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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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AZ Holding, L.L.C., a North Dakota) limited liability company,

No. CV-08-0276-PHX-LOA

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Plaintiff,

ORDER

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vs.

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Thomas C. Frederick and Christine J.) Cobb, husband and wife; RBW) Consultants, Inc., an Arizona corporation;) and Bumar, L.L.C., an Arizona limited liability company,

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Defendants.

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Thomas C. Frederick and Christine J.) Cobb, husband and wife; RBW) Consultants, Inc., an Arizona corporation;) Bumar, L.L.C., an Arizona limited liability company,

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Counterclaimants,

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vs.

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AZ Holding, L.L.C., a North Dakota) limited liability company,

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Counterdefendant.

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This matter is before the Court on review of the parties' briefing in response to the Court's December 24, 2009 Order to Show Cause why the Court should not enter an order compelling this entire case to arbitration, dismiss without prejudice or stay this federal action, and deny the pending Motion for Partial Summary Judgment without

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1 prejudice. (docket # 164) After hearing oral arguments, reviewing relevant case law, and
2 considering all briefing, the Court finds Plaintiff has failed to establish prejudice by
3 Defendants' conduct in this litigation and, therefore, Defendants have not waived their
4 contractual right to arbitration. The Court will grant Defendants' request and will order,
5 *inter alia*, the parties to proceed to arbitration on all issues.

6 **BACKGROUND**

7 This case arises out of the sale of a modular building business and lease
8 containing an option to buy the business' office building. (docket # 56) On June 15,
9 2007, Plaintiff AZ Holding, LLC ("Plaintiff" or "AZH") purchased three corporations
10 from Defendants Frederick and Cobb, husband and wife, co-founders of the business,¹
11 and another individual.² The three related corporations that Plaintiff purchased were
12 Ameri-Fab, Inc., American Modular Service, Inc. and Amerimod Transport, Inc. (*Id.* at
13 5) In connection with the sale, the parties contemporaneously entered into four
14 agreements - Asset Purchase and Sale Agreement, Consulting Agreement, Lease Agree-
15 ment, and Non-Competition and Confidentiality Agreement. (*Id.*) Plaintiff's pending
16 Motion for Partial Summary Judgment, docket # 140, focuses on the parties' Lease
17 Agreement, and specifically, an option to purchase the business' former office building
18 located at the Deer Valley Airport Industrial Park in Phoenix. Except as germane to the
19 issue of arbitration, the Court will not repeat the history of this litigation with which the
20 parties are quite familiar.

21 On or about December 23, 2009, while reviewing Defendants' November
22 30, 2009 Response to Plaintiff's pending Motion for Partial Summary Judgment, this
23 Magistrate Judge learned for the first time after nearly two years of active litigation that
24 the parties had entered into a contractual arbitration agreement, located in the Asset

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26 ¹ The Defendants are Thomas C. Frederick, Christine J. Cobb, RBW Consultants, Inc.
27 and Bumaro, L.L.C. (collectively the "Defendants").

28 ² This former shareholder, Marci Mitchell, is not a party to this lawsuit.

1 Purchase and Sale Agreement (“APA”), in connection with the sale of the business to
2 Plaintiff. (docket # 159 at 3) Section 9.12 of the APA requires that the parties resolve by
3 arbitration:

4 Any disagreement, Claim, demand, controversy, or dispute (collectively
5 “Dispute”) in any way arising out of or relating to [the APA] and its
6 performance or alleged breach, whether dispute by agreement, whether
7 involving questions of law or fact or both and regardless of the nature
8 thereof or the remedy therefore, which is not settlement by agreement of the
9 parties

10 (docket ##1, Exhibit (“Exh”) 1-2 at 2-33, 167 at 3; also see, docket # 160, Defendants’
11 Controverting and Supplemental Statement of Facts (“DSOF”) ¶ 18 at 7; Exh 5, ¶ 9.12 at
12 30-31).

13 The parties’ arbitration agreement provides that “the decision of the arbitra-
14 tor(s) shall be final and judgment thereon may be entered in any court of competent juris-
15 diction.” (*Id.*, Exh 5 at 31) Without citation to any legal authority, Defendants first raised
16 the issue of arbitration in this case, not as a request for an order compelling arbitration,
17 but rather, as an affirmative defense,³ to demonstrate that Plaintiff was the first to default
18 under the parties’ integrated purchase and lease agreements, relieving Defendants of their
19 contractual obligations. (docket # 159 at 9-10) Surprisingly, Plaintiff did not address this
20 issue in its Reply in Support of its Motion for Partial Summary Judgment. (docket # 162)
21 On January 11, 2010, after the Court issued the December 24, 2009 Order to Show Cause
22 (“OSC”), Defendants, for the first time in a court document, “urge[ed] the Court to dis-
23 miss this Case and deny the pending MPSJ so that the Claims asserted may be expedi-
24 tiously resolved through arbitration.” (Defendants’ Response to OSC; docket # 167 at 5)

