

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TAMSCO PROPERTIES, LLC;	)	2:09-cv-03086-GEB-EFB
JKR LASER INVESTMENT, LLC;	)	
SURFER BEACH, LLC; and TO BE	)	<u>ORDER GRANTING MOTION TO</u>
DETERMINED, LLC,	)	<u>COMPEL ARBITRATION</u>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
LORAL LANGEMEIER and LIVE OUT	)	
LOUD, INC.,	)	
	)	
Defendants.	)	
_____	)	

Defendants seek an order compelling Plaintiffs, nonsignatories to an arbitration agreement, to arbitrate all claims in this action. The order is sought under 9 U.S.C. § 4 of the Federal Arbitration Act ("FAA"). Defendants argue arbitration should be compelled under the equitable estoppel doctrine, *inter alia*, because all of Plaintiffs' claims relate to Defendants' alleged investment representations which were made with the understanding that any dispute concerning those representations would be arbitrated. Specifically, Defendants argue "Plaintiffs admit that . . . individuals," "affiliated with each Plaintiff" limited liability company, "attended the Big Table program[, an investment-education

1 program,] on [each plaintiff] entity's behalf." (Mot. Compel  
2 Arbitration 4:6-9, ECF No. 100.) Defendants argue "the individuals  
3 through which Plaintiffs attended the Big Table programs and heard  
4 the alleged representations regarding investments all signed  
5 arbitration agreements that this Court has determined to be valid,  
6 enforceable, and broad enough to cover the claims at issue in this  
7 litigation." (Id. at 4:20-24.) Defendants argue that at Big Table  
8 programs, said members received "educational information . . . that  
9 [is] the basis . . . of their claims," concerning which the members  
10 agreed in writing to arbitrate any dispute arising from or related to  
11 the Big Table programs. (Id. at 7:20-23, 8 n.3.) Defendants argue  
12 "Plaintiffs cannot adopt only the parts of this transaction which are  
13 beneficial, and then reject the burdens." (Id. at 7:25-26.) Further,  
14 Defendants argue Plaintiffs' claims are "inextricably intertwined  
15 with the contract that contained the arbitration agreement," because  
16 "[a]ll of the claims in this case arise out of representations that  
17 were supposedly made during the Big Table programs." (Id. at 8:6-14.)

18 Plaintiffs counter that their "claims are not intertwined  
19 to any degree with the obligations stated in the Big Table  
20 agreement," because "[P]laintiffs have not alleged a claim for breach  
21 of contract or the negligent performance of any duty to be provided  
22 under the agreements, nor even mention[ed the Big Table] agreements  
23 in their complaint." (Opp'n Mot. Compel Arbitration 7:10-16, ECF No.  
24 102.) Further, Plaintiffs rejoin with nonresponsive, conclusory, and  
25 unsupported equity arguments, which are insufficient to establish  
26 that applying equitable estoppel would be inappropriate in this case.  
27 Plaintiffs also respond with a waiver of arbitration argument.

28 However, as explained below, Plaintiffs have not shown that

1 Defendants waived arbitration, and Plaintiffs will be compelled to  
2 arbitrate their claims under the equitable estoppel doctrine since  
3 Plaintiffs claims are intertwined with the Big Table Program contract  
4 which includes an arbitration clause. Therefore, Defendants'  
5 alternative argument on which their motion is based need not be  
6 addressed.

