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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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MARLYN NUTRACEUTICALS, INC.,)
an Arizona corporation,)

No. CV 08-1798-PHX-MHM

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Plaintiff,)

ORDER

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vs.)

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IMPROVITA HEALTH PRODUCTS,)
INC., an Ohio corporation, THOMAS)
14 KLAMET, and DANIEL KOHLER,)

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Defendants.)

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Currently before the Court are Defendants Improvita Health Products, Inc.

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(“Improvita”), Thomas Klamet (“Klamet”), and Daniel Kohler’s (“Kohler”) Motion to

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Dismiss Plaintiff Marlyn Nutraceuticals, Inc.’s (“MNI”) Complaint pursuant to Rules

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12(b)(1)(2)(3) and (6) of the Federal Rules of Civil Procedure Rules. (Dkt. #7). Also

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before the Court is Plaintiff’s Motion for Expedited Hearing on Defendants’ Motion to

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Dismiss. (Dkt. #12). After reviewing the pleadings and determining that oral argument is

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unnecessary, the Court issues the following order.

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I. BACKGROUND

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On May 15, 2007, Plaintiff MNI and Defendant Improvita entered into a

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Manufacturing and Supply Agreement (the “Agreement”) pursuant to which MNI would

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manufacture and supply nutritional products and supplements to Improvita. (Dkt. #1,

1 ¶10). The Agreement provides that all disputes must be resolved through an arbitration
2 process pursuant to Article XVIII, entitled “Dispute Resolution.” (Dkt. #11, Ex. B).

3 The Agreement provides that Improvita will pay MNI for all finished product or
4 work in process, and all unused ingredients that can not be returned. (Dkt. #11, ¶11).
5 Improvita fell behind on payments; from approximately October 2007 through late
6 February 2008, MNI attempted to work with Improvita with respect to its delinquent debts.
7 (Id., ¶14). On February 29, 2008, due to Improvita’s failure to pay down its debts and
8 alleged attempt to delay resolving the payment issues, MNI initiated negotiation
9 proceedings pursuant to the Agreement’s notice provision in Article XVIII. (Id., ¶19).
10 MNI’s February 29, 2008 notice demanded that Improvita agree to formally mediate the
11 payment dispute on or before the close of business on March 5, 2008. (Id., ¶21). MNI
12 also provided names of potential mediators in Phoenix, Arizona, and approximately eight
13 possible dates on which the parties could mediate. (Id.). Improvita failed to respond to
14 MNI’s request until March 4, 2008. (Id., ¶20, Ex. C).

15 Having made no progress through alternative dispute resolution, MNI filed a
16 Complaint against Improvita in Maricopa County Superior Court on March 20, 2008.
17 (Dkt. #11, ¶23). Improvita subsequently filed a Motion to Dismiss, arguing that the
18 dispute must be resolved through mediation or arbitration based on the alternative dispute
19 resolution provision in the May 15, 2007 Agreement. (Id.). MNI did not file a responsive
20 memorandum to Defendants’ Motion to Dismiss, and the Superior Court dismissed the
21 case. (Id., ¶24).

22 On May 19, 2008, MNI and Improvita submitted to a mediation in Phoenix,
23 Arizona. (Dkt. #11, ¶24). In preparation for the mediation, MNI submitted a 13 page
24 Mediation Memorandum, including 25 exhibits; Improvita made no settlement offers and
25 raised its alleged defenses less than one week prior to the mediation. (Id., ¶25).
26 Improvita did not provide supporting documentation. (Id., ¶28). Although the mediation
27 was unsuccessful, the parties attempted to schedule an arbitration. (Id., ¶25). Based on
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1 correspondence between the parties' counsel, an arbitration was scheduled for August 19,
2 2008, before Steve Scott in Phoenix, Arizona. (Id., ¶26). However, one week after
3 arbitration was scheduled, Improvita informed MNI that due to a scheduling conflict, the
4 arbitration could not take place before August 26, 2008. (Id., ¶27). The parties
5 rescheduled the arbitration for August 27, 2008, to take place before Daniel Nastro. (Id.,
6 ¶29). The parties also agreed on a disclosure statement date for discovery and relevant
7 arbitration issues; Improvita confirmed the August 27, 2008 arbitration date in a letter
8 dated July 1, 2008. (Id.). But on August 14, 2008, Improvita announced that it would not
9 participate in the scheduled arbitration because of the "associated expenses"; it proceeded
10 to cancel the arbitration and offered to reschedule one after October 1, 2008. (Id., ¶30).

11 Instead, on August 22, 2008, MNI filed a Complaint against Improvita and
12 Defendants Klamet and Kohler for breach of contract, viewing Improvita's cancellation of
13 the arbitration as an act of bad faith and an attempt to further delay resolution. (Dkt. #1).
14 Defendants filed the instant Motion to Dismiss on October 6, 2008, and request dismissal
15 pursuant to Federal Rules of Civil Procedure 12(b)(1)(2)(3) and (6). (Dkt. #7).
16 Defendants contend that dismissal is appropriate because the May 2007 Agreement
17 between the parties provides that they must comply with a two-step resolution process
18 (mediation and then arbitration) in lieu of litigation. (Id.). Plaintiff, on the other hand,
19 argues that (1) Defendants' Motion to Dismiss is procedurally improper, (2) Defendants
20 Klamet and Kohler are not parties to the Agreement, and therefore, do not have a right to
21 demand arbitration, and (3) Defendant Improvita waived its right to enforce the arbitration
22 provision by its improper conduct. (Dkt. #8). Plaintiff also filed a Motion to Expedite
23 Hearing.¹ (Dkt. #12).

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26 ¹Having ruled on Defendants' Motion to Dismiss in this Order (see below), and having
27 determined that oral argument is unnecessary, the Court will deny Plaintiff's Motion for Expedited
28 Hearing as moot.

1 **II. STANDARD OF REVIEW**

2 Rule 12(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

3 “Every defense to a claim for relief in any pleading must be asserted in the
4 responsive pleading if one is required. But a party may assert the following
5 defenses by motion: (1) a lack of subject-matter jurisdiction; (2) lack of
6 personal jurisdiction; (3) improper venue; (4) insufficient process; (5)
insufficient service of process; (6) failure to state a claim upon which relief
can be granted”

7 Fed.R.Civ.P. 12(b). “The motion to dismiss for failure to state a claim is viewed with
8 disfavor and is rarely granted.” Gilligan v. Jamco Development Corp., 108 F.3d 246, 249
9 (9th Cir. 1997). When reviewing a motion to dismiss, the Court accepts the allegations in
10 the complaint as true and construes them in the light most favorable to the plaintiff. Sosa
11 v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990). The Court must draw all reasonable
12 inferences in favor of the non-moving party. Salim v. Lee, 202 F. Supp.2d 1122, 1125
13 (C.D.Cal. 2002). Dismissal is proper “only if it appears beyond doubt that the plaintiff can
14 prove no set of facts in support of his claim which would entitle him to relief.” Gibson v.
15 United States, 781 F.2d 1334, 1337 (9th Cir. 1986).

16 An inquiry into the adequacy of the evidence is improper when deciding whether to
17 dismiss a complaint for failure to state a claim. Enesco Corp. v. Price/Costco, Inc., 146
18 F.3d 1083, 1085 (9th Cir. 1998). In addition, when deciding a motion to dismiss for
19 failure to state a claim, courts may not consider facts and evidence outside the complaint.
20 See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted) (a
21 district court may not consider any material beyond the pleadings in ruling on a Rule
22 12(b)(6) motion). However, a district court may consider material that is properly
23 submitted as part of the complaint, as well as documents that are not physically attached to
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1 the complaint, as long as their authenticity is not contested and the complaint necessarily
2 relies on them.² Id. at 688.

3 **III. DISCUSSION**

4 **A. Waiver of Right to Arbitration**

5 Plaintiff contends that Defendant Improvita has waived its right to enforce the
6 arbitration agreement through its improper conduct, namely, refusing to participate in good
7 faith during mediation and allegedly delaying the resolution process. (Dkt. #8).

8 Defendants argue that the right to arbitrate was never waived because Defendants never
9 clearly repudiated the right to enforce the arbitration agreement. (Dkt. #11).

10 “It is well-established . . . that a party to a contract may waive its right to enforce an
11 arbitration agreement by its conduct. Waiver occurs when a party relinquishes a known
12 right or exhibits conduct that clearly warrants inference of an intentional relinquishment.”

13 Meineke v. Twin City Fire Insur. Co., 181 Ariz. 576, 581 (1994) (citations omitted).

14 There are three elements that support a finding of waiver of a right to arbitration: (1) a
15 party was aware of its right to arbitration, (2) acted in a manner inconsistent with the
16 exercise of that right, and (3) prejudiced the opposing party as a result. Fisher v. A.G.

17 Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986). “Inconsistency usually is found
18 when one party engages in conduct preventing arbitration, proceeds at all times in

19 disregard of arbitration, expressly agrees to waive arbitration, or unreasonably delays
20 requesting arbitration.” City of Cottonwood v. James L. Fann Contracting, Inc., 179 Ariz.
21 185, 190-91 (1994) (footnote omitted) (citation omitted).

