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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Altela Incorporated,
10 Plaintiff,

No. CV-16-01762-PHX-DGC

ORDER

11 v.

12 Arizona Science and Technology
13 Enterprises LLC, et al.,
14 Defendants.

15 Defendant Arizona Science and Technology Enterprises (“AzTE”) moves to
16 compel compliance with the alternative dispute resolution (“ADR”) provisions set forth
17 in its License Agreement with Plaintiff Altela, Inc. Doc. 22. Defendant Arizona State
18 University Foundation for a New American University (“Foundation”), which is not a
19 party to the License Agreement, files a separate motion to compel ADR with respect to
20 the claims against it. Doc. 23. The motions have been fully briefed (Docs. 26, 27, 28,
21 30), and the Court concludes that oral argument will not aid in its decision.¹ The Court
22 will grant the motions in part and deny them in part.

23 **I. Background.**

24 **A. This Dispute.**

25 The allegations in the complaint are taken as true, unless contradicted by an
26 evidentiary submission. In the 1990s, Professor James Beckman of Arizona State
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28 ¹ Plaintiff’s request for oral argument is therefore denied. *See* Fed. R. Civ. P.
78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 University (“ASU”) developed a water purification process that uses air to evaporate
2 dirty water, forming pure condensate. Doc. 1, ¶ 8. Professor Beckman invented a device
3 known as a “dewvaporation tower” to facilitate this process. ¶ 9. The Arizona Board of
4 Regents obtained a patent for this technology, and together with the Foundation, it later
5 founded AzTE to manage all of ASU’s intellectual property. ¶¶ 10, 14. Thus, AzTE is
6 the entity currently charged with managing the dewvaporation patent.

7 Following a complicated series of transactions that are not relevant here, Altela
8 was assigned the right to develop, use, and sell the dewvaporation technology in 2006,
9 pursuant to a License Agreement (“Agreement”) with AzTE. ¶¶ 12, 15-20. In exchange,
10 Altela promised to pay royalties to AzTE on the sale of any “Licensed Product” – “any
11 product or part thereof which incorporates or has been developed or made using” the
12 dewvaporation technology, and “any services offered in connection with or related to the
13 use of” such a product. ¶ 24.

14 This provision proved insufficiently precise to avert controversy. Beginning in
15 2007, the parties began to have disputes over the meaning of “Licensed Product.” ¶ 27.
16 This, in turn, led to disputes over how much Altela owed AzTE in royalties. Between
17 2007 and 2015, the parties exchanged proposals and counterproposals for revising the
18 definition. ¶ 28. In November 2010, AzTE threatened to terminate the Agreement based
19 on its allegation that Altela had not paid royalties. ¶ 30. Altela made a payment under
20 protest to avoid termination. *Id.*

21 In July 2013, AzTE performed an audit of Altela. ¶ 31. Based on the results of
22 this audit, AzTE claimed that Altela had improperly withheld royalties. ¶ 32. AzTE
23 demanded that Altela pay the amount in dispute and the cost of the audit. *Id.* Altela
24 disputed AzTE’s interpretation of the audit results, and refused to pay either sum. *Id.*

25 On March 26, 2014, AzTE sent a letter to Altela, alleging that Altela had
26 materially breached the Agreement by failing to pay certain royalties due in 2011, failing
27 to pay for the audit, and failing to provide certain annual reports. Doc. 26-1 at 2. AzTE
28 indicated that it intended to terminate the Agreement and pursue all available legal

1 remedies if Altela did not cure these breaches within the time period specified by the
2 Agreement. *Id.* Altela responded by invoking the Agreement’s ADR Addendum. *Id.* at
3 5. AzTE agreed to submit the dispute to ADR, and attended a negotiation session, as
4 required by the ADR Addendum. Doc. 1, ¶ 37.

5 During late 2014 and early 2015, the parties continued to negotiate, ultimately
6 producing a draft second amendment to the Agreement. ¶ 38; *see* Doc. 26-1 at 10-11.
7 On May 19, 2015, AzTE informed Altela that it needed to provide certain information,
8 and pay “the amount that it concedes is owed” pursuant to the audit report, before the
9 second amendment could be finalized. Doc. 26-1 at 13. The letter stated that AzTE
10 would “continue to separately address through our discussions or, if necessary, a dispute
11 resolution procedure, the additional payments and interests that AzTE is owed for 2011
12 and subsequent years.” *Id.*

13 On June 29, 2015, AzTE informed Altela that it was in material breach of the
14 Agreement, based on its failure to pay certain royalties due in 2011, its failure to pay for
15 the audit, and its failure to provide certain requested information. Doc. 26-1 at 16. AzTE
16 indicated that it would terminate the agreement within 30 days if Altela failed to cure
17 these breaches. *Id.* at 17. In addition, AzTE requested an in-person meeting “to begin
18 the process for initiating an arbitration for recovery of all amounts due to AzTE.” *Id.*
19 Altela responded by denying any material breach, but indicating its willingness to
20 proceed via ADR. Doc. 1-3 at 2. It requested that the parties proceed directly to
21 mediation. *Id.* AzTE presents no evidence that it responded to this request. On July 30,
22 AzTE terminated the Agreement. Doc. 26-1 at 27.

23 On October 12, 2015, Altela proposed that the parties resume the ADR process
24 and skip directly to arbitration. Doc. 29-1 at 2. It requested that AzTE reinstate the
25 Agreement pending the outcome of arbitration. *Id.* On October 16, AzTE responded that
26 it was open to expedited arbitration, and proposed a schedule for the proceedings.
27 Doc. 26-1 at 21. It indicated that while it was not willing to reinstate the Agreement
28 pending arbitration, it would agree not to grant the rights to the dewvaporation

1 technology to any third party until after the arbitration. *Id.* On October 29, AzTE
2 reiterated its position, and requested that the parties move forward with the selection of
3 an arbitrator. Doc. 29-2 at 2. Altela produces no evidence that it ever responded to this
4 request; AzTE produces emails and letters that suggest no response was received. *See*
5 Docs. 29-4 at 3 (counsel for AzTE, informing Altela that she never received response to
6 her October 29 letter, her November 13 email, or her November 19 voicemail); 29-5 at 2
7 (same); *see also* 29-3 at 2 (internal AzTE email, dated November 13, 2015, noting that
8 AzTE has not received any response).

9 Although AzTE received no response to its October 16, 2015 letter, it made two
10 additional offers to proceed with arbitration. On November 30, AzTE stated: “If after our
11 recent correspondence Altela believes that there remain open questions about the
12 Agreement or its termination . . . it is imperative that Altela immediately proceed to the
13 next step of the Dispute Resolution Procedure to avoid prejudice to AzTE from delay in
14 addressing them. AzTE stands ready to arbitrate now.” Doc. 29-4 at 3. Altela responded
15 by stating only that it was “evaluating its legal and financial options.” Doc. 26-1 at 24-
16 25. On December 15, 2015, AzTE stated: “If Altela wishes to arbitrate any issues under
17 the Agreement, please let us know by December 31, 2015 and we will immediately move
18 forward with the process.” Doc. 29-5 at 4. Altela submits no evidence that it responded
19 to this letter. It filed this action on June 6, 2016, asserting four claims against AzTE for
20 breach of contract, as well as claims for tortious interference with business relations and
21 unjust enrichment. Doc. 1. It also asserted a claim against the Foundation for aiding and
22 abetting. ¶¶ 104-08.

23 **B. Relevant Contractual Provisions.**

24 **1. The ADR Procedure.**

25 Section 28.11 of the Agreement provides that “any disputes under or relating to
26 this Agreement . . . shall be . . . resolved pursuant to the dispute resolution procedure set
27 forth in [the ADR Addendum].” Doc. 22-1 at 26. The ADR Addendum provides a
28 procedure for the parties to resolve “any dispute between them arising out of or relating

1 to this Agreement.” *Id.* at 28. First, representatives of each party are required to meet “to
2 attempt in good faith to negotiate a resolution of the dispute.” *Id.* If the parties are
3 unable to negotiate a written resolution to the dispute within 30 days, either party may
4 request the appointment of a neutral mediator. *Id.* “The parties agree to participate in
5 good faith in the Mediation to its conclusion.” *Id.* If the parties have not resolved the
6 dispute within 120 days, either party may move to terminate the mediation. *Id.* at 28-29.
7 Following such a motion, the mediator shall recommend a resolution; each party is
8 required to consider this recommendation in good faith. *Id.* at 29.

9 If either party rejects the mediator’s recommendation, the dispute will be
10 submitted to binding arbitration. *Id.* The arbitration tribunal will consist of three
11 arbitrators, one chosen by each party, and the third jointly appointed by the party-selected
12 arbitrators. *Id.* “The award of the arbitration tribunal shall be final and judgment upon
13 such an award may be entered in any competent court.” *Id.*

14 **2. The Termination Procedure.**

15 Section 16.1 provides that failure of either party to comply with a material
16 obligation imposed by the Agreement shall entitle the other party to give written notice
17 requiring the defaulting party to cure the default. Doc. 22-1 at 20. If the default concerns
18 a payment obligation, the defaulting party has 30 days to cure the breach; if the default
19 concerns something else, the defaulting party has 90 days to cure. *Id.* If the defaulting
20 party fails to cure within the specified time, the other party is entitled to terminate the
21 Agreement. *Id.* Such termination shall be “without prejudice to any . . . other rights
22 conferred . . . by this Agreement.” *Id.*

23 Section 17.1 states specifically that termination of the agreement “for any reason”
24 shall be without prejudice to “the rights and obligations provided for in . . . Article 28.”
25 *Id.* at 21. Article 28 provides, *inter alia*, that the parties shall resolve “any disputes under
26 or relating to th[e] Agreement” pursuant to the ADR Addendum. *Id.* at 26.

27 **II. AzTE’s Motion.**

28 AzTE contends that Altela’s complaint should be stayed or dismissed because the

1 ADR Addendum provides that all Agreement-related disputes between the parties that
2 relate to the Agreement shall be submitted to ADR, and Altela’s claims relate to the
3 Agreement. Altela does not dispute that its claims are Agreement-related. Instead, it
4 argues that AzTE is precluded from enforcing the ADR Addendum because AzTE
5 (1) materially breached the Agreement; (2) waived its right to insist on ADR; and (3) has
6 unclean hands. Altela also argues that (4) ADR would be an exercise in futility.

7 At the outset, the Court notes that the parties are, to some extent, talking at cross
8 purposes. AzTE focuses almost entirely on the enforceability of the arbitration provision
9 of the ADR Addendum, even as it seeks to enforce the entire ADR Addendum, which
10 requires the parties to engage in good faith negotiation and mediation before proceeding
11 to arbitration. Altela, on the other hand, advances a number of arguments apparently
12 directed at showing that the negotiation and mediation provisions are unenforceable. The
13 Court will first consider the enforceability of the arbitration provision, before considering
14 the enforceability of the negotiation and mediation provisions.

15 **A. Arbitration.**

16 **1. Legal Standard.**

17 Section 2 of the Federal Arbitration Act (“FAA”) provides that an agreement to
18 arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at
19 law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Section 3 provides that
20 a federal court must, upon application of one of the parties, stay an action “brought upon
21 any issue referable to arbitration,” unless “the applicant for the stay is . . . in default in
22 proceeding with such arbitration.” *Id.*, § 3. Section 4 provides that “[a] party aggrieved
23 by the alleged failure, neglect, or refusal of another to arbitrate” may petition a district
24 court to compel arbitration, and “upon being satisfied that the making of the agreement to
25 arbitrate or the failure to comply therewith is not in issue,” the court must enforce the
26 agreement. *Id.*, § 4. Although § 4 “does not expressly relate to situations . . . in which a
27 stay is sought” under § 3, the Supreme Court has concluded that the same standard should
28 apply regardless of “which party to the arbitration agreement first invokes the assistance

1 of the federal court.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404
2 (1967).

3 Thus, when confronted with a dispute about whether an arbitration provision
4 should be enforced, a federal court is limited to considering whether there is an
5 enforceable agreement to arbitrate, whether the arbitration agreement applies to the
6 dispute in question, and whether the party seeking the stay has defaulted on its right to
7 compel arbitration. *See id.* at 406 (“a federal court may consider only issues relating to
8 the making and performance of the agreement to arbitrate” on a motion to compel
9 arbitration); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)
10 (courts may resolve threshold questions such as “whether the parties are bound by a given
11 arbitration clause” and “whether an arbitration clause in a concededly binding contract
12 applies to a particular type of controversy”); *Martin v. Yasuda*, --- F.3d ---, 2016 WL
13 3924381, at *5 (9th Cir. July 21, 2016) (courts may consider whether a party waived its
14 right to arbitrate by engaging in inconsistent conduct). Merits issues are not to be
15 considered by the court. *See Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 521 (D.C.
16 Cir. 2009) (“[I]n deciding whether the parties have agreed to submit a particular
17 grievance to arbitration, a court is not to rule on the potential merits of the underlying
18 claims.”) (citation and quotation marks omitted). Finally, “any doubts concerning the
19 scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone*
20 *Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

21 **2. Material Breach.**

22 Altela argues that AzTE materially breached the Agreement by falsely claiming
23 that Altela had failed to pay certain royalties, refusing to mediate the royalty dispute, and
24 wrongfully terminating the agreement. Doc. 26 at 8-9. Altela argues that it is excused
25 from complying with the arbitration provision as a result of these breaches. This
26 argument fails as a matter of federal law. As explained, “a federal court may consider
27 only issues relating to the making and performance of the agreement to arbitrate” on a
28 motion to compel arbitration. *Prima Paint*, 388 U.S. at 406. Implicit in this formulation

1 is the understanding that a party's post-ratification breach of contract cannot negate a
2 valid agreement to arbitrate, unless the breach pertains to the arbitration provision itself.
3 *See Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l, AFL-*
4 *CIO*, 370 U.S. 254, 262 (1962) ("Arbitration provisions, which themselves have not been
5 repudiated, are meant to survive breaches of contract, in many contexts, even total
6 breach[.]"); *cf. Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005) (where
7 party breached the arbitration agreement by refusing to arbitrate, it was barred from
8 enforcing the agreement). Here, there is no allegation that AzTE breached the arbitration
9 provision itself.² Even if AzTE materially breached other parts of the Agreement, Altela
10 would not be excused from complying with the arbitration provision.

11 Since both parties cite Arizona law, the Court notes that the result would be the
12 same even if federal law were not controlling. In general, "the victim of a material or
13 total breach is excused from further performance" under the contract. *Zancanaro v.*
14 *Cross*, 339 P.2d 746, 750 (Ariz. 1959). But this rule does not apply where performance
15 under an arbitration provision is concerned. As explained in *EFC Dev. Corp. v. F. F.*
16 *Baugh Plumbing & Heating, Inc.*, 540 P.2d 185 (Ariz. Ct. App. 1975):

17 By its very nature the arbitration clause in the contract is distinct from other
18 clauses. It is not to be considered as a clause in favor of one party or the
19 other, the performance of which might be excused by the breach of other
20 provisions of the contract. Rather, the arbitration clause constitutes the
consent of the parties to the establishment of extra-legal machinery for the
settlement of their disputes.

21 *Id.* at 187. Following this reasoning, the Arizona Court of Appeals rejected the exact
22 argument made by Altela here: that a party's allegedly wrongful termination of a
23 licensing agreement precluded it from invoking the agreement's arbitration provision.
24 *See Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 680 P.2d 1235, 1241 (Ariz. Ct. App.

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26 ² To the extent Altela argues that AzTE breached the arbitration provision or
27 waived the right to rely on it by terminating the Agreement rather than initiating
28 arbitration, that argument is foreclosed by the Agreement. *See* Doc. 22-1 at 20 (a party
may terminate the Agreement "without prejudice to any . . . other rights conferred . . . by
this Agreement"); *id.* at 21 (termination of the Agreement "for any reason" shall be
without prejudice to "the rights and obligations provided for in . . . Article 28," which
incorporates the ADR Addendum).

1 1984) (“Northwestern’s letter is an attempt to terminate the license agreement for cause.
2 This position may or may not be supported by the evidence. If not, Northwestern’s
3 action would be considered a breach of the agreement. However . . . such a breach does
4 not constitute an abandonment or repudiation of the arbitration clause”). Thus, the result
5 is the same under either federal or Arizona law: a party does not, by breaching a contract,
6 forfeit the right to enforce an arbitration provision included in that contract.