### 7 I. BACKGROUND

8 The following assertions and allegations in the complaint  
9 concern the motion. See Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d  
10 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings, unless  
11 amended, are considered judicial admissions conclusively binding on  
12 the party who made them."). Defendants' "on-going business activities  
13 in the State of California . . . includ[ed] the Big Table events that  
14 Plaintiffs . . . attended, [and Defendants'] website known as  
15 DPPonline . . . [which] was used to direct [those] attending Big  
16 Table events towards the purchase of investments." (Compl. ¶¶ 16, 19,  
17 ECF No. 1.) Each Plaintiff is a limited liability company. (Id.  
18 ¶¶ 12-15.) The individual members of each Plaintiff limited liability  
19 company attended the "Big Table" events in South Lake Tahoe,  
20 California. (Id. ¶ 13 ("JKR is a limited liability company . . .  
21 whose individual members . . . attended Big Table No. 24 . . . at the  
22 Embassy Suite in South Lake Tahoe California."); id. ¶ 14 ("Surfer  
23 Beach is a limited liability company . . . whose individual members  
24 . . . attended Big Table No. 24 . . . at the Embassy Suite in South  
25 Lake Tahoe California."); id. ¶ 15 ("TBD is a limited liability  
26 company . . . whose individual members . . . attended Big Table No.  
27 23 . . . at the Embassy Suite in South Lake Tahoe California."); see  
28 id. ¶¶ 10-11 (stating that S. Newell and M. Newell "attended the Big

1 Table . . . in 2006"); id. ¶ 12 (listing "Newell" as Tamsco's "only  
2 member and manager since its formation"). At "Big Table" programs in  
3 South Lake Tahoe, California in 2006, (id. ¶ 6), Defendants  
4 "exhort[ed] and encourag[ed]" Plaintiffs "to invest in various real  
5 estate ventures and other investment 'opportunities.'" (Id. ¶ 228  
6 (regarding JKR Laser Investments); accord id. ¶ 202 ("Langemeier  
7 exhort[ed] and encourag[ed] Tamsco, and other Big Table participants,  
8 to purchase this investment."); id. ¶ 246 ("Langemeier exhort[ed] and  
9 encourag[ed] Surfer Beach, and other Big Table participants, to  
10 invest in the Cerritos."); id. ¶ 264 ("Langemeier exhort[ed] and  
11 encourag[ed] [Plaintiff To Be Determined, LLC,] and other Big Table  
12 participants, to purchase the investment offered by Renaissance."))

13 Defendants' misrepresentations at and in connection with  
14 these programs promoted "high risk and not safe" investments "in  
15 pursuit of their own pecuniary interests." (Id. ¶¶ 20, 117.)  
16 Plaintiffs sue Defendants for these misrepresentations alleging,  
17 inter alia, fraud and breach of fiduciary duties. (Id. ¶¶ 115-144,  
18 189-302.)

19 Tamsco Properties LLC ("Tamsco") states: "In actual  
20 reliance upon Langemeier's representations Tamsco paid \$50,000 for  
21 an equity interest in Z Harvard Square, \$50,000 . . . for a 'unit'  
22 of STG [a business], and \$125,000 . . . for a limited partnership  
23 interest in Renaissance." (Compl. ¶ 193.) JKR Laser Investment LLC  
24 ("JKR") states: "In actual reliance upon Langemeier's representations  
25 JKR paid \$100,000 for a limited property interest in Renaissance."  
26 (Id. ¶ 219.) Surfer Beach LLC states: "In actual reliance upon  
27 Langemeier's representations Surfer Beach paid \$250,000 for what it  
28 had been told by Langemeier to be an interest in real property . .

1 . ." (Id. ¶ 237.) To Be Determined LLC ("TBD") states: "In actual  
2 reliance upon Langemeier's representations TBD paid \$75,000 for a  
3 limited partnership interest in Renaissance." (Id. ¶ 255.)

4 Defendants also filed a declaration in support of their  
5 motion, in which Defendant Loral Langemeier declares: "Everyone who  
6 attends a Big Table program signs a Big Table Agreement." (Decl.  
7 Loral Langemeier ¶¶ 2-5, ECF No. 100-1.) Defendants attached to  
8 Langemeier's declaration Big Table agreements that state, in  
9 pertinent part, the following:

10 Services

11 Client engages [Defendant], and [Defendant] agrees to  
12 undertake and provide a program of services commonly known  
as Loral's Big Table, to the Client . . . .

\* \* \*

13 Arbitration

14 Any dispute or claim arising or related to this Agreement,  
15 its performance, breach, or interpretation (including  
16 issues about its validity or enforceability), shall be  
exclusively . . . resolved by final binding arbitration  
before the American Arbitration Association (AAA),  
utilizing its Commercial Arbitration Rules.

17 (E.g., id. Ex. A, at 5-6, ¶ "Arbitration.")

18 Further, Defendants attached to the motion special  
19 interrogatories and requests for admissions. Attached interrogatory  
20 No. 2 asks Plaintiffs to "IDENTIFY each person affiliated with YOU  
21 who heard representations at the BIG TABLE as alleged in YOUR  
22 COMPLAINT." (Decl. Benoff. Ex. A, at 9, ECF No. 100-3.) Plaintiff  
23 Tamsco responded by identifying Steven Newell, (id. at 13), Plaintiff  
24 JKR identified Jessica Behrman, (id. Ex. B, at 24), Plaintiff Surfer  
25 Beach also identified Jessica Behrman, (id. Ex. C, at 35), and  
26 Plaintiff TBD identified Wendy Maynard. (Id. Ex. D, at 47.)  
27 Defendants' requests for admissions include the following:

28 **Request No. 4**

Admit that the people identified in YOUR

1 response to Interrogatory Number 2 attended the BIG  
2 TABLE on YOUR BEHALF.

3 **Request No. 5**

4 Admit that the people identified in YOUR  
5 response to Interrogatory Number 2 signed a BIG  
6 TABLE AGREEMENT.

7 **Request No. 6**

8 Admit that the BIG TABLE AGREEMENT(s) signed  
9 by the people identified in YOUR response to  
10 Interrogatory Number 2 contained an arbitration  
11 clause.

12 (Id. Ex. E, at 53.) Tamsco responded as follows:

13 **Response to Request No. 4**

14 Admit.

15 **Response to Request No. 5**

16 Objection on the grounds of relevancy. Without  
17 waiving said objection responding party answers as  
18 follows: Admit.

19 **Response to Request No. 6**

20 Objection on the grounds of relevancy. Without  
21 waiving said objection responding party answers as  
22 follows: Admit.

23 (Id. at 57.) JKR responded as follows:

24 **Response to Request No. 4**

25 Admit, based on present knowledge. If  
26 responding party subsequently obtains information  
27 that would lead to a different response it will  
28 seek to amend this response.

**Response to Request No. 5**

Objection on the grounds of relevancy. Without  
waiving said objection responding party answers as  
follows: Admit, based on present knowledge. If  
responding party subsequently obtains information  
that would lead to a different response it will  
seek to amend this response.

**Response to Request No. 6**

Objection on the grounds of relevancy. Without  
waiving said objection responding party answers as  
follows: Admit, based on present knowledge. If  
responding party subsequently obtains information  
that would lead to a different response it will  
seek to amend this response.

(Id. Ex. F, at 68-69.) Surfer Beach responded as follows:

**Response to Request No. 4**

Admit, based on present knowledge. If  
responding party subsequently obtains information  
that would lead to a different response it will seek  
to amend this response.

1                   **Response to Request No. 5**

2                   Objection on the grounds of relevancy. Without  
3                   waiving said objection responding party answers as  
4                   follows: Admit, based on present knowledge. If  
5                   responding party subsequently obtains information  
6                   that would lead to a different response it will seek  
7                   to amend this response.

8                   **Response to Request No. 6**

9                   Objection on the grounds of relevancy. Without  
10                  waiving said objection responding party answers as  
11                  follows: Admit, based on present knowledge. If  
12                  responding party subsequently obtains information  
13                  that would lead to a different response it will seek  
14                  to amend this response.

15                  (Id. Ex. G, at 79-80.) Plaintiff TBD responded as follows:

16                  **Response to Request No. 4**

17                  Admit, based on present knowledge. If  
18                  responding party subsequently obtains information  
19                  that would lead to a different response it will seek  
20                  to amend this response.

21                  **Response to Request No. 5**

22                  Objection on the grounds of relevancy. Without  
23                  waiving said objection responding party answers as  
24                  follows: Admit, based on present knowledge. If  
25                  responding party subsequently obtains information  
26                  that would lead to a different response it will seek  
27                  to amend this response.

