UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL CIPRIANNI, et al.,

Plaintiffs,

v.

OMNI LA COSTA RESORT & SPA, et al.,

Defendant.

Case No.: 3:16-cv-01002-L-BGS

ORDER GRANTING DEFENDANTS' MOTION [Doc. 32] TO COMPEL ARBITRATION

Pending before this Court is Defendants Omni La Costa Resort & Spa, LLC., Omni Hotels Management Corporation, and LC Investment 2010, LLC's ("Defendants") motion to compel Plaintiffs Michael and Vanessa Cirprianni ("Plaintiffs") to submit their claims to arbitration. The Court decides the matter on the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons stated below, the Court **GRANTS** Defendants' motion.

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I. BACKGROUND

This case arises out of an injury sustained in July 2015 by Plaintiff Michael Ciprianni while using a fitness machine at a fitness facility (the "Resort") owned and operated by Defendants. Plaintiffs joined the Resort in 2009. At that time, Plaintiffs executed an Agreement [Doc. 32–3] that set forth the terms and conditions of membership. Of relevance to the present motion, the Agreement mentioned an arbitration provision, bound Plaintiff to all written membership policies, and contained a change of terms provision reserving to Defendants the right to amend membership policies from time to time. (See Agreement.) In 2011, Defendants modified membership policy by enacting the 2011 Bylaws [Doc. 32–4], which contained an Arbitration Agreement. Defendants sent all Resort members a copy of the 2011 Bylaws and posted them on the member pages of the Resort's website. (Miringoff Decl. [Doc. 32–2] ¶ 5.)

Plaintiffs filed a complaint with the Superior Court of California on March 21, 2016, alleging negligence and premises liability. (See Compl. [Doc. 1–2 Ex. A].) Defendants subsequently removed to this Court and answered. (See Removal Notice [Doc. 1]; Answer [Doc. 7].) Defendants now move to compel arbitration. (See Mot. [Doc. 32].) Plaintiffs oppose, arguing (1) the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") does not govern this dispute; (2) compelling arbitration would be unduly prejudicial; (3) Defendant waived any alleged right to compel arbitration; and (4) the 2011 Arbitration Clause is not valid. (See Opp'n [Doc. 33].) The Court will address these arguments in turn.

II. APPLICABILITY OF THE FEDERAL ARBITRATION ACT

Outside of the maritime context, the FAA governs only if the contract concerns interstate commerce. 9 U.S.C. § 1. Plaintiffs argue that this case does not concern interstate commerce because it involves only a "consumer contract for membership services provide[d] by a resort and spa located in California entered into by Plaintiffs in California and all services were provided in California." (Opp'n 6:27–7:2.)

In enacting the FAA, Congress intended to reach the full range of transactions covered by the Commerce Clause. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). Thus, even if a specific economic activity alone would not affect interstate commerce in a substantial way, it suffices to trigger the interstate commerce jurisdictional hook of the FAA if the aggregate practice of which that economic activity is a part affects interstate commerce. *Id.* at 56–57. Furthermore, if some activity of one of the parties, even if not directly the subject of the contract or transaction at issue, has a nexus to interstate commerce, the FAA applies. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 282 (holding the FAA applied to a local service contract between a homeowner and termite control company because the termite control company was multi-state in nature and used out of state material in performing on the contract).

Applying this broad standard, the Court finds that the contract between the parties involves interstate commerce. Defendants are unquestionably multi-state in nature as they are citizens of Delaware and Texas that offer services nationwide to customers of diverse citizenship. Furthermore, it would seem beyond dispute that Defendants utilize some out of state materials and/or services in the operation of the Resort. Accordingly, the Court finds that the facts of this case trigger the FAA and therefore preempt any conflicting state law. 9 U.S.C. §2; *Volt Information Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

III. UNDUE PREJUDICE

It is undisputed that Defendants Juan Manuel Anaya and San Diego Fitness Services, neither of whom are signatories to the Agreement, are not bound by the Arbitration Agreement. Thus, granting Defendants' motion could require Plaintiffs to litigate their claims against the Omni Defendants in arbitration while litigating their claims against Defendants Juan Manuel Anaya and San Diego Fitness Services before this Court. Plaintiffs contend this would cause them undue prejudice and, for this reason, asks the Court to deny Defendants' motion.

This argument is problematic in that Plaintiffs do not cite to any authority that supports it. Furthermore, it is clearly established law that under the FAA "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). Accordingly, the Court finds that the presence of defendants Juan Manuel Anaya and San Diego Fitness Services cannot defeat this motion to compel arbitration as to the Omni Defendants.

IV. WAIVER

Plaintiffs contend Defendants waived their right to arbitrate by not bringing the instant motion sooner. In support of their argument, Plaintiffs rely entirely on California law. Having decided the FAA governs here, the Court will apply federal law. In the Ninth Circuit, "[t]he party arguing waiver of arbitration bears a heavy burden of proof." *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (internal citations omitted). To carry this burden, the opposing party must show that the other party (1) had knowledge of the right to compel arbitration; (2) acted inconsistently with that right; and (3) resulting prejudice. *Id.*

Plaintiffs argue that Defendants sat on their alleged right to compel arbitration for one year after injury and, as a result, caused Plaintiffs prejudice in the form of incurred legal fees and unintentional evidence spoliation. As an initial matter, the Court disagrees with Plaintiffs' contention that the proper temporal focus is the time elapsed between injury and the filing of a motion to compel. Plaintiffs have not shown that, at time of injury, Defendants knew a lawsuit was forthcoming. Thus, the Court finds the proper focus is the time elapsed between service upon Defendants of the original complaint and the time Defendants first moved to compel arbitration. This period is only about four months (See Summons [Doc. 1-2]; First Mot. to Compel [Doc. 16].)), and during this four months, no substantive motion practice occurred. Accordingly, the Court finds Plaintiffs have failed to make an adequate showing that they were prejudiced in the form

of unnecessary legal fees because of Defendants' delay. Plaintiffs also speculate that, but for this delay, Defendants might not have unintentionally spoiled evidence by losing the Nautilus exercise machine at issue here. (Opp'n 11:3–10.) However, Plaintiffs fail to show that the Nautilus machine has in fact been irretrievably lost and, if so, how any delay in seeking arbitration occasioned this loss.

Thus, the Court is not convinced that Plaintiffs suffered prejudice from any delay in moving to compel arbitration. Nor does the Court find that Defendants' took any actions inconsistent with an intention to arbitrate. Other than move to compel, Defendants have merely removed and answered. Plaintiffs cite no authority, and the Court is unaware of any, holding that removal and answer are inconsistent with an intention to seek enforcement of an arbitration agreement. For these reasons, the Court finds Plaintiffs have failed to carry their "heavy burden" of showing Defendants waived their right to compel arbitration.

V. VALIDITY OF THE ARBITRATION AGREEMENT

An agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under California law, the elements of a valid contract are (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. Cal. Civ. Code § 1550. However, a court will not enforce an otherwise valid contract if there exists a viable defense. 1 Witkin, Summary 10th (2005) Contracts, § 331, p. 365.

Plaintiffs argue the 2011 Arbitration Agreement is invalid because of a lack of notice. Plaintiffs' argument relies entirely on *Badie v. Bank of America*, 67 Cal. App. 4th 779 (1998). In *Badie*, plaintiffs were individuals who opened credit card accounts with defendant Bank of America ("BoA"). *Badie*, 67 Cal. App. 4th at 783. When plaintiffs opened their accounts, they signed account agreements that did not include an arbitration provision. *Id.* at 787. However, the account agreements did contain a change of terms clause that purported to give BoA unilateral authority to change the terms of the account

agreements so long as BoA provided plaintiffs with advance notice. *Id*. at 786–87. BoA subsequently mailed plaintiffs letters announcing a change in terms requiring arbitration of disputes arising out of the account agreements. *Id.* at 785.

Plaintiffs sued to enjoin enforcement of the arbitration provision, arguing that the change of terms provision did not bestow *carte blanche* upon BoA to make any change it wanted provided it gave advance notice. *Badie*, 67 Cal. App. 4th at 783–84. The Court of Appeals agreed. *Id.* at 807. Plaintiffs argue that the instant case is on all fours with *Badie* because, like BoA, Defendants here seek to (1) take advantage of a change of terms provision to (2) modify an existing agreement such that (3) any disputes arising out of the agreement must go to arbitration.

While the Court agrees that there are some similarities between the present action and *Badie*, Plaintiffs' opposition ignores a central distinction. The *Badie* court reasoned that a change of terms provision confers upon a party only the authority to modify a term "whose general subject matter was anticipated when the contract was entered into." *Badie*, 67 Cal. App. 4th at 791. Because the original account agreement contained no mention at all regarding dispute resolution, the Court of Appeals reasoned that an arbitration provision fell outside the reach of the change of terms provision and was not valid as a modification of the original agreement. *Id*. at 795. Here, by contrast, the subject matter of arbitration was undeniably "anticipated when the contract was entered into." Indeed, the 2008 Rules and Regulations [Doc. 32–6] in place when Plaintiffs' joined the Resort included an arbitration agreement, and this arbitration agreement was expressly referenced in the Agreement.

Furthermore, the Agreement indicated assent to (1) the 2008 Rules and Regulations, (2) an arbitration provision, and (3) subsequent amendments to Resort policies. (Agreement.) When Defendants adopted the 2011 Bylaws, they sent a copy to all members and posted them on the members' pages of the Resort's website. (Miringoff Decl. ¶ 5.) Accordingly, the Court finds that the Arbitration Agreement contained in the 2011 Bylaws was effective when Plaintiff sustained his injury in 2015. Under the FAA, a

Court must compel arbitration of claims covered by a valid arbitration agreement. *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Here, there is no dispute as to whether the Arbitration Agreement covers Ciprianni's claim. Accordingly, the Court **GRANTS** Defendants' motion to compel arbitration and dismisses Plaintiffs' Second Amended Complaint as to the moving Defendants.

VI. CONCLUSION AND ORDER

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Compel arbitration and dismisses Plaintiffs' Second Amended Complaint as to the following Defendants only: Omni La Costa Resort & Spa, LLC., Omni Hotels Management Corporation, and LC Investment 2010, LLC.

IT IS SO ORDERED.

Dated: April 6, 2017

Hon. M. James Lorenz
United States District Judge