7 **3. Waiver.**

8 The FAA specifically recognizes that a party can waive its right to insist on
9 arbitration if it fails to properly invoke that right. Section 3 provides that an action shall
10 be stayed only if “the applicant for the stay is not in default in proceeding with such
11 arbitration.” 9 U.S.C. § 3. Section 4 provides that an arbitration provision need not be
12 enforced if there is a dispute regarding a party’s compliance with that provision. *Id.* § 4.
13 Consistent with this language, the Ninth Circuit has stated that a federal court presented
14 with a motion to compel arbitration may consider whether the moving party waived its
15 right to arbitrate. *Martin*, 2016 WL 3924381, at *5; *see also Prima Paint*, 388 U.S. at
16 406 (courts may consider issues related to the “performance of the agreement to
17 arbitrate” on a motion to compel arbitration). A party may waive the right to insist on
18 arbitration, for example, by refusing a request to arbitrate the relevant claim, or by
19 actively litigating the claim. *See Martin*, 2016 WL 3924381, at *5-7.³

20 The Ninth Circuit recently explained the standard for determining whether waiver-
21 by-conduct has occurred:

22 The right to arbitration, like other contractual rights, can be waived. A
23 determination of whether the right to compel arbitration has been waived
24 must be conducted in light of the strong federal policy favoring
enforcement of arbitration agreements. Because waiver of the right to
arbitration is disfavored, any party arguing waiver of arbitration bears a

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26 ³ Courts distinguish between waiver-through-conduct, which may be considered
27 by a court, and contractual waiver, which is presumptively for the arbitrator. *See JPD,*
28 *Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 391-94 (6th Cir. 2008). Contractual
waiver concerns whether the party seeking to arbitrate waived its right to insist on
arbitration by failing to satisfy contractual prerequisites to arbitration. *Id.* at 392-93.
Waiver-through-conduct concerns whether the party seeking to enforce arbitration acted
in a manner “completely inconsistent” with the right to arbitrate. *Id.* at 393.

1 heavy burden of proof. As such, a party seeking to prove waiver of a right
2 to arbitration must demonstrate: (1) knowledge of an existing right to
3 compel arbitration; (2) acts inconsistent with that existing right; and
inconsistent acts.

4 *Id.* at *5 (internal citations and quotation marks omitted).

5 Altela argues that AzTE waived its right to enforce the arbitration provision by
6 “engaging in acts inconsistent with utilization of arbitration.” Doc. 26 at 11. But it fails
7 to bear its heavy burden to show waiver. Altela does not identify any specific acts by
8 AzTE that it believes were inconsistent with the right to arbitrate. In the portion of its
9 brief purporting to show inconsistent conduct, Altela offers only the following:

10 Defendant’s actions and statements have repeatedly established its intention
11 not to arbitrate, Defendant has proceeded in contradiction of the Dispute
12 Resolution Agreement, and it has unreasonably delayed seeking arbitration.
13 Defendant has even attempted to use its refusal to arbitrate as leverage to
coerce Altela into capitulating to Defendant’s position on royalties due
under the License Agreement.

14 *Id.* No citations to the record or the complaint appear in this section of the brief. Altela’s
15 failures to describe the alleged inconsistent acts with specificity, or to present factual
16 support for its waiver argument, are reason enough to reject its argument. *See Martin*,
17 2016 WL 3924381, at *5 (party asserting waiver of arbitration provision bears “heavy
18 burden”).

19 Moreover, the idea that AzTE has intentionally relinquished a known right to
20 compel arbitration is contradicted by the record. AzTE never disavowed an intention to
21 arbitrate. Just the opposite is true. *See* Docs. 26-1 at 21 (“AzTE is open to participating
22 in an expedited arbitration”); 29-2 at 2 (suggesting that the parties move forward with the
23 selection of an arbitrator); 29-4 at 3 (“AzTE stands ready to arbitrate now.”); 29-5 at 4
24 (“If Altela wishes to arbitrate . . . we will immediately move forward with the process.”).
25 It never acted in a manner completely inconsistent with the right to arbitrate by, for
26 example, refusing a proper request to arbitrate, *cf. Dillard’s*, 430 F.3d at 1012, or
27 consenting to litigate a dispute with Altela, *cf. Martin*, 2016 WL 3924381, at *6.⁴ Nor

28 ⁴ As explained below, AzTE did fail, on one occasion, to respond to a request by

1 did it unreasonably delay in seeking to compel arbitration; its motion to compel was filed
2 just over a month after Altela initiated this action.

3 **4. Unclean Hands.**

4 Altela argues that AzTE is precluded from enforcing the ADR Addendum because
5 it has unclean hands as a result of its wrongful termination of the Agreement. The Court
6 does not agree. As explained, “a federal court may consider only issues relating to the
7 making and performance of the agreement to arbitrate” on a motion to compel arbitration.
8 *Prima Paint*, 388 U.S. at 406. Thus, courts will not deny a motion to compel arbitration
9 on unclean hands grounds unless “the misconduct allegedly giving rise to the unclean
10 hands . . . relate[s] directly to the making of th[e] agreement” to arbitrate. *In re A2P SMS*
11 *Antitrust Litig.*, 972 F. Supp. 2d 465, 481 (S.D.N.Y. 2013) (citation and quotation marks
12 omitted). Altela does not allege that AzTE acted inequitably during the formation of the
13 Agreement. Therefore, the unclean hands doctrine does not apply. *See Lange v. KPMG*
14 *LLP*, No. 4:12-CV-3148, 2014 WL 1584483, at *4 (D. Neb. Apr. 21, 2014) (“Virtually
15 all of the alleged malfeasance on the part of [defendant] of which the plaintiff complains
16 occurred in the course of its performance under the terms of the agreement and upon
17 [defendant’s] withdrawal; not with respect to the formation of the agreement. . . . In such
18 instances, the court cannot apply the doctrine of unclean hands to circumvent the parties’
19 contractual agreement to arbitrate”).

20 **5. Futility.**

21 Altela argues that it would be futile to enforce the ADR Addendum because AzTE
22 cannot be expected to engage in the process in good faith. This argument also lacks
23 merit. Futility is not one of the grounds upon which a court can refuse to enforce an
24 agreement to arbitrate under the FAA. *See Prima Paint*, 388 U.S. at 406 (“a federal court
25

26 Altela to mediate. But Altela cites no case holding that failure to mediate can constitute
27 waiver of the right to arbitrate. Nor would such a holding make sense under the
28 governing framework for determining whether a party has waived the right to arbitrate.
At the time Altela requested mediation, AzTE had no “existing right to compel
arbitration,” *Martin*, 2016 WL 3924381, at *5, so it could not have taken action
inconsistent with such a right.

1 may consider only issues relating to the making and performance of the agreement to
2 arbitrate” on a motion to compel arbitration). In any case, enforcing the arbitration
3 provision will not be futile. The Agreement provides that, once a dispute has been
4 subject to arbitration:

5 [t]he award of the arbitration tribunal shall be final and judgment upon such
6 an award may be entered in any competent court or application may be
7 made to any competent court for judicial acceptance of such an award and
an order of enforcement.

8 Doc. 22-1, ¶ 1(f). Thus, whether or not AzTE acts in good faith, Altela can obtain a final,
9 judicially enforceable judgment. There is nothing futile about this result.

10 **B. Mediation.**

11 There is no Federal Mediation Act,⁵ and “mediation is not within the FAA’s
12 scope.” *Advanced Bodycare Sols., LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1240 (11th
13 Cir. 2008). Hence, courts apply ordinary principles of state law in determining whether
14 an agreement to mediate is enforceable. One such principle is waiver. “Waiver is either
15 the express, voluntary, intentional relinquishment of a known right[,] or such conduct as
16 warrants an inference of such an intentional relinquishment.” *Am. Cont’l Life Ins. Co. v.*
17 *Ranier Const. Co.*, 607 P.2d 372, 374 (Ariz. 1980). “Waiver by conduct must be
18 established by evidence of acts inconsistent with an intent to assert the right.” *Id.*

19 The Court concludes that AzTE waived its right to compel mediation by engaging
20 in conduct inconsistent with reliance on that right. On July 21, 2015, Altela sent AzTE a
21 letter requesting that the parties commence mediation. Doc. 1-3 at 2-3. AzTE presents
22 no evidence indicating that it responded to this request.⁶ Altela later requested that the
23 parties skip the mediation stage and proceed directly to arbitration. Doc. 29-1 at 2.