22 Here, although Defendants’ conduct could be construed as attempting to prevent
23 arbitration, the Court is unconvinced at this time that Defendants *clearly* repudiated the
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25 ²As such, to the extent that Plaintiff contends that Defendants’ Motion to Dismiss is
26 procedurally improper because it cites to and quotes the parties’ May 2007 Agreement, Plaintiff is
27 incorrect. The authenticity of the Agreement is not contested; Plaintiff does not contend that its
28 Complaint does rely on the Agreement.

1 Agreement. See Cooper v. QC Financial Services, Inc., 503 F.Supp.2d 1266, 1274
2 (D.Ariz. 2007) (stating that repudiation should not be inferred unless it is clear). Although
3 Improvita cancelled arbitration twice (and for ambiguous reasons), they did offer to
4 reschedule the August 27th arbitration to October 1st, a delay of only one month. The
5 Court cannot, without more, hold that that request was unreasonable. As such, the Court is
6 hesitant to infer a repudiation to enforce the arbitration agreement at this time.
7 Accordingly, the Court finds that Defendant Improvita has not waived its right to
8 arbitration, and thus dismissal without prejudice is appropriate.

9 **B. The Individual Defendants**

10 Plaintiff contends in its Response to Defendants' Motion to Dismiss that its
11 Complaint, which alleges misrepresentation and fraud against Improvita, as well as Klamet
12 and Kohler (the "Individual Defendants"), may not be dismissed against Individual
13 Defendants Klamet and Kohler based on a demand for arbitration because they are not
14 parties to the May 2007 Agreement. However, Defendants, in their Reply, essentially
15 argue that Plaintiff fails to state a claim against the Individual Defendants because the
16 allegations "arise from the exact same facts as the claims against the corporate Defendant
17 Improvita."³ Defendants do not dispute that the Individual Defendants are not parties to
18 the May 2007 Manufacturing and Supply Agreement.

19 Although Individual Defendants Klamet and Kohler are not parties to the
20 Agreement, and thus are not entitled to demand arbitration, the Court notes that the claims
21 asserted in the Complaint against the Individual Defendants are indistinguishable from the
22 allegations made against Defendant Improvita. In addition, having reviewed the
23 Complaint, it appears that Plaintiff does not allege that the Individual Defendants acted in
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25 ³Defendants also argue that the arbitration provision in the May 2007 Agreement expressly
26 provides that all disputes arising out of or related to the Agreement must be resolved by arbitration,
27 and thus it would be inefficient to require the Individual Defendants to defend themselves in this
28 case while Defendant Improvita proceeded to arbitration.

1 their individual capacities when making representations to Plaintiff on behalf of Improvita.
2 Further, the Individual Defendants contend that they are “senior management” of
3 Improvita who are required under the Agreement to engaged directly in the dispute
4 resolution process (Dkt. #11, p.3); the Court notes that “arbitration clauses should be
5 liberally construed, and doubts regarding arbitrability should be resolved in favor of
6 arbitration.” See Foy v. Thorp, 186 Ariz. 151, 153 (App. 1996). As such, the Court finds
7 no basis on which to retain this case against only the Individual Defendants.

8 However, the Court recognizes Plaintiff’s stated frustration with respect to
9 Defendants’ conduct and is aware that continued rescheduling of arbitration will delay
10 resolution of the parties’ dispute. As such, the Court will infer that any further,
11 substantially unjustified delay by Defendants in submitting to arbitration will constitute
12 waiver of Defendants’ right to enforce the parties’ arbitration agreement. Further, should
13 arbitration not occur by the date specified below, the Court will allow Plaintiff to file a
14 motion to re-open this case.

15 **Accordingly,**

16 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (Dkt. #7) is
17 GRANTED. The case is dismissed without prejudice.

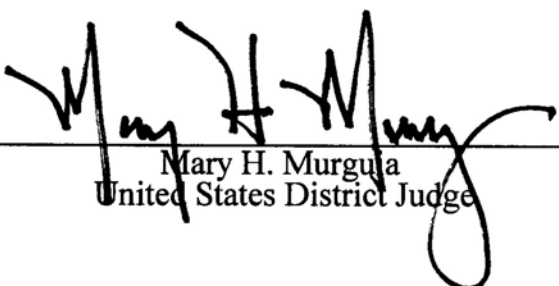
18 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Expedited Hearing (Dkt.
19 #12) is DENIED as moot.

20 **IT IS FURTHER ORDERED** that the parties must submit to arbitration no later
21 than December 23, 2008. If arbitration does not occur within the specified time, the Court
22 will permit Plaintiff to file a motion to re-open the case.

23 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter Judgement
24 accordingly.

25 DATED this 24th day of November, 2008.

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Mary H. Murgu
United States District Judge