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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PHILADELPHIA INDEMNITY INSURANCE
COMPANY, a Pennsylvania
corporation,

 Petitioner,

 v.

THE CITY OF FRESNO, a municipal
corporation,

 Respondent.

No. 2:16-cv-00495-JAM-KJN

**ORDER GRANTING RESPONDENT'S
MOTION TO VACATE ORDER FILED
ON JULY 13, 2016 (ECF No. 21)**

The City of Fresno ("Fresno") moves this Court to vacate its July 13, 2016 Order (ECF No. 21) compelling arbitration of an insurance coverage dispute between Fresno and Philadelphia Indemnity Insurance Company ("Philadelphia"). ECF No. 36.

For the reasons set forth below, this Court GRANTS Fresno's motion.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for August 13, 2019.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Fresno, through SMG Holdings, Inc. ("SMG"), entered into a
3 licensing agreement with the California Association of Future
4 Farmers of America ("Future Farmers") for Future Farmers to use a
5 portion of the Fresno Convention and Entertainment Center.
6 Petition to Compel Arbitration ("Petition"), ECF No. 1, ¶ 5. The
7 licensing agreement required Future Farmers to obtain liability
8 insurance. *Id.* In accordance with this requirement, Future
9 Farmers entered into a liability insurance agreement with
10 Philadelphia (the "Future Farmers Policy"). *Id.* ¶ 8. The Future
11 Farmers Policy states that either party may demand arbitration if
12 a dispute arises over "whether coverage is provided under this
13 [policy] for a claim made against the insured." *Id.* ¶ 10.

14 In April 2013, Timothy Sailors ("Sailors") allegedly
15 sustained injuries after stepping into a large pot hole in the
16 parking lot of the Fresno Convention Center on his way to a
17 Future Farmers event. Petition ¶ 7. Both Sailors and his
18 employer, Reef Sunset Unified School District ("Reef"), sued
19 Fresno and SMG to recover for his injuries and for the employment
20 benefits Reef paid to Sailors after he was injured. *Id.* ¶¶ 6-7.
21 The cases, filed in Fresno County Superior Court and later
22 consolidated, are captioned *Timothy Sailors vs. City of Fresno,*
23 *et al.*, Case No. 14CECG00069 (the "Sailors Action") and *Reef*
24 *Sunset vs. City of Fresno, et al.*, Case No. 14CECG00807 (the
25 "Reef Action"). *Id.* ¶ 6.

26 Facing the Sailors and Reef Actions, Fresno demanded that
27 Philadelphia defend and indemnify Fresno as an additional insured
28 under the Future Farmers Policy. See Petition. Philadelphia

1 refused on the grounds, among others, that Fresno was not named
2 as an insured in the Future Farmers Policy. Id. Philadelphia
3 then sought an order from this Court requiring Fresno to submit
4 the coverage dispute to arbitration pursuant the policy's
5 arbitration clause. Id. Fresno did not oppose the petition and,
6 on July 13, 2016, this Court issued an order compelling
7 arbitration on "whether Philadelphia must indemnify and defend
8 Fresno in the underlying Sailors litigation." Order Compelling
9 Arbitration (the "Arbitration Order"), ECF No. 21, at 6.

10 Fresno now moves to vacate the Arbitration Order. Mot.,
11 ECF No. 37. Philadelphia opposes the motion. Opp'n, ECF No. 43.

12 13 II. OPINION

14 A. Judicial Notice

15 Fresno asks this Court to take judicial notice of five
16 California state court documents: (1) Opinion of the California
17 Court of Appeal in *Timothy Sailors v. City of Fresno, et al.*,
18 Case No. F074944; (2) online case docket for the Sailors Action;
19 (3) Amended Cross-Complaint by SMG and Fresno in the Sailors
20 Action; (4) online case docket for the Reef Action; and (5)
21 online docket for California Court of Appeal case *Philadelphia*
22 *Indemn. Ins. Co. vs. SMG Holdings, Inc.*, Case No. C082841. RJN,
23 ECF No. 40. Philadelphia does not oppose this request. And
24 since requests for judicial notice of court records are routinely
25 accepted, Fresno's request is granted as to the existence of the
26 documents but not as to the truth of their contents.

27 B. Relief from Final Judgment

28 Federal Rule of Civil Procedure 60(b)(5) authorizes a court

1 to relieve a party from a final judgment, order, or proceeding if
2 "applying it prospectively is no longer equitable." Fed. R. Civ.
3 P. 60(b)(5). The party seeking relief bears the burden of
4 establishing that a "significant change in facts or law warrants
5 [the] revision." Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S.
6 367, 384, 393 (1992). Once the moving party carries this burden,
7 a court abuses its discretion "when it refuses to modify [the
8 judgment or order] in light of such changes." Agostini v.
9 Felton, 521 U.S. 203, 215 (1997).

