

1 both entities are real parties in interest to this action. (ECF No. 23 at 3-4.) Despite the
2 government's decision not to intervene in this case, Welch insists that the *qui tam* claims
3 continue to implicate the government's interest, such that requiring arbitration of those
4 claims is improper. (*Id.*) Defendants contend that whether the government is a party to
5 the arbitration agreement makes no difference — the *qui tam* claims belong, at least in
6 part, to Welch, who signed the agreement. (ECF No. 20 at 8-10; ECF No. 24 at 4-7.)
7 Defendants assert that regardless of its status as a real party in interest, the government
8 is not a party to this litigation, and therefore cannot stand in the way of the arbitration
9 agreement.⁵ (ECF No. 24 at 4-6; ECF No. 29 at 1-3.) Defendants' arguments are
10 misplaced.

11 First, Defendants overstate the import of the government's decision not to
12 intervene in the *qui tam* action. Citing *Eisenstein*, Defendants argue that the government
13 "is a 'party' to a privately filed FCA action only if it intervenes in accordance with the
14 procedures established by federal law." 556 U.S. at 933. In *Eisenstein*, the Supreme
15 Court held that a 30-day timeline applied to a relator's appeal in an FCA action, rather
16 than the 60-day timeline that applies when the United States is a party to an action. *Id.* at
17 937 (discussing Rule 4 of the Federal Rules of Appellate Procedure, which creates
18 different deadlines for appealing a final judgment based on the United States' status as a
19 party to a case). The Court recognized that the government is a real party in interest to
20 an FCA action regardless of its decision to intervene in the case. *Id.* at 934-35. But
21 unlike a party to a lawsuit, which is "one by or against whom a lawsuit is brought," *id.* at
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24 ⁵Defendants further argue that, as a matter of law, FCA claims may be arbitrated.
25 (ECF No. 20 at 8-10; ECF No. 24 at 7-9.) Defendants rely primarily on nonbinding
26 authority — a Fourth Circuit decision and two decisions from the Southern District of
27 Ohio — to support this assertion. (See ECF No. 24 at 7-8 (citing *United States v.*
28 *Bankers Ins. Co.*, 245 F.3d 315, 323-25 (4th Cir. 2001); *United States ex rel. Hicks v.*
Evercare Hosp., No. 1:12-cv-887, 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015);
Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12-cv-63, 2013 WL 394875, at *6-7 (S.D.
Ohio Jan. 31, 2013).) Because the Court finds dispositive the fact that the government
never agreed to the arbitration agreement, the Court need not decide whether FCA
claims may, as a matter of law, ever be submitted to arbitration.

1 933 (citation and alteration omitted), a real party in interest is “an actor with a substantive
2 right whose interests may be represented in litigation by another.” *Id.* at 934-35.

3 According to Defendants’ logic, the government’s status as a real party in interest
4 means that the *qui tam* claims belong to Welch, who agreed to arbitrate them. But the
5 Ninth Circuit has concluded that FCA *qui tam* claims belong to the government, not the
6 relator. *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1126-27 (9th Cir.
7 2007) (holding that relators cannot proceed pro se in *qui tam* lawsuits). As the court
8 explained, “[t]he FCA makes clear that notwithstanding the relator’s statutory right to the
9 government’s share of the recovery, the underlying claim of fraud always belongs to the
10 government.” *Id.* at 1126. Relators thus do not prosecute “only their ‘own case.’” *Id.* at
11 1126-27 (quoting 28 U.S.C. § 1654 (defining when litigants may appear without
12 representation in federal court)). They also “represent[] the United States and bind[] it to
13 any adverse judgment the relators may obtain.” *Id.* at 1127. Given the government’s
14 interest in the outcome of the *qui tam* action, Defendants have not demonstrated that
15 Welch’s involvement in the lawsuit somehow transforms the fraud claims into her own.

16 Furthermore, Defendants have not explained how (or whether) the government’s
17 status as a real party in interest affects the fact that the government was not a party to
18 the arbitration agreement. (See ECF No. 22.) Defendants, in short, seek to compel
19 arbitration of claims in which the government has “a substantive right” that is
20 “represented in litigation by another,” but which the government never agreed to
21 arbitrate. *Eisenstein*, 556 U.S. at 934-35. Extending the arbitration agreement to cover
22 the non-signatory federal and Nevada governments would stretch the agreement beyond
23 its scope. The FAA ensures that “private agreements to arbitrate are enforced according
24 to their terms,” but here, Defendants ask the Court to expand those terms to cover non-
25 parties to the agreement. *Zenelaj v. Handybrook, Inc.*, 82 F. Supp. 3d 968, 970 (N.D.
26 Cal. 2015) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*,
27 489 U.S. 468, 479 (1989)).

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1 Second, Defendants' cited authority is either distinguishable or unpersuasive.
2 (See ECF No. 20 at 8-10; ECF No. 24 at 7-8.) For example, Defendants point to *Bankers*
3 *Ins. Co.*, 245 F.3d at 319-25, where the Fourth Circuit held that the federal government's
4 FCA claim should be arbitrated according to the terms of a contract to which the
5 government was a party. The court explained: "The Government should comply with its
6 contract obligations, and it cannot avoid them merely by invoking a statutory civil claim,
7 such as one contemplated under the FCA." *Id.* at 324. Here, by contrast, only Welch and
8 MLF — and not the government — were parties to the arbitration agreement. While
9 *Bankers Insurance Co.* suggests that the FCA does not, on its own, foreclose arbitration
10 of *qui tam* claims, the case is silent as to arbitration agreements to which the
11 government is not a party.

12 Defendants further highlight two unpublished decisions from a court — indeed,
13 from the same District Judge — in the Southern District of Ohio, both of which held that a
14 plaintiff's FCA claim was subject to arbitration even though the government was not a
15 party to the underlying agreement. See *United States ex rel. Hicks v. Evercare Hosp.*,
16 No. 1:12-cv-887, 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015); *Deck v. Miami*
17 *Jacobs Bus. Coll. Co.*, No. 3:12-cv-63, 2013 WL 394875, at *6-7 (S.D. Ohio Jan. 31,
18 2013). Just as in this lawsuit, the government declined to intervene in the FCA claims at
19 issue in *Hicks* and *Deck*. See *Hicks*, 2015 WL 4498744, at *3 (describing the
20 government as the real party in interest); *Deck*, 2013 WL 394875, at *6. In both cases,
21 however, the court emphasized that the government never objected to arbitration;
22 instead, the government had asked the court to clarify that any arbitration would result in
23 a non-binding recommendation. *Hicks*, 2015 WL 4498744, at *3; *Deck*, 2013 WL
24 394875, at *6. Here, conversely, the government filed an opposition to Defendants'
25 Motion, arguing that the government cannot be bound by an arbitration agreement that it

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1 never signed.⁶ (ECF No. 25 at 3.) The government has not consented to arbitration. In
2 fact, it has objected to arbitration.

3 More important, the *Deck* court reasoned that any *qui tam* action “belong[s] to”
4 both the relator and the government. *Deck*, 2013 WL 394875, at *7. Because the relator
5 had agreed to arbitrate the *qui tam* claims, the government’s interest in those claims was
6 also subject to arbitration. *Id.* (emphasizing that FCA claims are “for the person and for
7 the United States Government” (quoting 31 U.S.C. § 3730(b)). But, as discussed above,
8 the opposite also holds true — if the *qui tam* action “belongs to” the government, a
9 nonparty to the arbitration agreement, then requiring both the government and the
10 relator to arbitrate would exceed the bounds of the arbitration agreement regardless of
11 whether the government objects to arbitration.

12 A similar conclusion was reached in *Mikes v. Strauss*, 889 F. Supp. 746, 754-55
13 (S.D.N.Y. 1995). Like Welch’s claims here, the plaintiff in *Mikes* brought *qui tam* claims
14 against her former employers for their allegedly improper medical billing practices.⁷ *Id.* at
15 749. The court denied the defendants’ motion to compel arbitration of the *qui tam* claims,
16 finding that (1) they were not covered by the arbitration agreement; and (2) even if they
17 were, the government’s status as a non-party to the agreement foreclosed arbitration. *Id.*
18 at 754-55; (see *supra* note 4). Although the court did not rule on whether all causes of
19 action brought under the FCA may be arbitrated, *Mikes*, 889 F. Supp. at 755 n.7, the
20 court was not persuaded that the “plaintiff, suing on the government’s behalf, [was]
21 necessarily bound by [the arbitration agreement’s] terms. *Id.* at 755. The plaintiff “st[ood]

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24 ⁶The government also stated that any arbitration decision would be “advisory
25 only” because the *qui tam* claims cannot be dismissed without the federal Attorney
26 General’s consent. (ECF No. 25 at 3.) But the government appears to have raised this
27 argument as a reason to reject arbitration, not as a basis for consenting to arbitration.

28 ⁷The plaintiff also claimed that her former employer had discharged her in
retaliation for her *qui tam* claims, in violation of 30 U.S.C. § 3730(h). *Mikes*, 889 F. Supp.
at 750. Considering the retaliation claim separately from the *qui tam* claims, the court
held that the arbitration agreement covered the retaliation claim because it related to the
plaintiff’s former employment. *Id.* at 755-56.

1 as a private representative of the government,” which never agreed to arbitrate the *qui*
2 *tam* claims. *Id.*

3 While the *Mikes* court based its ruling on the narrow scope of the arbitration
4 agreement at issue, the Court finds its reasoning regarding the government’s status as a
5 non-party to the agreement persuasive. The arbitration agreement covers only Welch
6 and MLF, not the government. (See ECF No. 22.) Because the fraud claims at the heart
7 of this case belong to the government, the Court will not compel arbitration of the *qui tam*
8 claims.

9 Defendants’ Motion to Compel (ECF No. 20) is accordingly denied. Finally,
10 because this dispute will remain before the Court, Defendants’ Motion to Stay (ECF No.
11 21) is also denied.

12 **V. CONCLUSION**

13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines that they do not warrant discussion as they do not affect the outcome of the
16 Motion.

17 It is therefore ordered that Defendants’ Motion to Compel Arbitration and Stay
18 Action (ECF Nos. 20, 21) is denied.

19 DATED THIS 13th day of June 2016

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23 MIRANDA M. DU
24 UNITED STATES DISTRICT JUDGE
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