25 ³ This defense was not raised in either of Defendants’ Answers. Rule 8(c)(1), FED.
26 R.Civ.P. (docket ## 27, 147) The Ninth Circuit has held that unless there is a showing of
27 prejudice by the plaintiff, “the bare fact that [a defendant] failed to raise an affirmative
28 defense is inadequate by itself to support a claim of waiver of arbitration.” *Fisher v. A.G.
Becker Paribas Inc.*, 791 F.2d 691, 698 (9th Cir. 1986) (citing *Rush v. Oppenheimer & Co.*,
779 F.2d 885, 889 (2d Cir. 1985)).

1 Plaintiff's Amended Response⁴ to the OSC contends "Defendants' conduct
2 in this litigation and delay constitute a waiver of any purported right to arbitrate." (docket
3 # 170 at 4) Plaintiff argues that "it would be inequitable and unjust to force the parties to
4 arbitrate after almost two years of litigation as it would impose substantial and unwarrant-
5 ed prejudice upon Plaintiff." (*Id.* at 1) Plaintiff argues that this is not a case where
6 Defendants timely requested arbitration and Plaintiff refused. Plaintiff claims it has
7 already incurred substantial litigation expenses exceeding \$380,000 to date. (*Id.* at 3)
8 Plaintiff contends that "[i]f forced to arbitrate this dispute, Plaintiff will be made to fore-
9 go its efforts in having prepared and served the Rule 11 motion, filing its summary judg-
10 ment motion, and engaging in extensive pretrial discovery."⁵ (*Id.*) Plaintiff points out that
11 "Defendants served a demand for arbitration with the [American Arbitration Association
12 "AAA"] upon Plaintiff on December 17, 2009[.]"⁶ for the first time in this case. (*Id.* at n.
13 1; Exh A) Plaintiff asserts that if the Court orders arbitration so late in this case, it would
14 "reward[Defendants'] dilatory conduct" after they "obtained all the discovery and dis-
15 closures from Plaintiff that would not otherwise have been permitted under the rules of
16 the American Arbitration Association." (*Id.* at 3)

17 Defendants' Reply to Plaintiff's Amended Response to OSC asserts "there
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19 ⁴ Plaintiff's original 24-page Response to the Court's December 24, 2009 OSC was
20 stricken with leave to file an amended response due to Plaintiff's counsels' violation of the
21 District Court's 17-page limit. See, LRCiv 7.2(e) ("Unless otherwise permitted by the Court,
22 a . . . response including its supporting memorandum, each shall not exceed seventeen (17)
23 pages, exclusive of attachments . . ."). Enforcement of this Local Rule assures one party
does not have a briefing advantage over an adverse party who complies with the page
limitation.

24 ⁵ The docket does not reflect a pending Motion for Rule 11 Sanctions against
25 Defendants.

26 ⁶ Defendants' Exhibit B to their Response to the OSC is a letter from AAA's case
27 manager, dated January 4, 2010, "acknowledg[ing] receipt on December 23, 2009, of a
28 Demand for Arbitration dated **December 23, 2009**, providing for administration of a
controversy arising out of contract between the above-captioned parties . . ." (docket # 167-
2, Exh B at 1) (emphasis added).

1 has been no waiver [of arbitration] by Defendants. And all claims before this Court relate
2 to the [APA] and, thus, are arbitrable.” (docket # 173 at 2) First, relying upon *Britton v.*
3 *Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990), Defendants claim they “were
4 unaware of their right to arbitrate the claims against AZH” and Plaintiff is required “to
5 prove that Defendants were aware of the Arbitration Provision, which AZH has not
6 done.” (*Id.* at 3) Next, Defendants assert that, like the facts in *Sovak, M.D. v. Chugai*
7 *Pharmaceutical Co.*, 280 F.3d 1266 (9th Cir. 2002), there is no “waiver where the
8 plaintiff (like AZH) filed two amended complaints over the course of litigation before the
9 defendant moved to compel arbitration.” (*Id.* at 4) While Defendants acknowledge that
10 they engaged in discovery, they argue their actions have not prejudiced Plaintiff because
11 “discovery alone does not constitute waiver of a right to compel arbitration[,]” citing
12 *Britton*, 916 F.2d at 1413; “the AAA Rules expressly permit discovery”; and “arbitration
13 of this case will not render the discovery efforts of the parties futile.” (*Id.* at 4, 7) Finally,
14 Defendants refute as unfounded Plaintiff’s claims of prejudice that AAA arbitration
15 permits only recovery of attorneys’ fees incurred in connection with arbitra-tion; that the
16 parties’ arbitration provision requires them to conduct the arbitration in Fargo, North
17 Dakota, rather than Phoenix; and that Plaintiff’s claims arising out of the Lease
18 Agreement are not arbitrable. (*Id.* at 7-11)

19 In its Reply, Plaintiff argues “Defendants’ Response purposefully ignores
20 the extent to which they voluntarily participated in the litigation process since the action
21 commenced in February 2008[,]” emphasizing that Defendants have filed two counter-
22 claims, “more than 35 documents with the Court over the last two years and fully
23 participated in pretrial discovery until it closed in October, 2009,” and first “rais[ed] the
24 arbitration issue as a ‘defense’ in their Response in opposition to Plaintiff’s summary
25 judgment motion, while failing to ever request or move the Court to compel arbitration.”
26 (docket # 172 at 2) “Even if Plaintiff was the first to repudiate its right to arbitrate, the
27 record in this case overwhelmingly demonstrates that Defendants acquiesced in that
28 decision and agreed to litigate rather than pursue arbitration.” (*Id.* at 3) (emphasis omit-

1 ted). Plaintiff further asserts that Defendants’ case law is distinguishable from this case
2 because “[n]one of Defendants’ cases examine the issue of whether a party had waived its
3 right to compel arbitration due to its litigation conduct in a judicial forum.” (*Id.* at 4)
4 Alternatively, Plaintiff contends, because “the Lease Agreement at issue does not require
5 arbitration[,]” and if the Court does not find the parties waived their right to arbitration,
6 “the Court retain jurisdiction as to all three claims alleged in Plaintiff’s Complaint
7 (Counts I, II, and III) and Count Two of the Counterclaim, and compel only those claims
8 arising under the [APA], the Consulting Agreement, and the Non-compete Agreement to
9 arbitration (Counts One, Three and Four of the Counterclaim).” (*Id.* at 5)

10 ARBITRATION

11 The Federal Arbitration Act (“FAA”), Title 9 U.S.C. § 1 *et seq.*, creates “a
12 body of federal substantive law of arbitrability, applicable to any arbitration agreement
13 within the coverage of the Act.” *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*,
14 460 U.S. 1, 24 (1983). The FAA applies to any “written provision in . . . a contract
15 evidencing a transaction involving commerce.” Title 9 U.S.C. § 2. The FAA mandates
16 that ““district courts shall direct the parties to proceed to arbitration on issues as to which
17 an arbitration agreement has been signed[.]” *Cox v. Ocean View Hotel Corp.*, 533 F.3d
18 1114, 1119 (9th Cir. 2008) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d
19 1126, 1131 (9th Cir. 2000)). Congress’ intent in passing the FAA was twofold: “to
20 ensure judicial enforcement of privately made agreements to arbitrate [and] to promote
21 the expeditious resolution of claims.” *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 219
22 (1985).

23 There is a “strong federal policy in favor of enforcing arbitration agree-
24 ments.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479
25 (1989). Under Title 9 U.S.C. § 2, contractual arbitration agreements are “valid, irrevoc-
26 able, and enforceable, save upon such grounds as exist at law or in equity for the revoca-
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1 tion of any contract.” Title 9 U.S.C. § 2.⁷ “By its terms, the [FAA] leaves no place for
2 the exercise of discretion by a district court, but instead mandates that district courts shall
3 direct the parties to proceed to arbitration on issues as to which an arbitration agreement
4 has been signed.” *Dean Witter*, 470 U.S. at 218 (citing §§ 3, 4); *Meritage Homes Corp. v.*
5 *Hancock*, 522 F.Supp.2d 1203, 1210-11 (D.Ariz. 2007). Pursuant to Title 9 U.S.C. § 3, a
6 district court is required to either stay proceedings pending arbitration or dismiss the case
7 if it determines that the issues involved are referable to arbitration under a written arbitra-
8 tion agreement. *Meritage Homes*, 522 F.Supp.2d at 2011 (citing *Pearce v. E.F. Hutton*
9 *Group, Inc.*, 828 F.2d 826, 830 (D.C.Cir. 1987) (once a district court is satisfied that the
10 issue before it is referable to arbitration, the court must, on application, stay the proceed-
11 ing pending the arbitration); *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635 (9th Cir.
12 1988) (district courts have discretion to dismiss cases in favor of arbitration under 9
13 U.S.C. § 3).

14 **A. Waiver of the Right to Compel Arbitration**

15 “A party seeking to prove waiver of a right to arbitrate must demonstrate
16 (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that
17 existing right; and (3) prejudice to the party opposing arbitration resulting from such
18 inconsistent acts.” *Britton*, 916 F.2d at 1412. “Because waiver of the right to arbitration
19 is disfavored, ‘any party arguing waiver of arbitration bears a heavy burden of proof.’”
20 *Fisher*, 791 F.2d at 694 (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693
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22 ⁷ Title 9 U.S.C. § 2 provides:

23 A written provision in any . . . contract evidencing a transaction involving
24 commerce to settle by arbitration a controversy thereafter arising out of such
25 contract or transaction, or the refusal to perform the whole or any part thereof,
26 or an agreement in writing to submit to arbitration an existing controversy
27 arising out of such a contract, transaction, or refusal, shall be valid,
irrevocable, and enforceable, save upon such grounds as exist at law or in
equity for the revocation of any contract.

28 9 U.S.C. § 2

1 F.2d 1023, 1025 (11th Cir. 1982)). Here, Plaintiff bears the “heavy burden of proof in
2 showing [all three] elements.” *Sovak*, 280 F.3d at 1270 (quoting *Britton*, 916 F.2d at
3 1412). “As a matter of federal law, any doubts concerning the scope of arbitrable issues
4 should be resolved in favor of arbitration, whether the issue is the construction of the
5 contract language itself or *an allegation of waiver*, delay, or a like defense to
6 arbitrability.” *Fisher*, 791 F.2d at 694 (citing *Moses*, 460 U.S. at 24-25) (emphasis
7 added).

8 **1. Knowledge of an Existing Right to Compel Arbitration**

9 Here, defense counsel, retained in October 2009 and the second law firm to
10 represent Defendants in this litigation, acknowledges that when he reviewed the file, he
11 “became aware of the Arbitration Provision contained in the [APA] and promptly review-
12 ed the Arbitration Provision with the Defendants. Until then, Defendants were unaware of
13 their right to arbitrate the claims against AZH.” (docket # 173 at 3) Defense counsel
14 does not claim, however, that the signatures on the four contracts, including the APA and
15 Lease Agreement, are not those his clients. He does not provide the Court with an affi-
16 davit from any Defendant denying the signatures on the contracts are theirs, does not
17 explain why his clients would be “unaware” of the arbitration clause in the APA which
18 bear Defendants Tom Frederick’s and Christine Cobb’s signatures, in his corporate
19 capacity as President, and their individual capacities as shareholders. (docket # 1-2, Exh 1
20 at 32-33). Moreover, Defendants make no claim that Plaintiff engaged in fraud by false
21 representations to the APA’s contents. See, e.g., *Pacific Western Const. Co. v. Industrial*
22 *Com’n of Arizona*, 166 Ariz. 16, 20, 800 P.2d 3, 7 (Az.Ct.App. 1990) (“Failure to read an
23 agreement reduced to writing and signed by a party precludes recovery for fraud or misre-
24 presentation concerning oral statements made about the contents of the agreement.”).
25 Further, “[i]t has long been the common law rule that signing a document authenticates
26 and adopts the words it contains, even if there was a lack of subjective understanding of
27 the words or their legal effect. In essence, people are presumed to be bound by what they
28 sign.” *In re Schwalb*, 347 B.R. 726, 743 (D.Nev. 2006); *Operating Engineers Pension*

1 *Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984) (“[one] who signs a written agree-
2 ment generally is bound by its terms, even though he neither reads it nor considers the
3 legal consequences of signing it.”). Significantly, Plaintiff confirms, and Defendants do
4 not deny, that the APA containing the arbitration clause was not only signed by Defen-
5 dants but was prepared by the same law firm who represented Defendants until November
6 2009.

7 The Court concludes that Defendants had, at least, constructive knowledge
8 of the right to compel arbitration upon their signing the APA. *Steiner v. Horizon Moving*
9 *Systems, Inc.*, 2008 WL 4822774, (C.D. Cal. 2008) (finding element of “knowledge of
10 right to arbitration” satisfied where party had “constructive, if not actual, knowledge of
11 the existing right to compel arbitration upon signing the agreement allegedly containing
12 the arbitration provision”). Defense counsel’s hearsay statement that his clients were
13 unaware of the arbitration clause contained in the APA when they signed it does not
14 warrant either a different result or create a disputed question of fact to order an eviden-
15 tiary hearing on this issue.

16 **2. Acts Inconsistent with Right to Compel Arbitration**

17 As mentioned earlier, Defendants actively participated in this case for
18 nearly two years before raising the issue of arbitration, and when they did, it was as a
19 defense in a “first-to-breach-the-contract” argument to Plaintiff’s dispositive motion over
20 a month after discovery closed. After litigating this case before a district Judge for eleven
21 months, on January 12 and 20, 2009, the parties voluntarily consented in writing, docket
22 ## 63, 70, to magistrate-judge jurisdiction pursuant to 28 U.S.C. §636(c) to “conduct any
23 and all further proceedings in this case, including the trial, order the entry of final judg-
24 ment, and conduct all post-judgment proceedings.” (docket # 63) On March 17, 2009,
25 the parties’ counsel met with the Court and jointly established the Rule 16 Scheduling
26 Order which set “the various deadlines for the judicial management of this case.” (docket
27 # 81 at 2)

28 Additionally, the Court cannot ignore prior defense counsel’s legal actions

1 in this case which were inconsistent with Defendants’ contractual right to arbitration.
2 Plaintiff points out that out of “11 depositions” noticed in this case, “Defendants took
3 seven depositions (each lasting almost a full seven-hour day), including a Rule 30(b)(6)
4 deposition.”⁸ (docket # 170 at 2) Defendants served multiple requests for production and
5 inspection of documents, interrogatories and requests for admissions pursuant to Rules
6 33, 34, and 36. After discovery closed, Defendants filed an amended counterclaim, add-
7 ing new claims and allegations. (*Id.*) Specifically, on January 13, 2009, Defendants filed
8 their first Counterclaim, asserting four claims arising out of the APA, the Non-Compete
9 Agreement, and the Lease. (docket # 64 at ¶¶ 14- 36.) On the face of their Counterclaim,
10 Defendants demand a jury trial. In their First Amended Counterclaim, filed on October
11 14, 2009, docket # 147, Defendants demand a jury trial “on all counts of [their] Counter-
12 claim.” (*Id.* at ¶¶ 37-43) For their declaratory relief claims, Defendants expressly invoked
13 the Court’s authority, stating that “[t]he Court must adjudicate the right [sic] of the parties
14 relating to these matters pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of
15 Civil Procedure.” (docket # 64 at ¶¶ 28, 29, 35, 36; docket # 147 at ¶¶ 37-43, 44.) On
16 administrative issues only, Defendants sought and obtained relief from this Court, mostly
17 by stipulation, for extensions to deadlines for filings, deadlines set forth in certain court
18 orders, and due dates in the Scheduling Order. (docket ## 92, 96, 98, 142, 150, and 152)

19 The Court has little trouble concluding that until January 11, 2010, docket #
20 167 at 5, over 22 months after Defendants first appeared in this lawsuit on March 7, 2008,
21 docket # 19, Defendants’ legal actions in this federal forum were inconsistent with their
22 contractual right to compel arbitration.

23 **3. Prejudice to Party Opposing Arbitration Resulting from such Inconsistent Acts**

24 In addition to undue delay or other factors, “[p]rejudice in this context may
25 consist of expense, duplication of effort in separate forums, or advantage to the other

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27 ⁸ The Court counts 12 deposition notices in the docket. Five were filed by Plaintiff
28 (Frederick, Cobb, Decker, Miller and Fox); seven by Defendants (Hofer, Heier, Mitchell,
Tiberio, Baldwin, Hauff, and a Rule 30(b)(6)).

1 party.” *Brooks v. Robert Larson Auto. Group*, 2009 WL 2853452, at * 2 (W.D.Wash.
2 2009) (citing *Mitsui & Co. (USA) v. C & H Refinery, Inc.*, 492 F.Supp. 115, 118-20
3 (N.D.Cal. 1980)); *Ori v. American Family Mut. Ins. Co.*, 2005 WL 3079044, * 3 (D.Ariz.
4 2005). “Unsurprisingly, courts are reluctant to find prejudice to the plaintiff who has
5 chosen to litigate, simply because the defendant litigated briefly (e.g., by filing a motion
6 to dismiss or requesting limited discovery) before moving to compel arbitration.” *Brown*
7 *v. Dillard’s, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005).

8 Initially, one might surmise that Defendants’ active involvement in this
9 federal litigation for nearly two years would constitute sufficient prejudice to Plaintiff to
10 justify a finding of Defendants’ waiver of their right to arbitration. Upon a closer analysis
11 of Ninth Circuit authority, however, that is not the case. While Plaintiff claims to have
12 incurred attorneys’ fees in this litigation exceeding \$380,000, docket # 170 at 3, like the
13 plaintiff in *Fisher*, “[t]his wound is self-inflicted.” 791 F.2d at 698. Acknowledging at
14 oral argument that Plaintiff intended to waive its contractual right to arbitration by filing
15 this federal action, a significant portion of Plaintiff’s fees and delay in this case are attri-
16 butable solely to Plaintiff’s aggressive prosecution of its case and the various changes in
17 its requests for relief. Early in the case, Plaintiff sought a temporary restraining order and
18 preliminary injunctive relief, docket # 2, and then Plaintiff stipulated with Defendants to
19 stay this action and vacate the scheduled preliminary injunction hearing. (docket # 36)
20 After unsuccessful mediation, Plaintiff filed another Motion for Preliminary Injunction
21 and Declaratory Relief , docket # 61, which was denied on February 26, 2009. (docket #
22 77)

23 Plaintiff filed its First Amended Complaint on November 17, 2008, docket
24 # 52, electing to abandon its original claims for breach of the Non-Competition Agree-
25 ment and Consulting Agreement in the February 12, 2008 Complaint and replacing them
26 with claims for breach of the Lease Agreement and declaratory judgment with respect to
27 the purchase option contained in the Lease Agreement. (docket ## 1, 44, 52) On
28 September 22, 2009 and without objection by Defendants, Plaintiff filed its Second

1 Amended Complaint, less than three (3) months before the Defendants invoked their right
2 to arbitrate, again changing the relief sought in the First Amended Complaint from an
3 order to compel the sale of the office building to a request for money damages for Defen-
4 dants' alleged breach of the purchase option contained in the Lease Agreement. (docket
5 ## 103, 124) There are several other examples in this case wherein Plaintiff incurred
6 attorneys' fees unrelated to Defendants' litigation conduct, such as, requesting continu-
7 ances of hearings or not complying with prior court orders. (e.g., docket ## 24, 28, 36, 46,
8 102, and 168) The amount of Plaintiff's attorneys' incurred to date does not alone consti-
9 tute prejudice to deny Defendants' belated request for arbitration.

10 Plaintiff's concerns of prejudice regarding the loss of use of the discovery
11 taken in this case, a possible denial of an award of attorneys' fees by the arbitrator to the
12 prevailing party, and the requirement that the arbitration be held in Fargo, North Dakota
13 are illusory. Plaintiff does not cite a single case or any Commercial Arbitration Rule of
14 the AAA⁹ which precludes the use of pretrial discovery where, as here, all the discovery
15 was taken before the parties were referred to arbitration or that the prevailing party would
16 not be entitled to an award of reasonable attorneys' fees and costs, including those costs
17 related to arbitration. In fact, the APA mandates that "the arbitrator(s) **shall**, in the final
18 award, order the losing party to pay all of the charges for such arbitration and **all of the**
19 **prevailing party's costs of arbitration including without limitation reasonable**
20 **attorneys' fees and expenses, and expert witness fees and disbursements[.]**" (docket #
21 1-2, Exh 1 at 31) (emphasis added). Further, at oral argument on the record, defense
22 counsel offered to stipulate that the arbitration be held in Phoenix as the APA allows by
23 stipulation. (*Id.* at 30) ("the arbitration shall be held in Fargo, North Dakota, or in such
24 other location as the parties may agree;"). Contrary to its written concern, Plaintiff,
25 however, was unwilling to so stipulate at oral argument, reserving its right to arbitrate in

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27 ⁹ The APA requires "the arbitration . . . be conducted in accordance with the
28 Commercial Arbitration Rules of the American Arbitration Association then existing."
(docket # 1-2, Exh 1 at 31)

1 Fargo, North Dakota, presumably if it were advantageous to Plaintiff to do so. This
2 refusal confirms the absence of any real prejudice to Plaintiff to arbitrate in Fargo, North
3 Dakota.

4 Finally, Defendants have not filed a dispositive motion, much less obtained
5 a substantive ruling, that is adverse to Defendants. The pending Motion for Partial Sum-
6 mary Judgment, docket # 140, was filed by Plaintiff and has been briefed but not ruled
7 upon the Court. The trial of this case has not even been set. *Brownstone Invest. Group,*
8 *LLC v. Levey*, 514 F.Supp.2d 536, 551 (S.D.N.Y. 2007) (recognizing that pretrial expense
9 and delay, without more, do not constitute prejudice sufficient to support waiver but
10 rather prejudice is only properly found where, for example, a party's legal position is
11 damaged by the opposing party's delay in moving for arbitration). Plaintiff's reliance on
12 *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992) is misplaced and
13 distinguishable. Besides non-controlling in the Ninth Circuit, there was a finding of
14 waiver of arbitration in *Hoxworth* because after defendants' motion to dismiss the
15 complaint was denied and plaintiffs' motion to compel discovery was granted, did defen-
16 dants filed its motion to compel arbitration. 980 F.2d at 926. Here, Defendants have not
17 sought any substantive relief from the Court.

18 In hindsight, the delay in the resolution of this case may have actually bene-
19 fitted Plaintiff. It is common knowledge that the current recession, beginning in the later
20 part of 2007, has had a major adverse effect on real property values, likely including
21 industrial property, in Maricopa County, Arizona. This delay has allowed Plaintiff suffi-
22 cient time to amend its initial claim for injunctive relief to compel the sale upon the
23 agreed-upon terms to one seeking damages for the high lease payments (\$30,000.00 per
24 month) it paid after Defendants allegedly breached the Lease Agreement when Plaintiff
25 purportedly properly exercised its option to purchase the Deer Valley industrial property
26 at issue in this case. *Corin v. Cintas Corp.*, 2009 WL 5206712, * 5 (E.D.Cal. 2009)
27 (district court did not discern any prejudice by virtue of defendants' actions where there
28 had been no delay or evidence of unjustified pretrial expense, and plaintiff's legal

1 positions had not been impeded by defendants’ assertion of the right to arbitrate at this
2 time. Arbitration clause, however, was unenforceable as procedurally and substantively
3 unconscionable.); *Balezos v. Calvalry Portfolio Servs., LLC*, 2007 WL 2330861, at * 2
4 (D.Ariz. 2007) (despite two years of litigation, defendant did not waive right to arbitration
5 because “[c]ourts are reluctant to find prejudice to plaintiffs who have chosen to litigate,
6 simply because the defendant litigated briefly in response (e.g., by filing a motion to
7 dismiss or requesting limited discovery) before moving to compel arbitration[,]” citing
8 *Brown*, 430 F.3d at 1012).

9 Because Plaintiff has not shown that it has suffered prejudice by Defen-
10 dants’ actions, nor can the Court independently discern any, the Court does not find a
11 waiver of the right to arbitrate by Defendants.

12 **B. Whether the Arbitration Clauses Apply to the Lease Agreement**

13 Finally, Plaintiff contends that “the Lease Agreement at issue does not
14 require arbitration nor refer to or rely upon the APA in any way.” (docket ## 170 at 14,
15 172 at 5) Plaintiff argues that if the Court finds Defendants did not waive their right to
16 arbitration, the Court should compel arbitration only on those claims arising under the
17 APA, the Consulting Agreement, and the Non-compete Agreement (Counts One, Three
18 and Four of the First Amended Counterclaims) and retain jurisdiction and adjudicate the
19 parties’ disputes regarding the Lease and option to buy. (Plaintiff’s Second Amended
20 Complaint (Counts I, II, and III), docket # 124; and Count Two of the First Amended
21 Counterclaims, docket # 147 at 13). (*Id.*) According to Plaintiff, the pending Motion for
22 Partial Summary Judgment, docket # 140, purportedly deals with only the claims arising
23 under the Lease Agreement. (docket # 172 at 5) Defendants, however, disagree and
24 contend the parties’ APA (sometimes called the “Business Purchase Agreement” by
25 Defendants) “expressly incorporates the Lease Agreement, and thus the agreements must
26 be read together.” (docket # 173 at 8) The Court agrees with Defendants that all claims
27 and counterclaims should be arbitrated.

28 Here, the APA contains the arbitration clauses in Section 9.12 which

1 require that the parties resolve by arbitration “[a]ny disagreement, Claim, demand,
2 controversy, or dispute (collectively “Dispute”) in any way arising out of or relating to
3 this [Asset Purchase and Sale] Agreement. . . .” (docket # 1-2, Exh 1 at 30) The APA
4 expressly references the Lease Agreement in, at least, two separate places. Paragraph 1.27
5 of the APA defines the term “Lease” to mean “the lease for the Real Estate referred to in
6 Section 2.10” which is clearly the Deer Valley industrial property. (*Id.* at 5) Paragraph
7 2.10 of the APA requires the Plaintiff, as the “Purchaser,” to enter into the Lease
8 Agreement, docket # 141-1, Exh 1 at 2-11, for the Deer Valley property pursuant to the
9 following:

10 Lease. Purchaser shall enter into a Lease Agreement (containing an option
11 to buy) with Bumaro, LLC (“Bumaro”), an Arizona limited liability
company, for the Real Property described in Schedule 2.10.

12 (docket # 1-2, Exh 1 at 12) The lessor or “Landlord” is Defendant Bumaro, L.L.C., an
13 Arizona limited liability company, with Defendants Frederick and Cobb, husband and
14 wife, as “Members.” (docket # 141-1, Exh 1 at 11-12)

15 Paragraph 9.4 of the APA implicitly incorporates the Lease Agreement
16 pursuant to the following:

17 Complete Agreement. This Agreement, including the Schedules and
18 Exhibits attached hereto and the documents and agreement referred to
19 herein, shall constitute the entire agreement between the parties hereto with
20 respect to the subject matter hereof and shall supersede all previous
negotiations, commitments, and writings with respect to such subject
matter.

