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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALLIED WORLD INSURANCE
COMPANY, a Delaware corporation,

Plaintiff,

v.

NEW PARADIGM PROPERTY
MANAGEMENT, LLC, a California
corporation, and DOES 1 through 20,
inclusive,

Defendants.

No. 2:16-cv-02992-MCE-GGH

MEMORANDUM AND ORDER

Through the present action, Plaintiff Allied World Insurance Company (“Plaintiff” or “Allied”) seeks a declaratory judgment and consequential damages arising from Defendant New Paradigm Property Management’s (“Defendant” or “New Paradigm”) allegedly false disclosures and non-disclosures that purportedly induced Plaintiff to issue a performance bond to general contractor, TEC Construction Services, Inc. (“TEC”).¹ Plaintiff’s Complaint filed December 22, 2016, sets forth causes of action for (1) declaratory relief, (2) fraud in the inducement, (3) intentional and negligent representation, and (4) fraudulent concealment. ECF No. 1. At base, Plaintiff seeks a determination that its bond is unenforceable and should be exonerated because of New

¹ TEC is not a party to this action.

1 Paradigm’s representations. The parties refer to this suit as the “Bond
2 Exoneration/Declaratory Relief Action.”

3 On December 28, 2016, New Paradigm filed a separate lawsuit in Placer County
4 Superior Court against Allied seeking to enforce the same bond. In its Complaint, New
5 Paradigm asserts causes of action for breach of contract and declaratory relief. ECF
6 No. 1. Allied removed that case to this federal district on March 14, 2017, and the two
7 cases were related and consolidated by stipulation and a Court order dated April 24,
8 2017. ECF Nos. 17, 19. The parties refer to the second action as the “Breach of
9 Contract/Bond Enforcement Action.”

10 Presently before the Court is Defendant New Paradigm’s Motion to Compel
11 Arbitration and Dismiss Plaintiff’s Complaint, or Alternatively, Stay Action.² Def’s Mot.,
12 ECF No. 6. The matter has been fully briefed.³ See Def’s Mot.; Pl’s Opp., ECF No. 8;
13 Def’s Reply, ECF No. 9; Pl’s RJN, ECF No. 14; Def’s Obj., ECF No. 15. For the reasons
14 discussed below, the motion is DENIED.⁴

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20 ² For ease of reference and clarity, the Court will refer to Allied as “Plaintiff” and New Paradigm as
21 “Defendant” throughout this Order, as the parties have done in recent filings. See Reply to Request for
22 Ruling, ECF No. 25, at 2. The Court will also refer to the lawsuits by the respective designations indicated
above, which titles were also provided by the parties. Id.

23 ³ Plaintiff also requests that the Court take judicial notice of (1) New Paradigm’s complaint in
24 Placer County Superior Court Case No. SCV0038842, and (2) Allied’s Notice of Removal of the Placer
County action to this District. Defendant objects on the basis that Plaintiff’s Request for Judicial Notice
25 (“RJN”) was not timely filed with Plaintiff’s Opposition, and further is not relevant and/or is more prejudicial
than probative under Federal Rules of Evidence 401 and 403. Because both documents have since been
26 filed with this Court in related and consolidated Case No. 17-cv-00552-MCE-GGH, however, the Court
may consider those documents in any event and need not take judicial notice of them. Plaintiff’s RJN is
therefore denied as moot, and Defendant’s objections are likewise overruled as moot.

27 ⁴ Because oral argument would not have been of material assistance, the Court ordered this
28 matter submitted on the briefs. E.D. Cal. Local R. 230(g).

1 **BACKGROUND⁵**

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3 Defendant is the owner of certain real property in Rocklin, California, on which a
4 hotel sits. Defendant contracted with general contractor TEC to undertake a remodel of
5 the hotel in November 2015 (the “Prime Contract”). That contract contains a provision
6 mandating arbitration of “[a]ll claims and disputes between Contractor and Owner that
7 cannot otherwise be resolved” Decl. of Brittany Rupley ISO Def. Mot., Ex. A-A,
8 “Prime Contract,” at § 22. The contract also required TEC to obtain a performance bond
9 and payment bond for the project. Id. § 13. In December 2015, Plaintiff issued the
10 required performance bond and payment bond in connection with TEC’s work under the
11 Prime Contract (the “Bonds”). By their terms, the Bonds explicitly incorporate the terms
12 of the Prime Contract without exception. Decl. of Brittany Rupley ISO Def. Mot., Ex. A-
13 C, “Bonds.” In January 2016, TEC defaulted in the performance of its work and
14 Defendant made a claim against the performance Bond. Plaintiff ultimately denied that
15 claim in April 2016.

16 Presumably based on the language of the Prime Contract, Defendant sent
17 Plaintiff a notice of intent to arbitrate in December 2016. Plaintiff did not respond to
18 Defendant’s demand and as briefly explained above, both parties thereafter initiated
19 separate lawsuits, with Plaintiff claiming the Bond is unenforceable because it was
20 procured by fraud and Defendant claiming the Bond is enforceable and Plaintiff
21 breached the contract.

22 Before Plaintiff removed Defendant’s Bond Enforcement Action to this Court—but
23 after that action was filed in state court—Defendant filed the present Motion to Compel
24 Arbitration of Plaintiff’s Bond Exoneration Action.

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⁵ The following recitation of facts is derived from the parties’ briefing.

1 **B. Valid Agreement to Arbitrate**

2 Plaintiff does not dispute that a valid agreement to arbitrate exists within the
3 Prime Contract, as between TEC and Defendant. See Pl’s Opp. at 5. Plaintiff disputes,
4 however, that the agreement applies to it as the surety. To the extent Plaintiff argues
5 that the arbitration agreement does not apply because it is not a party to the underlying
6 Prime Contract, that argument is negated by the fact that the Bond specifically
7 incorporates the Prime Contract without limitation. Indeed, an abundance of case law
8 provides that a surety may be bound by an arbitration clause in the underlying contract
9 to which it is not a party where that contract is incorporated by reference in the Bond.
10 See Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., 6 Cal.App.4th
11 1266 (1992); see also Tower Ins. Co. of N.Y. v. Davis/Gilford, 967 F. Supp. 2d 72
12 (D.D.C. 2013).

13 **C. Scope of the Agreement**

14 The only remaining issue, then, is whether the scope of that arbitration provision
15 encompasses the controversy at issue between Plaintiff and Defendant. It does not.

16 Even assuming the Bond and the Prime Contract “must be read together, as
17 ‘parts of substantially one transaction,’” Def. Reply at 2, citing Cal. Civ. Code § 1642,
18 reading the two documents together does not automatically impose all obligations in the
19 contract on Plaintiff. Specifically, the scope of the arbitration clause—even when read
20 as part of the Bond—is limited to (1) “[a]ll claims and disputes between Contractor and
21 Owner that cannot otherwise be resolved . . .” (emphasis added), and (2) disputes that
22 arise “[i]f a party materially breaches any provision of this Agreement.” Prime Contract,
23 § 22. By its explicit terms, then, there can be no question that the arbitration clause
24 does not extend to the present dispute between the surety and the owner concerning
25 alleged fraud in procuring the Bond. Ultimately, Plaintiff incorporated and adopted
26 through the Bond an agreement requiring two other parties to arbitrate disputes between
27 themselves in the event a party materially breached a provision of that agreement. See
28 id.

1 Defendant cites to Boys Club in support of its position that Plaintiff may be bound
2 to the arbitration agreement, even where the language of that agreement is limited to
3 claims “between Contractor and Owner.” Def’s Mot. at 4, citing 6 Cal. App. 4th at 1270.
4 But Boys Club is distinguishable in at least one important respect. There, the contractor
5 and owner were engaged in an ongoing arbitration concerning a breach, and the plaintiff
6 moved to compel the surety to join that arbitration. Because the arbitration provision
7 explicitly compelled arbitration of claims “between the Contractor and the Owner arising
8 out of, or relating to, the Contract Documents or the breach thereof,” Boys Club, 6 Cal.
9 App. 4th at 1270, the court determined that the parties—including the surety by way of
10 bond—intended that the surety “would join in arbitration of disputes between the parties
11 to the contract in view of the fact that such disputes necessarily affect its liability under
12 the bond.” The surety was therefore compelled to join in the pending arbitration between
13 the contractor and owner. Id. at 1273. That is not the case here where there is no
14 pending dispute between Defendant and TEC concerning the Prime Contract, and Boys
15 Club is therefore inapposite.

16 Lastly, Defendant contends that the matter should be referred to arbitration
17 because any attempt to void the contract as a whole, as opposed to one attacking the
18 specific arbitration provision, must be addressed by an arbitrator. Prima Paint Corp. v.
19 Flood & Conklin Mfg.Co., 388 U.S. 395 (1967); See Def’s Mot. at 5 (“[I]n Nagrampa v.
20 MailCoups, Inc., 469 F.3d 1257, 1264 (9th Cir. 2006) (en banc), . . . [the Ninth Circuit]
21 held that federal courts must refer to arbitration those claims seeking to ‘invalidate or
22 otherwise directly affect the entire contract . . .’”). While an accurate statement of the
23 law, it is not relevant here where there is no question that the scope of the arbitration
24 agreement does not extend to the present dispute. Indeed, it cannot be the case that
25 any challenge to a contract⁷ must be referred to arbitration if the contract contains any

26 ⁷ It should also be noted that although the Court acknowledges that the language of the Prime
27 Contract was incorporated by reference into the Bond, the Court is not convinced that Plaintiff’s claim
28 should be taken as a challenge to the Prime Contract itself. The present suit in no way affects the validity
of the Prime Contract. Indeed, if the Court were to find that the Bond was procured by fraud, such a
finding would only invalidate the Bond, not the underlying contract between Defendant and TEC.

1 form of arbitration clause. If that were the case, there would be no need for the Court to
2 ever consider the scope of the agreement, and a court's inquiry would be limited to
3 whether a valid agreement to arbitrate exists. Consequently, even if the Court accepts
4 that Plaintiff's attempt to void the Bond is the equivalent of an attempt to void the Prime
5 Contract, the scope of the arbitration agreement simply does not reach the present
6 dispute between Plaintiff and Defendant.

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CONCLUSION

For the reasons set forth above, Defendant's Motion to Compel Arbitration, ECF No. 6, is DENIED.

IT IS SO ORDERED.

Dated: September 28, 2017


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE