

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  
NORTHERN DISTRICT OF CALIFORNIA

NIKOLA LOVIG,  
Plaintiff,  
v.  
BEST BUY STORES LP, et al.,  
Defendants.

Case No. 18-cv-02807-PJH

**ORDER DENYING MOTION TO  
VOLUNTARILY DISMISS**

Re: Dkt. No. 29

Plaintiff's motion to Voluntarily Dismiss Claims One through Six Without Prejudice came on for hearing before this court on June 19, 2019. Plaintiff did not make an appearance, but his attorney called to advise that he had missed his flight and subsequently filed a written explanation. Defendants appeared through their counsel, Barbara Miller. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion, for the reasons stated at the hearing and for the following reasons.

**BACKGROUND**

Plaintiff Nikola Lovig was an employee of defendant Best Buy Stores, L.P. ("Best Buy Stores") from approximately April 24, 2004 through May 12, 2017. See First Amended Complaint ("FAC"), Dkt. 14 ¶ 21. On April 3, 2018, plaintiff filed a complaint in Alameda County Superior Court against Best Buy Stores and Best Buy Co., Inc. (together "Best Buy") on behalf of himself and a putative class of "[a]ll persons employed by Defendants and/or any staffing agencies and/or any other third parties in hourly or non-exempt positions in California during the Relevant Time Period." Compl., Dkt. 1-1

United States District Court  
Northern District of California

1 ¶ 12; see also FAC ¶ 13 (same). The state-court complaint alleged the following causes  
 2 of action: (1) failure to provide meal periods, (2) failure to provide rest periods, (3) failure  
 3 to pay hourly wages, (4) failure to provide accurate written wage statements, (5) failure to  
 4 timely pay all final wages, and (6) unfair competition. See Compl.; FAC.

5 On May 11, 2018, defendants removed the action to this court. Dkt. 1. On July  
 6 10, 2018, plaintiff filed an amended complaint adding a seventh cause of action (7) under  
 7 the Private Attorneys General Act, Cal. Lab. Code §§ 2698, et. seq. (“PAGA”). See FAC.

8 On July 18, 2018, defendants moved to compel arbitration. Dkt. 15. On August  
 9 28, 2018, this court issued an order finding that the parties had entered into an  
 10 enforceable arbitration agreement that governed plaintiff’s non-PAGA claims. Dkt. 27.  
 11 That order compelled arbitration of plaintiff’s non-PAGA claims and stayed the action  
 12 pending resolution of the arbitration. Id. The arbitration has not yet completed.

13 On April 26, 2019, plaintiff filed a motion pursuant to Federal Rule of Civil  
 14 Procedure 41 to voluntarily dismiss his “First through Sixth Causes of Action without  
 15 prejudice so Plaintiff may proceed in a representative capacity, with his Seventh Cause of  
 16 Action under PAGA.” Dkt. 29 at 1. Defendants oppose the motion.

## 17 **DISCUSSION**

### 18 **A. Legal Standard**

#### 19 **1. Federal Rule of Civil Procedure Rule 41**

20 A plaintiff may voluntarily dismiss an action without court order by filing “(i) a notice  
 21 of dismissal before the opposing party serves either an answer or a motion for summary  
 22 judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.” Fed.  
 23 R. Civ. P. 41(a)(1)(A).

24 Except under those circumstances, “an action may be dismissed at the plaintiff’s  
 25 request only by court order, on terms that the court considers proper.” Fed. R. Civ.  
 26 P. 41(a)(2). “A district court should grant a motion for voluntary dismissal under  
 27 Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as  
 28 a result.” Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001) (footnote omitted).

1 Rule 41 “only applies to dismissals of all claims against a particular defendant, not  
 2 to dismissals of less than all claims against that defendant.” ECASH Techs., Inc. v.  
 3 Guagliardo, 35 F. App’x 498, 499 (9th Cir. 2002) (citing Gen. Signal Corp. v. MCI  
 4 Telecomms. Corp., 66 F.3d 1500, 1513 (9th Cir. 1995); Ethridge v. Harbor House Rest.,  
 5 861 F.2d 1389, 1392 (9th Cir. 1988) (“a plaintiff may not use Rule 41(a)(1)(i) to dismiss,  
 6 unilaterally, a single claim from a multi-claim complaint”)); see also Hells Canyon Pres.  
 7 Council v. U.S. Forest Serv., 403 F.3d 683, 687–89 (9th Cir. 2005) (applying the same  
 8 reasoning to Rule 41(a)(2)). When a purported dismissal is “of less than all  
 9 counterclaims, Rule 41(a) [is] inapplicable.” ECASH Techs., 35 F. App’x at 499; Hells  
 10 Canyon, 403 F.3d at 689 n.7 (“Rule 41(a) does *not* encompass the dismissal of individual  
 11 claims”).

12 Instead, “Rule 15, not Rule 41, governs the situation when a party dismisses  
 13 some, but not all, of its claims” against a defendant. Gen. Signal Corp., 66 F.3d at 1513;  
 14 Ethridge, 861 F.2d at 1392 (“Federal Rule of Civil Procedure 15(a) is the appropriate  
 15 mechanism where a plaintiff desires to eliminate an issue, or one or more but less than  
 16 all of several claims, but without dismissing as to any of the defendants.”) (internal  
 17 quotation marks omitted); Hells Canyon, 403 F.3d at 687–89 (Rule 41(a) “does not allow  
 18 for piecemeal dismissals. Instead, withdrawals of individual claims against a given  
 19 defendant are governed by Fed. R. Civ. P. 15, which addresses amendments to  
 20 pleadings.”).

## 21 **2. Federal Rule of Civil Procedure Rule 15**

22 Federal Rule of Civil Procedure 15(a) governs the amendment of pleadings and  
 23 permits a party to amend a previously-amended pleading “only with the opposing party’s  
 24 written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). The grant or denial of  
 25 leave to amend is within the discretion of the district court. Foman v. Davis, 371 U.S.  
 26 178, 182 (1962).

27 In determining whether to grant leave to amend, the court should consider “the  
 28 presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure

1 deficiencies by previous amendments, undue prejudice to the opposing party and futility  
2 of the proposed amendment.” Moore v. Kayport Package Express, Inc., 885 F.2d 531,  
3 538 (9th Cir. 1989); see also Foman, 371 U.S. at 182. While the court should consider all  
4 those factors, “the crucial factor is the resulting prejudice to the opposing party.” Howey  
5 v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973).

## 6 **B. Analysis**

### 7 **1. Plaintiff’s Motion Fails When Construed As Either a Motion to** 8 **Voluntarily Dismiss or a Motion to Amend the Complaint**

9 Plaintiff moved to voluntarily dismiss some, but not all, of his claims pursuant to  
10 Rule 41. But Rule 41 “only applies to dismissals of all claims against a particular  
11 defendant, not to dismissals of less than all claims against that defendant.” ECASH  
12 Techs., 35 F. App’x at 499. Because plaintiff is attempting to dismiss some but not all of  
13 his claims against defendants, plaintiff’s motion fails under Rule 41.

14 The court may construe plaintiff’s motion as a motion to amend his complaint  
15 under Rule 15. Defendants’ opposition brief identified Rule 15 as the proper procedural  
16 mechanism, and plaintiff seemed to adopt that position in his reply brief. However, even  
17 after being alerted to the fact that his motion should have been filed pursuant to Rule 15,  
18 plaintiff has not submitted a proposed amended complaint as required by this district’s  
19 Local Rules. See Civ. L.R. 10-1 (“Any party . . . moving to file an amended pleading must  
20 reproduce the entire proposed pleading[.]”). As such, plaintiff’s motion does not comply  
21 with this district’s basic requirements of a motion to amend the complaint.

### 22 **2. The Federal Arbitration Act Does Not Permit Plaintiff to Amend the** 23 **Complaint**

24 More importantly, defendants argue that this case is currently stayed, and that  
25 plaintiff is seeking a court order advancing the litigation without first requesting that the  
26 court lift the stay. That much is true—the action is stayed pursuant to 9 U.S.C. § 3  
27 (Dkt. 27), and no party has moved this court to lift the stay. Plaintiff ignores this point  
28 entirely, and the court declines to proceed with motion practice in a stayed case.

1           Moreover, even if plaintiff had moved to lift the stay, defendants argue that  
2 9 U.S.C. § 3 requires the stay to remain in effect until arbitration is complete. Plaintiff has  
3 also not addressed that argument.

4           The Federal Arbitration Act (“FAA”) provides that:

5                     If any suit or proceeding be brought in any of the courts of the  
6                     United States upon any issue referable to arbitration under an  
7                     agreement in writing for such arbitration, the court in which such  
8                     suit is pending, upon being satisfied that the issue involved in  
9                     such suit or proceeding is referable to arbitration under such an  
10                    agreement, **shall on application of one of the parties stay  
11                    the trial of the action until such arbitration has been had in  
12                    accordance with the terms of the agreement**, providing the  
13                    applicant for the stay is not in default in proceeding with such  
14                    arbitration.

15 9 U.S.C. § 3 (emphasis added). The plain language of the FAA seems to require that, if  
16 “any issue” is referred to arbitration, the court “shall” stay the “action” pending arbitration  
17 upon request. Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073–74 (9th  
18 Cir. 2014); see also Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 88 (2000)  
19 (applying “the plain language of the statutory text” in interpreting the FAA). The statute  
20 compels staying the entire action and leaves no room to stay certain claims and proceed  
21 with or dismiss others.

22           There is an exception to that literal reading of Section 3. In this Circuit,  
23 “notwithstanding the language of § 3, a district court may either stay the action or dismiss  
24 it outright when . . . the court determines that all of the claims raised in the action are  
25 subject to arbitration.” Johnmohammadi, 755 F.3d at 1074. When elucidating that  
26 exception, the Ninth Circuit has consistently explained that it applies only when “all of the  
27 claims raised in the action are subject to arbitration.” Johnmohammadi, 755 F.3d at  
28 1074; see Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999) (dismissal  
affirmed where “all of Simula’s claims against Autoliv were subject to the arbitration  
clause”); Sparling v. Hoffman Const. Co., 864 F.2d 635, 638 (9th Cir. 1988) (“the  
arbitration clause was broad enough to bar all of the plaintiff’s claims since it required  
Active to submit all claims to arbitration”); see also, e.g., Campos v. JPMorgan Chase

United States District Court  
Northern District of California

1 Bank, NA, Case No. 18-cv-06169-JSC, 2019 WL 827634, at \*12 (N.D. Cal. Feb. 21,  
2 2019) (“Courts in this District regularly dismiss actions after granting motions to compel  
3 arbitration where all of the plaintiff’s claims were subject to arbitration.”) (collecting  
4 cases). Neither Section 3 nor the Ninth Circuit contemplates staying or dismissing less  
5 than the entire action.

6 This court has previously determined that some but not all of Lovig’s claims  
7 against Best Buy are arbitrable. Dkt. 27. Because this action raises claims both subject  
8 to arbitration and not subject to arbitration, 9 U.S.C. § 3 dictates that it must be stayed  
9 pending arbitration, and the Ninth Circuit exception allowing dismissal of an action when  
10 all asserted claims are arbitrable is not applicable. In short, 9 U.S.C. § 3 does not allow  
11 this court to dismiss Lovig’s arbitrable claims and proceed with his non-arbitrable claims.  
12 Therefore, the court must continue to stay the entire action—and cannot dismiss fewer  
13 than all of the claims—until the contracted-for “arbitration has been had in accordance  
14 with the terms of the agreement[.]” 9 U.S.C. § 3.

15 **CONCLUSION**

16 For the foregoing reasons, plaintiff’s motion to voluntarily dismiss claims one  
17 through six without prejudice is DENIED. The previously-ordered stay remains in effect  
18 pending resolution of the arbitration.

19 **IT IS SO ORDERED.**

20 Dated: June 21, 2019



21  
22 

---

PHYLLIS J. HAMILTON  
United States District Judge