21 (docket # 1-2, Exh 1 at 28)

22 As Defendants point out, “[t]he incorporation of the Lease Agreement into
23 the APA also can be inferred from the context in which the agreements were executed.”

24 (docket # 173 at 9) “[U]nder Arizona law, substantially contemporaneous instruments
25 will be read together to determine the nature of the transaction between the parties.”

26 *Pearll v. Williams*, 146 Ariz. 203, 206, 704 P.2d 1348, 1351 (Az.Ct.App. 1985); *Child-*
27 *ress Buick Co. v. O’Connell*, 198 Ariz. 454, 456, 11 P.3d 413, 415 (Az.Ct.App. 2000).

28

1 Here, the Lease Agreement, docket # 167-1, Exh. A at 48, and the APA were executed
2 on the same day, June 15, 2007. As a general rule, agreements “should read together as
3 they represent successive steps which were taken to accomplish a single purpose.”
4 *Dakota Gasification Co. v. Natural Gas Pipeline Co. of America*, 964 F.2d 732, 734-735
5 (8th Cir. 1992) (citing, among others, *Williston on Contracts* § 628 at 904 (3d. Ed.) for
6 the principle that “[e]ven where a writing does not refer to another writing, if such other
7 writing was made as part of the same transaction, the two should be interpreted
8 together.”). Because Paragraph 2.10 of the APA required Plaintiff to enter into the Lease
9 Agreement, the APA and Lease Agreement must be read collectively, regardless of
10 whether the Lease Agreement references the APA.

11 Ninth Circuit authority is clear that the language of arbitration agreements
12 must clearly and unequivocally demonstrate the parties’ intention was to arbitrate some
13 claims but not others before claims are bifurcated for resolution in different forums. *Van*
14 *Ness Town-houses v. Mar Indus. Corp.*, 862 F.2d 754, 757 (9th Cir. 1988) (district court’s
15 finding of waiver of arbitration was reversed because the language of the parties’ agree-
16 ment clearly demonstrated the parties’ intention was to arbitrate some claims but not
17 others); *Paulson v. Dean Witter Reynolds*, 905 F.2d 1251, 1255 (9th Cir. 1990) (district
18 court’s finding that claims for losses from option trading were not arbitrable was vacated
19 because “[t]he parties clearly expressed their intention to arbitrate ‘[a]ny controversy’
20 arising between them concerning the Options Trading Agreements.”). Additionally, “[a]s
21 a matter of federal law, any doubts concerning the scope of arbitrable issues should be
22 resolved in favor of arbitration, whether the issue is the construction of the contract
23 language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Fisher*,
24 791 F.2d at 694 (citing *Moses*, 460 U.S. at 24-25).

25 The Court finds that the parties’ claims and counterclaims shall be resolved
26 by arbitration.

27 **CONCLUSION**

28 In light of the strong federal policy favoring arbitration “to ensure judicial

1 enforcement of privately made agreements to arbitrate [and] to promote the expeditious
2 resolution of claims,” *Dean*, 470 U.S. at 219, the Court will grant Defendants’ request to
3 stay this action, will deny the pending dispositive motion without prejudice and will
4 compel arbitration. 9 U.S.C. §§ 2-4. Despite the passage of two years of active litigation,
5 arbitration of all claims and counterclaims at this late date will most certainly be more
6 expeditious than if the parties remained on their present course.

7 **IT IS ORDERED** as follows:

8 1. Defendants’ request to compel arbitration, docket.# 167 at 5, is **GRANT-**
9 **ED.**

10 2. The parties are directed to submit this matter to arbitration consistent
11 with the terms of their contract and the provisions of the Federal Arbitration Act, 9 U.S.C.
12 §§ 1 *et seq.*

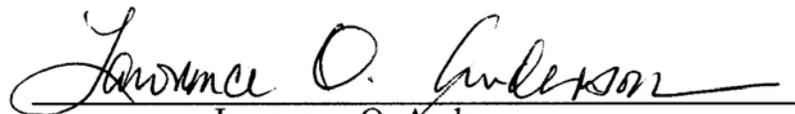
13 3. Upon completion of the arbitration proceedings, the parties are directed
14 to comply with the provisions of 9 U.S.C. §§ 9-13, as applicable.

15 4. This action is **STAYED** pursuant to 9 U.S.C. § 3.

16 5. The parties shall file a Joint Status Report concerning their arbitration on
17 or before **Friday, August 6, 2010** or this case may be dismissed without prejudice.

18 6. Plaintiff’s pending Motion for Partial Summary Judgment, docket # 140,
19 is **DENIED** without prejudice and may be resubmitted in arbitration.

20 DATED this 9th day of February, 2010.

21
22
23 

24 Lawrence O. Anderson
25 United States Magistrate Judge
26
27
28