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25 ⁵ As a matter of historical interest only, an act known as the “Federal Mediation
26 Act of 1946” was proposed and passed by Congress, but vetoed by President Truman.
See <https://library.cqpress.com/cqalmanac/document.php?id=cqal46-1410247>.

27 ⁶ AzTE argues that it did respond, and points to an email it sent to Altela’s counsel
28 on July 22, 2015. Doc. 29 at 2. But the email simply alerts counsel that its representation
of Altela would give rise to a conflict of interest, given the firm’s representation of AzTE
in other matters. *Id.* That is not a response to Altela’s request for mediation.

1 AzTE indicated that it was amenable to skipping mediation, Doc. 26-1 at 21 (“AzTE is
2 open to participating in an expedited arbitration”), and suggested that the parties move
3 forward with the selection of an arbitrator. Doc. 29-2 at 2; *see also* Docs. 29-4 at 3
4 (“AzTE stands ready to arbitrate now.”); 29-5 at 4 (“If Altela wishes to arbitrate . . . we
5 will immediately move forward with the process.”). AzTE’s failure to accept Altela’s
6 July 21, 2015 offer to mediate, and its subsequent statements that it was willing to skip
7 the mediation stage and proceed directly to arbitration, suggest that AzTE intentionally
8 relinquished the right to mediate. The Court concludes that AzTE has waived that right.

9 **III. The Foundation’s Motion.**

10 The Foundation separately moves to compel ADR with respect to the claims
11 against it. Although the Foundation is not a signatory to the Agreement, Altela alleges
12 that the Foundation acts as the “alter ego” of AzTE. Doc. 1, ¶ 5. It is well settled that the
13 alter ego of a signatory is bound by, and can enforce, the terms of an arbitration
14 agreement to the same extent that the signatory can. *See Mundi v. Union Sec. Life Ins.*
15 *Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (“General contract and agency principles” –
16 including those of veil-piercing/alter ego – “apply in determining the enforcement of an
17 arbitration agreement by or against nonsignatories.”). Because Altela alleges that the
18 Foundation is the alter ego of a signatory, the Foundation is entitled to enforce the
19 Agreement’s ADR provisions to the same extent that AzTE can.

20 **IV. Remedy.**

21 The FAA provides that, upon determining that an issue in a pending action is
22 subject to a mandatory arbitration provision, a federal court “shall . . . stay the action until
23 such arbitration has been had.” 9 U.S.C. § 3. “Notwithstanding this statutory language
24 . . . the majority of courts . . . have held that a stay serves no obvious purpose and
25 dismissal is appropriate where the entire controversy between the parties is subject to and
26 will be resolved by arbitration.” *Jann v. Interplastic Corp.*, 631 F. Supp. 2d 1161, 1167
27 (D. Minn. 2009) (citation and quotation marks omitted); *see also Sparling v. Hoffman*
28 *Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (affirming dismissal of case where all

1 claims were subject to arbitration).

2 Here, the Agreement's arbitration provision provides that all Agreement-related
3 disputes between the parties shall be submitted to arbitration. The Court finds this
4 provision enforceable, and Altela does not deny that its claims relate to the Agreement.
5 Thus, all of Altela's claims are subject to mandatory arbitration. The Court will dismiss
6 this case rather than staying it.

7 **IT IS ORDERED:**

- 8 1. AzTE's motion to dismiss and compel ADR (Doc. 22) is **granted**,
9 insofar as it seeks to compel arbitration pursuant to subsection 1(f)
10 of the ADR Addendum. The motion is **denied** insofar as it seeks to
11 compel negotiation or mediation pursuant to subsections 1(a)-(d).
12 2. The Foundation's motion to dismiss and compel arbitration
13 (Doc. 23) is **granted**, insofar as it seeks to compel arbitration
14 pursuant to subsection 1(f) of the ADR Addendum. The motion is
15 **denied** insofar as it seeks to compel negotiation or mediation
16 pursuant to subsections 1(a)-(d).
17 3. The Rule 16 Case Management Conference set for August 31, 2016
18 at 4:00 pm. is **vacated**.
19 4. The Clerk of the Court shall enter judgment accordingly and
20 **terminate** this case.

21 Dated this 31st day of August, 2016.

22
23 

24 _____
25 David G. Campbell
26 United States District Judge
27
28