10 This Court is not persuaded by Philadelphia's arguments that
11 the motion is untimely. Opp'n at 3-4. On March 20, 2019, the
12 California Court of Appeal affirmed the trial court's grant of
13 summary judgment in favor of Fresno and SMG in the consolidated
14 Sailors Action. ECF No. 40-1. That order became final in April
15 2019. Fresno would have had no basis in July or August 2016 to
16 appeal the Arbitration Order, nor any basis to have this Court
17 reconsider the Arbitration Order before April 2019. This Court
18 therefore finds the motion was filed within a reasonable time.
19 See United States v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985).
20 The Arbitration Order is subject to review under Rule 60(b)(5).

21 C. Mootness of Subject Arbitration

22 Fresno argues this Court should vacate the Arbitration Order
23 because a California court found Fresno not liable in the
24 underlying Sailors and Reef Actions, and therefore the compelled
25 arbitration regarding insurance coverage for any such liability
26 is moot. Philadelphia opposes on several grounds.

27 Philadelphia argues any question regarding mootness must be
28 decided in arbitration, not by this Court. Opp'n at 4-7. This

1 Court disagrees. A "question of arbitrability," including
2 whether "an arbitration clause in a concededly binding contract
3 applies to a particular type of controversy," is a matter "for
4 judicial determination unless the parties clearly and
5 unmistakably provide otherwise." Howsam v. Dean Witter Reynolds,
6 Inc., 537 U.S. 79, 84 (2002) (quoting in part AT & T Techs., Inc.
7 v. Commc'ns Workers of Am., 475 U.S. 643, 651-52 (1986)).

8 Indeed, in deciding a petition to compel arbitration, the court's
9 role is to determine "[1] whether a valid arbitration agreement
10 exists and, if so, [2] whether the agreement encompasses the
11 dispute at issue." Lifescan, Inc. v. Premier Diabetic Svcs.,
12 Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). This Court previously
13 answered both prongs in the affirmative. See Arbitration Order
14 at 6 ("Given that Philadelphia and Fresno dispute whether
15 coverage under the Future Farmers Policy extends to the area in
16 which Sailors was injured, the arbitration clause clearly
17 encompasses the dispute in this case."). The instant motion now
18 raises questions as to whether the agreement still encompasses
19 the dispute at issue, and that question of arbitrability is
20 squarely within the purview of this Court. See Howsam, 537 U.S.
21 at 84.

22 The California Court of Appeal affirmed the trial court's
23 grant of summary judgment in favor of Fresno and SMG in the
24 consolidated Sailors Action, and that judgment is now final.
25 ECF No. 40-1. Given that Fresno has no liability to the
26 underlying plaintiff, "Fresno readily agrees it has no damage
27 claims to arbitrate" and "has nothing to seek indemnity for from
28 Philadelphia." Mot. at 1; Reply at 1. Despite the final

1 judgment on underlying liability and Fresno's statements to this
2 Court, Philadelphia asserts it may face liability in a
3 subrogation action for Fresno's litigation costs from the Sailors
4 Action. Opp'n at 6. Federal Insurance Company ("Federal") paid
5 Fresno's defense expenses in that case. Mot. at 1; Reply at 1-2.
6 Fresno thus asserts that only Federal owns the right to bring a
7 claim against Philadelphia for those litigation costs. Id.

8 It is this Court's duty to determine questions of
9 arbitrability, here the presence of a disagreement about "whether
10 coverage is provided . . . for a claim made against the insured."
11 Petition ¶ 10. This Court finds there is no live controversy
12 between Philadelphia and Fresno regarding potential insurance
13 coverage. The arbitration previously compelled by this Court is
14 therefore moot. Am. Rivers v. Nat'l Marine Fisheries Serv., 126
15 F.3d 1118, 1123 (9th Cir. 1997), as amended (Sept. 16, 1997) ("A
16 claim is moot if it has lost its character as a present, live
17 controversy.").

18 D. Conclusion

19 This Court previously compelled arbitration between Fresno
20 and Philadelphia on coverage for the Sailors incident, including
21 as to "whether Philadelphia must indemnify and defend Fresno in the
22 underlying Sailors litigation." Arbitration Order at 6. The
23 Sailors Action has since been resolved in favor of Fresno, and
24 the arbitration compelled by this Court is now moot. This Court
25 finds this to be a "significant change in facts" warranting
26 relief from the Arbitration Order, the application of which is no
27 longer equitable. Fed. R. Civ. P. 60(b)(5); see Rufo, 502 U.S.
28 367, at 384. Given this disposition, it is unnecessary for this

1 Court to reach Fresno's other arguments for vacating the
2 Arbitration Order.


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III. ORDER

For the reasons set forth above, this Court GRANTS
respondent Fresno's Motion to Vacate. ECF No. 36. This Court's
July 13, 2016 Order (ECF No. 21) is hereby VACATED. The Petition
(ECF No. 1) is hereby DENIED AS MOOT. This case remains CLOSED.

IT IS SO ORDERED.

Dated: October 3, 2019



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE