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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HOWARD APPEL, *et al.*,

Plaintiffs,

v.

CONCIERGE AUCTIONS, LLC, *et al.*,

Defendants.

Case No. 17-cv-02263-BAS-MDD

**ORDER DENYING PLAINTIFFS'
MOTION TO LIFT STAY AND
RECONSIDER ORDER
COMPELLING ARBITRATION
(ECF No. 53)**

Plaintiffs Howard Appel and David Cohen move the Court to lift its stay and reconsider the April 13, 2018, Order Compelling Arbitration. Reconsideration may be appropriate when there is an intervening change in controlling law or newly discovered evidence. Plaintiffs argue this test is met in light of a 2021 Ninth Circuit decision and the arbitration panel's decision to apply New York law to the parties' dispute.

The Court is unconvinced. The Ninth Circuit decision applied a rule that existed before the Court's Arbitration Order. And the arbitration panel's ruling is not newly

1 discovered evidence under the reconsideration standard. Hence, the Court denies
2 Plaintiffs' motion.

3 **I. Background**

4 Plaintiffs seek relief from the Arbitration Order based on a California rule that
5 prohibits the contractual waiver of a party's right to seek public injunctive relief. The
6 Court first summarizes the Arbitration Order and then reviews both the California rule and
7 the Ninth Circuit decisions applying this rule.

8 **A. Arbitration Order**

9 As described in the Arbitration Order, Defendant Concierge advertises itself as a
10 large, high-end real estate company that auctions luxury residential real property. Plaintiffs
11 are real estate investors who participated in Concierge's auctions.

12 Plaintiffs bring claims concerning Concierge's solicitation and auction practices
13 against Concierge and eight related individuals. (First Am. Compl. ("FAC"), ECF No. 12.)
14 These claims include causes of action for violation of California's Unfair Competition Law
15 and False Advertising Law. (*Id.* ¶¶ 78–82, 121–27.) Plaintiffs seek not only restitution,
16 but also "injunctive relief enjoining Concierge from soliciting sellers and/or bidders
17 through false and misleading advertising." (*Id.* 37:13–14, 38:4–5.)

18 In 2018, Concierge moved to compel arbitration based on its form bidder registration
19 agreement ("Bidder Agreement"). (ECF No. 10.) The Bidder Agreement includes a clause
20 that clearly and unmistakably delegates arbitrability to the arbitrator. (Arbitration Order
21 8:18–11:6.)

22 Plaintiffs argued the delegation clause is unconscionable, so the Court considered
23 which jurisdiction's law applies to this enforceability argument. (Arbitration Order 12:7–
24 13:4.) The Bidder Agreement includes a New York choice of law clause. The Court,
25 however, discerned no substantial relationship between New York and the parties or
26 transactions at issue. Further, as Concierge conceded, there is no material difference
27 between California and New York law on the issue of unconscionability. Hence, the Court
28 concluded California law applied to this issue. The Court then rejected Plaintiffs'

1 unconscionability argument, granted the request to compel arbitration, and stayed the
2 remainder of this case pending conclusion of the arbitration. (*Id.* 13:6–22:10.)

3 **B. *McGill* Rule**

4 **1. *McGill v. Citibank, N.A.* (Cal. 2017)**

5 In 2017—before this case started—the California Supreme Court decided that a
6 contractual agreement waiving a party’s right to seek public injunctive relief in any forum
7 is unenforceable. *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). In *McGill*, the court
8 applied California Civil Code section 3513, which provides that “a law established for a
9 public reason cannot be contravened by a private agreement.” Under section 3513, a party
10 may contractually waive a statutory right only if the “statute does not prohibit doing so, the
11 statute’s public benefit is merely incidental to its primary purpose, and waiver does not
12 seriously compromise any public purpose that the statute was intended to serve.” *McGill*,
13 2 Cal. 5th at 961 (cleaned up) (quoting *DeBerard Props., Ltd. v. Lim*, 20 Cal. 4th 659, 669
14 (1999)).

15 The *McGill* court explained that public injunctive relief available under California’s
16 Unfair Competition Law, among other statutes, is “[b]y definition . . . primarily ‘for the
17 benefit of the general public.’” *McGill*, 2 Cal. 5th at 961 (quoting *Broughton v. Cigna*
18 *Healthplans of Cal.*, 21 Cal. 4th 1066, 1082 (1999)). Waiver “of the right to seek public
19 injunctive relief under these statutes would seriously compromise the public purposes the
20 statutes were intended to serve.” *Id.* Therefore, these waivers are “invalid and
21 unenforceable under California law.” *Id.*

22 The contract in *McGill* was an arbitration agreement that waived the plaintiff’s right
23 to seek public injunctive relief in arbitration and required arbitration of all claims. Because
24 the contract waived the plaintiff’s right to seek a public injunction in any forum, the court
25 held the waiver was unenforceable under Civil Code section 3513. *McGill*, 2 Cal. 5th at
26 966–67.

1 **2. *Blair v. Rent-A-Ctr., Inc. (9th Cir. 2019)***

2 The Ninth Circuit first addressed the *McGill* rule in *Blair v. Rent-A-Ctr., Inc.*, 928
3 F.3d 819 (9th Cir. 2019). There, the defendant argued the Federal Arbitration Act preempts
4 the *McGill* rule. *Id.* at 822. The Ninth Circuit was unconvinced. The court explained that
5 “the *McGill* rule is a generally applicable contract defense derived from long-established
6 California public policy. It is a ‘ground[] . . . for the revocation of any contract’ and falls
7 within the FAA’s saving clause[.]” *Id.* at 828 (alterations in original) (quoting 9 U.S.C. §
8 2). Further, the rule does not interfere with arbitration because parties may arbitrate
9 requests for public injunctive relief. *Id.* at 827–29. The Ninth Circuit therefore held “the
10 FAA does not preempt the *McGill* rule.” *Id.* at 831.¹

11 **3. *DiCarlo v. MoneyLion, Inc. (9th Cir. 2021)***

12 More recently, in 2021, the Ninth Circuit again applied what it referred to as “the
13 *McGill* rule”—“California’s legal requirement that contracts allow public injunctive
14 relief.” *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152 (9th Cir. 2021). In *DiCarlo*, the
15 district court compelled arbitration of a putative class action that sought public injunctive
16 relief under California’s Unfair Competition Law, False Advertising Law, and Consumers
17 Legal Remedies Act. *Id.* at 1152. The plaintiff appealed, and the Ninth Circuit rejected
18 her argument that the arbitration agreement violated the *McGill* rule. The court explained
19 that because the agreement authorized the arbitrator to “award all [injunctive] remedies
20 available in an individual lawsuit under [California] law,” it encompassed the public
21 injunctive relief addressed in *McGill* and was enforceable. *Id.* at 1153–58 (alterations in
22 original). The Ninth Circuit also noted that “[o]nly an interpretation that public injunctive
23 relief remains available will render the arbitration provision ‘lawful’ and ‘capable of being
24 carried into effect.’” *Id.* at 1158 (quoting Cal. Civ. Code § 1643).

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¹ Relatedly, in a 2020 unpublished decision, the Ninth Circuit determined a district court did not
28 abuse its discretion by reconsidering a 2016 order compelling arbitration in light of the 2017 *McGill*
decision. *Roberts v. AT&T Mobility LLC*, 801 F. App’x 492, 494 (9th Cir. 2020).

1 Citing *DiCarlo*, Plaintiffs now ask the Court to lift its stay and reconsider the 2018
2 Arbitration Order. (Mot., ECF No. 53.) Concierge opposes. (Opp’n, ECF No. 58.)^{2, 3}

3 **II. Legal Standard**

4 Reconsideration is an “extraordinary remedy.” *Kona Enters., Inc. v. Est. of Bishop*,
5 229 F.3d 877, 890 (9th Cir. 2000). It should be used sparingly in the interests of finality
6 and conserving judicial resources. *Id.*

7 Therefore, “a motion for reconsideration should not be granted, absent highly
8 unusual circumstances, unless the district court is presented with newly discovered
9 evidence, committed clear error, or if there is an intervening change in the controlling law.”
10 *Kona Enters.*, 229 F.3d at 890 (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656,
11 665 (9th Cir. 1999)). A reconsideration motion “may not be used to raise arguments or
12 present evidence for the first time when they could reasonably have been raised earlier in
13 the litigation.” *Id.* (emphasis omitted).

14 **III. Analysis**

15 **A. Intervening Change in Controlling Law**

16 Plaintiffs argue reconsideration is appropriate “due to the intervening change in law
17 that occurred when *DiCarlo* was decided.” (Mot. 18:1–22:21.) The Court is unconvinced.
18 *DiCarlo* was not the first Ninth Circuit decision to address the public injunctive relief issue
19 from *McGill*. See *Blair*, 928 F.3d 819. And the fact that the Ninth Circuit in *DiCarlo*
20 refers to the relevant issue as the “*McGill* rule” belies Plaintiffs’ argument. See 988 F.3d
21 at 1152. *McGill* was decided in April 2017. 2 Cal. 5th 945. Plaintiffs did not raise the
22 *McGill* rule in their opposition to Concierge’s motion to compel arbitration filed in January
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26 ² The Court finds this motion suitable for determination on the papers submitted and without oral
27 argument. See Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1).

28 ³ After their reply, Plaintiffs filed an additional brief in support of their motion without the Court’s
permission. (ECF No. 61.) This brief was not authorized under the Civil Local Rules or this Court’s
Standing Order for Civil Cases. Hence, the Court has not considered it.

1 2018.⁴ (ECF No. 21.) The Court issued its Arbitration Order in April 2018—after *McGill*.
2 So, the relevant rule is not an intervening change in controlling law under the
3 reconsideration standard.

4 Even so, Plaintiffs argue that “[w]hile the Ninth Circuit did apply the *McGill* rule in
5 *Blair*, it did so pre-*DiCarlo* concerning a contract with express terms precluding public
6 injunctive relief.” (Reply 4:27–28.) Plaintiffs further frame *DiCarlo* as having “expanded
7 the *McGill* rule to contracts having the *practical effect* of preventing the parties from
8 obtaining public injunctive relief in the Court and in arbitration.” (*Id.* 8:22–24.) This
9 construction is not convincing. *Blair* applied the same rule. Each new application of the
10 *McGill* rule by the Ninth Circuit is not an intervening change in controlling law. The Court
11 thus concludes reconsideration is not warranted on this basis.

12 **B. Newly Discovered Evidence**

13 Plaintiffs also argue there is “newly discovered or previously unavailable evidence”
14 that supports reconsideration. (Mot. 15:6–17:8.) After the Court’s Arbitration Order, the
15 parties proceeded to arbitration. In December 2020, a three-member arbitration panel
16 determined New York law applies to the parties’ dispute and dismissed Plaintiffs’
17 California statutory claims. (ECF No. 53-3, at Ex. 11.) Plaintiffs claim that this ruling,
18 combined with the *McGill* rule applied in *DiCarlo*, means the arbitration agreement is
19 unenforceable. (Mot. 15:1–17:8.) Therefore, Plaintiffs contend the Court should
20 reconsider the Arbitration Order.

21 Plaintiffs’ argument is not persuasive. Plaintiffs do not point the Court to any Ninth
22 Circuit authority showing an interim arbitration ruling can be used to support
23 reconsideration of an order compelling arbitration. (*See* Mot. 15:6–27.) Rather, Concierge
24 convincingly argues that the relevant “evidence” for determining whether to compel
25 arbitration in 2018 was the parties’ agreement containing the arbitration clause. “Movants
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27 ⁴ Nor do Plaintiffs argue the Court committed clear error by not applying the *McGill* rule to the
28 parties’ arbitration agreement *sua sponte*. But if Plaintiffs had advanced this claim, their argument would
have been neither timely nor supported by a showing of diligence.

1 could have relied on that evidence . . . by making the same . . . argument that they make
2 now—that the parties’ Arbitration Agreement[] contain[s] a New York choice of law
3 [clause] that would deprive them of the right to seek public injunctive relief, making [it]
4 invalid and unenforceable under *McGill*.” (Opp’n 11:17–21.) Plaintiffs made no such
5 argument. And how an arbitration panel might rule down the line is typically not germane
6 to the Court’s decision to compel arbitration. Were the opposite true, parties would
7 frequently return to the district court for reconsideration of orders compelling arbitration
8 based on subsequent arbitration rulings. Hence, the interests of finality and conserving
9 judicial resources do not support reconsideration here. In short, the Court finds there is not
10 newly discovered evidence supporting reconsideration of the Arbitration Order.⁵

11 **IV. Conclusion**

12 For the foregoing reasons, the Court **DENIES** Plaintiffs Howard Appel and David
13 Cohen’s motion to lift the stay and reconsider the April 13, 2018, Order Compelling
14 Arbitration. (ECF No. 53.)

15 **IT IS SO ORDERED.**

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17 **DATED: March 2, 2022**


Hon. Cynthia Bashant
United States District Judge

26 ⁵ Along the same lines, the Court is not persuaded by Plaintiffs’ argument that “highly unusual
27 circumstances” or a “manifest injustice” warrant reconsideration. (See Mot. 14:16–17; 17:9–21.) See
28 also *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001); *Sch. Dist. No. 1J, Multnomah*
Cty., 5 F.3d 1255, 1263 (9th Cir. 1993). The timeline here and unfavorable arbitration ruling do not satisfy
these standards.