28                  **Response to Request No. 6**

                  Objection on the grounds of relevancy. Without  
                  waiving said objection responding party answers as  
                  follows: Admit, based on present knowledge. If  
                  responding party subsequently obtains information  
                  that would lead to a different response it will seek  
                  to amend this response.

                  (Id. Ex. H, at 90-91.) Further, Plaintiffs produced the formation  
documents of their respective entities, which show that Steve Newell  
is a member of Tamsco, (id. Ex. I, at 103), Jessica Behrman is a  
member of both Surfer Beach and JKR, (id. Ex. J, at 117-18 (regarding  
JKR); id. Ex. K, at 133 (regarding Surfer Beach)), and Wendy Maynard  
is a member of TBD. (Id. Ex. L, at 158.)

                  Further, Defendants attached to Langemeier's Declaration  
a copy of the Big Table Agreement signed by a member of each entity  
Plaintiff who attended the Big Table program in South Lake Tahoe,  
California. (Id. Ex. A, at 7 (showing Jessica Behrman, member of both

1 JKR and Surfer Beach, signed the agreement); id. Ex. E, at 20  
2 (showing Steven Newell, member of Tamsco, signed the agreement); id.  
3 Ex. I, at 32 (showing Wendy Maynard, member of TBD, signed the  
4 agreement).)

## 5 **II. DISCUSSION**

6 "A district court's role under the FAA is limited to  
7 determining (1) whether a valid agreement to arbitrate exists and, if  
8 it does, (2) whether the agreement encompasses the dispute at issue."  
9 Samson v. NAMA Holdings LLC, 637 F.3d 915, 923 (9th Cir. 2010)  
10 (internal alterations and quotation marks omitted). "If the response  
11 is affirmative on both counts, then the Act requires the court to  
12 enforce the arbitration agreement in accordance with its terms." Id.  
13 at 923-24.

14 Defendants' evidence evincing that a valid arbitration  
15 agreement exists between Defendants and an individual member of each  
16 entity Plaintiff is uncontroverted. Therefore, the issue is whether  
17 Plaintiffs are required to arbitrate their claims under the equitable  
18 estoppel doctrine even though they are nonsignatories. Defendants cite  
19 both federal and California authority in support of their motion, but  
20 do not directly address the issue of which law governs. However, the  
21 precise law governing the issue need not be decided, since the  
22 conclusion is the same under both federal and California law. See  
23 generally Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co., 470 F.  
24 App'x 652, 653 (9th Cir. 2012) (finding that a district court's  
25 decision to apply federal law to "equitably estop[ a party] from  
26 refusing to arbitrate" was "not material" since the conclusion would  
27 have been the same under state law).

28 "Equitable estoppel 'precludes a party from claiming the



1 benefits of a contract while simultaneously attempting to avoid the  
2 burdens that contract imposes.'" Mundi v. Union Sec. Life Ins. Co.,  
3 555 F.3d 1042, 1045 (9th Cir. 2009); accord NORCAL Mut. Ins. Co. v.  
4 Newton, 84 Cal. App. 4th 64, 84 (2000) ("No person can be permitted  
5 to adopt that part of an entire transaction which is beneficial to  
6 him/her, and then reject its burdens."). Further, "[a] nonsignatory  
7 can be compelled to arbitrate when a preexisting relationship existed  
8 between the nonsignatory and one of the parties to the arbitration  
9 agreement, making it equitable to compel the nonsignatory to arbitrate  
10 as well." JSM Tuscan, LLC v. Superior Court, 193 Cal. App. 4th 1222,  
11 1240 (2011). "The equitable estoppel doctrine extends to claims that  
12 are dependent upon or inextricably intertwined with the obligations  
13 imposed by the contract containing the arbitration clause. As with  
14 signatory plaintiffs, when nonsignatory plaintiffs are pursuing such  
15 claims, they should be bound by the arbitration clause in the contract  
16 which is integral to their claims." Id. at 1241.

17           The Court is "thus required to analyze the [claims]  
18 alleged in the complaint, to determine whether the claims asserted by  
19 the plaintiffs are dependent upon, or inextricably intertwined with,"  
20 the benefits attendant to the Big Table programs concerning which an  
21 arbitration obligation exists. Id. at 1242. Plaintiffs sue Defendants  
22 for fraud, false statements, breach of fiduciary duties, and unlawful  
23 and unfair business practices based on misrepresentations allegedly  
24 made in relation to the Big Table programs. (Id. ¶¶ 115-144, 189-302.)  
25 All of these claims are based upon alleged obligations related to  
26 Defendants' performance under the Big Table agreement, and therefore  
27 are subject to the arbitration clauses that an individual member of  
28 each Plaintiff entity signed. (Decl. Langemeier Ex. A at 6 (showing

1 Jessica Behrman, an member of both JKR and Surfer Beach, signed the  
2 Big Table agreement); id. Ex. E, at 20 (showing Steven Newell, a  
3 member of Tamsco, signed the Big Table agreement); id. Ex. I, at 32  
4 (showing Wendy Maynard, a member of TBD, signed the Big Table  
5 agreement).)

6 Equitable estoppel "prevent[s] a non-signatory from  
7 embracing a contract, and then turning its back on the portions of the  
8 contract, such as an arbitration clause, that it finds distasteful."  
9 E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin  
10 Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001); accord Mundi  
11 v. Union Sec. Life Ins., Co., 555 F.3d 1042, 1045 (9th Cir. 2009)  
12 (stating "a nonsignatory may be held to an arbitration clause where  
13 the nonsignatory knowingly exploits the agreement containing the  
14 arbitration clause despite having never signed the agreement."  
15 (internal quotation marks and citation omitted)).

16 Defendants argue Plaintiffs are required to arbitrate their  
17 claims because:

18 Plaintiffs admittedly received the benefits of the  
19 Big Table Agreement. They judicially admit to  
20 attending and participating in the Big Table  
21 programs. Similarly, Plaintiffs judicially admit  
22 that they received the educational information  
23 offered at those programs—this is the very same  
24 information that Plaintiffs cast as the purported  
25 representations regarding investments that are the  
26 basis for all of their claims. Plaintiffs cannot  
27 adopt only the parts of this transaction which are  
28 beneficial, and then reject the burdens. Since the  
representations allegedly made to Plaintiffs at the  
Big Table program form the basis of every claim in  
this litigation, those claims must be arbitrated  
under the terms of the Big Table Agreement signed  
by Plaintiffs' [individual members].

27 (Mot. Compel Arbitration 7:18-8:2 (internal citations omitted)  
28 (citing (Decl. Langemeier, Exs. A-L).) Plaintiffs counter that their

1 "claims are not intertwined to any degree with the obligations stated  
2 in the Big Table agreement." (Opp'n Mot. Compel Arbitration 7:10-12.)  
3 Defendants reply: "It is the law of this case that Plaintiffs' claims  
4 are intertwined with the Big Table Programs and Agreements. Indeed,  
5 this Court previously stayed this litigation on two separate occasions  
6 because all of the claims arise out of the Big Table." (Reply 6:12-16,  
7 ECF No. 104 (citing Prior Orders ECF Nos. 37, 70).)

8 Here, the language of the Big Table agreement establishes  
9 the benefits and, conversely, the detriments or burdens of the  
10 agreement. The Big Table agreements state, in pertinent part, the  
11 following:

12 Services

13 Client engages [Defendant], and [Defendant] agrees  
14 to undertake and provide a program of services  
commonly known as Loral's Big Table, to the Client

14 . . . .

\* \* \*

15 Arbitration

16 Any dispute or claim arising or related to this  
17 Agreement, its performance, breach, or  
18 interpretation (including issues about its validity  
19 or enforceability), shall be exclusively . . .  
resolved by final binding arbitration before the  
American Arbitration Association (AAA), utilizing  
its Commercial Arbitration Rules.

20 (Decl. Langemeier Ex. A, at 5-6.) Thus, the "Clients" under the Big  
21 Table agreement agreed to the "burden" or "detriment" of forgoing  
22 their rights to litigate by agreeing to arbitrate disputes "related  
23 to this Agreement[ and] its performance" in exchange for the "benefit"  
24 of the "program of services commonly known as Loral's Big Table,"  
25 which Defendants agreed to provide. (Id. at 6.)

26 Further, Plaintiffs admitted in the complaint and in their  
27 responses to requests for admissions that they received information  
28 "about individual investments," (Compl. ¶¶ 190, 192 (regarding

1 Tamsco); id. ¶ 228 (regarding JKR); id. ¶ 256 (regarding Surfer  
2 Beach); id. ¶ 264 (regarding TBD), when their individual members  
3 “attended the Big Table” events “on [their] behalf.” (Decl. Benoff Ex.  
4 E, at 53, 57 (regarding Tamsco); id. Ex. F, at 68–67 (regarding JKR);  
5 id. Ex. G, at 79–80 (regarding Surfer Beach); id. Ex. H, at 90–91  
6 (regarding TBD).) This information was obtained through the “program  
7 of services commonly known as Loral’s Big Table” which Defendants  
8 agreed to provide, and was the sole benefit that the “Clients” who  
9 signed this agreement expected to receive. See Deloitte Noraudit A/S  
10 v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993)  
11 (holding that if a nonsignatory “knowingly accepted the benefits”  
12 which were the same as those “benefits secured for all” signatories,  
13 the nonsignatory is “estopped from denying its obligation to  
14 arbitrate”). The entity Plaintiffs were aware of this agreement and  
15 its obligation to arbitrate disputes related to performance thereunder  
16 since their individual members signed the agreements. (Decl.  
17 Langemeier Ex. A at 6 (showing Jessica Behrman, member of both JKR and  
18 Surfer Beach, signed the agreement); id. Ex. E, at 20 (showing Steven  
19 Newell, member of Tamsco, signed the agreement); id. Ex. I, at 32  
20 (showing Wendy Maynard, member of TBD, signed the agreement).)  
21 Plaintiffs assert in their complaint that: “In actual reliance” on  
22 these “representations,” Plaintiffs used the information and made  
23 substantial investments. (Id. ¶ 193; accord id. ¶¶ 219, 237, 255.)

24           Therefore, by virtually attending the Big Table programs,  
25 using the Defendants’ investment information, and asserting claims  
26 founded on representations made at the Big Table programs which are  
27 related to Defendants’ performance under the Big Table agreement,  
28 Plaintiffs “embrac[ed]” the Big Table Agreement and now “turn [their]

1 back[s]" to its arbitration clause. E.I. DuPont de Nemours & Co., 269  
2 F.3d at 200. "To allow [P]laintiff[s] to claim the benefit of the [Big  
3 Table Agreements] and simultaneously avoid its burdens would both  
4 disregard equity and contravene the purposes underlying enactment of  
5 the Arbitration Act." Int'l Paper Co. v. Schwabediseen Maschinen &  
6 Analgen GMBH, 206 F.3d 411, 418 (4th Cir. 2000). Defendants'  
7 uncontroverted evidence demonstrates that "it would be . . .  
8 inequitable to permit" Plaintiffs to use the investment information  
9 upon which this suit is grounded, "and at the same time . . . avoid  
10 arbitration of claims clearly within the ambit of the arbitration  
11 clause." Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.,  
12 659 F.2d 836, 838-39 (7th Cir. 1981).

13           However, Plaintiffs argue that "Defendants have waived their  
14 right to arbitrate by waiting three years after their initial motions  
15 and less than a year before trial, as well as seeking the court's  
16 determination on issues going to the merits of this case." (Opp'n Mot.  
17 Compel Arbitration 1:25-27, ECF No. 102.) Plaintiffs contend this  
18 delay has prejudiced Plaintiffs in part because "[P]laintiffs have yet  
19 been able to conduct discovery in a meaningful way, and the discovery  
20 cut-off is approaching." (Id. at 10:25-11:4.) Defendants reply  
21 discussing, inter alia, the procedural history of this action, which  
22 includes stays imposed while previous parties in this action were  
23 ordered to arbitrate claims, and argue that Defendants' discovery  
24 requests were designed to "gather[] the information necessary to file  
25 a motion to compel arbitration." (Reply 10:22-23, ECF No. 10.)

26           Although "it is certainly possible to waive contractual  
27 rights to arbitration, such waivers are not favored." Letizia v.  
28 Prudential Bache Sec., Inc., 802 F.2d 1185, 1187 (9th Cir. 1986). "A

1 party seeking to prove such a waiver must demonstrate: (1) knowledge  
2 of an existing right to compel arbitration; (2) acts inconsistent with  
3 that existing right; and (3) prejudice to the party opposing  
4 arbitration resulting from such inconsistent acts." Id. (quoting  
5 Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir.  
6 1986)) (internal quotation marks omitted). In the arbitration context,  
7 "[w]aiver . . . is distinct from forfeiture . . . . [W]aiver is the  
8 intentional relinquishment or abandonment of a known right, whereas  
9 forfeiture is the failure to make the timely assertion of that right."  
10 United States v. Park Place Assocs., Ltd., 563 F.3d 907, 935 n.10 (9th  
11 Cir. 2009) (internal quotation marks and alterations omitted) (quoting  
12 United States v. Jacobo Castillo, 496 F.3d 947, 952 n.1 (9th Cir.  
13 2007) (en banc)). Further, "waiver does not occur by mere  
14 participation in litigation if there has been no judicial litigation  
15 of the merits of arbitrable issues. . . . Prejudice typically is found  
16 only where the petitioning party's conduct has substantially  
17 undermined this important public policy or substantially impaired the  
18 other side's ability to take advantage of the benefits and  
19 efficiencies of arbitration." Saint Agnes Med. Ctr. v. PacifiCare of  
20 Cal., 31 Cal. 4th 1187, 1203-04 (2003). "Because waiver of the right  
21 to arbitration is disfavored, any party arguing waiver of arbitration  
22 bears a heavy burden of proof." Fisher v. A.G. Becker Paribas Inc.,  
23 791 F.2d 691, 694 (9th Cir. 1986) (internal quotation marks omitted).

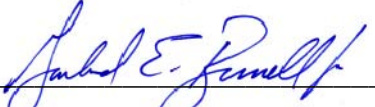
24 Plaintiffs have not shown that Defendants' litigation  
25 actions in this case have been inconsistent with Defendants' assertion  
26 of their arbitration rights, in light of the procedural history in  
27 this action showing that Defendants have asserted their rights to  
28 arbitration. Further, since Defendants' discovery requests were

1 focused on identifying the individuals who attended the Big Table  
2 Programs on behalf of each Plaintiff in order to support their motion  
3 to compel arbitration, these acts were consistent with their rights  
4 to arbitrate. Nor have Plaintiffs shown that they would be prejudiced  
5 in any measurable manner by being compelled to arbitrate their claims,  
6 particularly since "there has been no judicial [resolution] of the  
7 merits of arbitrable issues." Saint Agnes Med. Ctr., 31 Cal. 4th at  
8 1203 (reversing trial court for failing to stay proceeding and order  
9 arbitration, reasoning that even extensive litigation over venue does  
10 not waive arbitration rights); see also Fisher, 791 F.2d at 697  
11 (holding that even extensive discovery over three and a half years is  
12 insufficient prejudice for a waiver of arbitration). Therefore,  
13 Plaintiffs have failed to sustain their burden of showing that  
14 Defendants waived their right to arbitrate.

### 15 III. CONCLUSION

16 For the stated reasons, Defendants' Motion to Compel  
17 Arbitration (ECF No. 100) is granted. Further, this action is  
18 dismissed without prejudice in light of the requirement that  
19 Plaintiffs arbitrate their claims. Sparling v. Hoffman Constr., Co.,  
20 864 F.2d 635, 638 (9th Cir. 1988) (stating "district court acted  
21 within its discretion when it dismissed . . . claims [since] . . . the  
22 arbitration clause was broad enough to bar all of the plaintiff's  
23 claims since it required [plaintiff] to submit all claims to  
24 arbitration."). Therefore, this action shall be closed.

25 1/18/13

26   
27 GARLAND E. BURRELL, JR.  
28 Senior United States District Judge