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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-2263-BAS-MDD
**ORDER DENYING MOTION
FOR RECONSIDERATION**
[ECF No. 37]

Presently before the Court is Defendant Concierge Auctions, LLC’s Motion for Reconsideration. (“Mot.,” ECF No. 37.) Also before the Court is Plaintiffs Howard Appel and David Cohen’s Opposition to the Motion, (“Opp’n,” ECF No. 42), and Defendant’s Reply in Support of the Motion, (“Reply,” ECF No. 43). The Court finds this Motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the reasons stated below, this Court **DENIES** Defendant’s Motion for Reconsideration.

I. BACKGROUND

The Court provided the relevant factual background to this case in its prior order and does not repeat it here. (*See* “Prior Order,” ECF No. 30, at 2–4.) As to the procedural background, Plaintiffs brought suit against Concierge and eight

1 individuals associated with Concierge in November 2017. (ECF No. 1.) Plaintiffs’
2 First Amended Complaint alleges claims under California’s unfair competition law,
3 Racketeering Influenced and Corrupt Organizations Act (“RICO”), and state tort
4 claims. (ECF No. 12.) Concierge filed a motion to compel arbitration due to an
5 arbitration clause in the parties’ agreement. (ECF No. 10.) In its motion, Concierge
6 requested the Court compel arbitration in New York, or in the alternative, transfer
7 the case to New York pursuant to a forum selection clause in the parties’ agreement.
8 (*Id.*) On April 13, 2018, the Court granted Concierge’s motion to compel arbitration
9 and ordered the parties to proceed to arbitration. (Prior Order 21.) Citing *Continental*
10 *Grain Co. v. Dant & Russell*, 118 F.2d 967 (9th Cir. 1941), the Court ordered
11 arbitration to proceed in the Southern District of California. (*Id.*) The Court
12 recognized the parties had designated New York as the arbitration venue in their
13 agreement, but the Court found it cannot compel arbitration outside its district.¹

14 On May 21, 2018, Plaintiffs filed an ex parte motion. (ECF No. 31.) Plaintiffs
15 informed the Court that Concierge had filed an arbitration demand in New York,
16 requested the American Arbitration Association (“AAA”) consolidate the California
17 arbitration with the New York arbitration, and that Concierge represented to AAA
18 that the individual Defendants in the case were not subject to the arbitration
19 agreement. (*Id.* at 2–3.) Plaintiffs requested the Court lift the stay as to Plaintiffs’
20 claims against the individual Defendants and order Concierge to withdraw the New
21 York arbitration. Concierge filed a response to the ex parte motion on May 23, 2018.
22 (ECF No. 32.) On June 14, 2018, the Court denied the ex parte motion. (ECF No.
23 36.) The Court noted that AAA had consolidated the arbitration proceedings in
24 California, thus, Plaintiffs’ request that the Court do so was moot. (*Id.* at 2.) The
25 Court also clarified that the stay in the case “relates to all claims asserted by Plaintiffs
26

27 ¹ Because Concierge’s request to transfer venue was brought in the alternative to its request to
28 compel arbitration, the Court did not address the transfer request in its order after granting the
motion to compel arbitration.

1 against Concierge and the Individual Defendants.” (*Id.* at 3.) On June 27, 2018,
2 Concierge filed the present Motion for Reconsideration.

3 In sum, Concierge requests the Court reconsider its April 13, 2018 order
4 because of a change in controlling law due to the recent Supreme Court’s case *Epic*
5 *Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). In the alternative, Concierge requests
6 the Court certify its prior order for interlocutory appeal or stay the pending arbitration
7 proceedings.

8 **II. LEGAL STANDARD**

9 District courts have the authority to entertain motions for reconsideration of
10 interlocutory orders at any time before the entry of final judgment. *See* Fed. R. Civ.
11 P. 59(e); *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996); *Balla v. Idaho State*
12 *Bd. of Corr.*, 869 F.2d 461, 465 (9th Cir. 1989). To determine the merits of a request
13 to reconsider an interlocutory order, courts apply the standard required under a Rule
14 59(e) reconsideration motion. *See Hydranautics v. FilmTec Corp.*, 306 F. Supp. 2d
15 958, 968 (S.D. Cal. 2003). Reconsideration is appropriate under Federal Rule of
16 Civil Procedure 59(e) if: (1) the district court “is presented with newly discovered
17 evidence,” (2) the district court “committed clear error or the initial decision was
18 manifestly unjust,” or (3) “there is an intervening change in controlling law.” *Sch.*
19 *Dist. No. 1J, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see*
20 *also Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

21 **III. MOTION FOR RECONSIDERATION**

22 Before addressing the merits of Concierge’s Motion, the Court addresses
23 Plaintiffs’ timeliness argument.

24 **A. Timeliness**

25 Under this District’s local rules, “[e]xcept as may be allowed under Rules 59
26 and 60 of the Federal Rules of Civil Procedure, any motion or application for
27 reconsideration must be filed within twenty-eight (28) days after the entry of the
28 ruling, order or judgment sought to be reconsidered.” Civ. L. R. 7.1(i)(2). Here, the

1 order Concierge requests be reconsidered was issued on April 13, 2018. The
2 Supreme Court issued *Epic Systems* on May 21, 2018. On May 23, 2018, when
3 Concierge filed its response to Plaintiffs’ ex parte motion, it included a footnote
4 arguing *Epic Systems* “calls into question the continuing validity of the *Continental*
5 *Grain* rule.” (ECF No. 32, at 3 n.7.) Concierge did not elaborate on this brief
6 argument, and the Court did not discuss *Epic Systems* in its order on Plaintiffs’ ex
7 parte motion. Concierge filed the present Motion on June 27, 2018.

8 Concierge is requesting the Court reconsider its April 13, 2018 order because
9 of a case that was issued on May 21, 2018. There is no doubt Concierge was aware
10 of *Epic Systems* on at least May 23, 2018, when it filed its response that referenced
11 the case. Twenty-eight days from the date of issue of *Epic Systems* is June 11, 2018,
12 but Concierge did not file its Motion for Reconsideration until June 27, 2018. Under
13 the strict letter of the local rules, the Motion for Reconsideration is untimely.
14 Concierge appears to recognize this, but argues “a court’s inherent power to
15 reconsider interlocutory orders exists independently of local rules.” (Reply 7.) The
16 Ninth Circuit has held “[a]s long as a district court has jurisdiction over the case, then
17 it possesses the inherent procedural power to reconsider, rescind, or modify an
18 interlocutory order for cause seen by it to be sufficient.” *City of Los Angeles, Harbor*
19 *Div. v. Santa Monica Baykeeper*, 254 F.3d 882 (9th Cir. 2001) (internal quotation
20 omitted) (emphasis omitted). Indeed, Concierge points to a case where a Court in
21 this district analyzed the merits of a clearly untimely motion for reconsideration. *See*
22 *Jones v. Bank of Am., N.A.*, No. 11-1161-JM(WVG), 2012 WL 1286924, at *2 (S.D.
23 Cal. Oct. 10, 2012) (“[T]he time limitations set forth in local rules do not affect a
24 court’s power to correct or modify its previous rulings *sua sponte* at any time prior
25 to judgment.”). Because the Court prefers a ruling on the merits of a motion to a
26 denial for procedural reasons, the Court will consider Concierge’s Motion.²

27

28 ² Plaintiffs further argue Concierge’s Motion procedurally fails because Concierge’s counsel did not comply with this Court’s Standing Order Section 5(A). (Opp’n 3). The Court assumes

1 **B. Epic Systems Corp. v. Lewis**

2 Defendant argues *Epic Systems* has overruled *Continental Grain*. *Epic*
3 *Systems* involved three similar, consolidated cases. 138 S.Ct at 1619. In each case,
4 an employee and his employer entered into an agreement wherein they agreed to
5 arbitrate any disputes. The employees filed suit and objected to the arbitration
6 agreements because the agreements required individualized arbitration proceedings
7 instead of class or collective ones. The employees argued the agreements were not
8 enforceable and pointed to the Arbitration Act’s “saving clause” which allows courts
9 to refuse to enforce arbitration agreements “upon such grounds as exist at law or in
10 equity for the revocation of any contract.” *Id.* at 1623 (citing 9 U.S.C. § 2). The
11 employees argued the saving clause removes the obligation to enforce arbitration
12 agreements if the agreement violates a federal law. *Id.* at 620.

13 In one of the cases, the Ninth Circuit agreed with the employee. It held “an
14 agreement requiring individualized arbitration proceedings violates the [National
15 Labor Relations Act] by barring employees from engaging in the ‘concerted
16 activit[y],’ . . . of pursuing claims as a class or collective action.” *Id.* at 1620 (quoting
17 29 U.S.C. § 157). It found the arbitration agreement violate a federal law, and
18 therefore, the district court erred in compelling arbitration.

19 _____
20 Plaintiffs intend to refer to Section 4(A) because they argue Concierge did not “confer over every
21 issue to be raised” in its Motion in the parties’ meet and confer session. (*Id.* at 11.) Plaintiffs argue
22 Concierge did not discuss the alternative requests presented in its Motion. The Court’s standing
23 order requires the parties discuss “the substance of the contemplated motion” and while Concierge
24 is correct that “substance” is not defined, the Court encourages this to be an exhaustive conversation
25 wherein the moving party discusses all requests it intends to assert in its proposed motion. This
26 serves the purpose of the order and the Court cautions the parties to comply with this in the future.

27 Plaintiffs also argue Concierge failed to set forth the “new or different facts and
28 circumstances [] claimed to exist which did not exist, or were not shown, upon such prior
application” in a supporting declaration. (*Id.* at 3 (quoting Civ. L.R. 7.1(i)(1)).) The Court
disagrees. Concierge attached to its Motion a declaration of attorney Derek Wallen. (ECF No. 37-
2.) This declaration, although extremely vaguely, references the Supreme Court case *Epic Systems*,
which Concierge asserts to be the “new circumstance” and basis behind its Motion for
Reconsideration. In sum, the Court will not deny Concierge’s motion due to these alleged
procedural deficiencies.

1 In analyzing the three cases, the Supreme Court noted the “liberal federal
2 policy favoring arbitration agreements.” *Id.* at 1621 (quoting *Moses H. Cone*
3 *Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court
4 noted “[n]ot only did Congress require courts to respect and enforce agreements to
5 arbitrate; it also specifically directed them to respect and enforce the parties’ chosen
6 arbitration procedures.” *Id.* The Arbitration Act “requires courts ‘rigorously’ to
7 ‘enforce arbitration agreements according to their terms, including terms that specify
8 *with whom* the parties choose to arbitrate their disputes and *the rules* under which
9 that arbitration will be conducted.” *Id.* (quoting *Am. Express Co. v. Italian Colors*
10 *Restaurant*, 570 U.S. 228, 233 (2013)). The saving clause “allows courts to refuse
11 to enforce arbitration agreements ‘upon such grounds as exist at law or in equity for
12 the revocation of any contract.’” *Id.* (quoting 9 U.S.C. § 2). But the Court held an
13 arbitration agreement requiring individualized proceedings was not one of those
14 grounds, and “Congress has instructed that arbitration agreements like those before
15 us must be enforced as written.” *Id.* at 1632. Arbitration agreements providing for
16 individualized proceedings must be enforced and the saving clause does not provide
17 otherwise. *Id.*

18 Broadly, this Court understands Concierge’s argument that *Epic Systems*
19 supports Concierge’s position. The Supreme Court noted the Arbitration Act directs
20 the courts “to respect and enforce the parties’ chosen arbitration procedures.” *Epic*
21 *Sys.*, 138 S.Ct at 1621. On the other hand, the Ninth Circuit in *Continental Grain*
22 disallows courts from ordering arbitration in any venue outside its district. 118 F.2d
23 at 968–69. Arbitration may be compelled in the district where the plaintiff chooses
24 to file suit, regardless of a forum selection clause. *Id.*

25 The Court finds *Epic Systems* is not a “change in the law” in any area relevant
26 to the Court’s prior order in this case. Concierge incorrectly states that after *Epic*
27 *Systems*, “District Courts in the Ninth Circuit must now enforce parties’ arbitration
28 agreements ‘as written.’” (Mot. 15 (quoting *Epic Sys.*, 138 S.Ct at 1620).) This is

1 not a new holding from *Epic Systems* but is an interpretation of part of the Arbitration
2 Act. *See* 9 U.S.C. § 4 (“[U]pon being satisfied that the making of the agreement for
3 arbitration or the failure to comply therewith is not in issue, the court shall make an
4 order directing the parties to proceed to arbitration in accordance with the terms of
5 the agreement.” (emphasis added)). *But see id.* (“The hearing and proceedings, under
6 such agreement, shall be within the district in which the petition for an order directing
7 such arbitration is filed.” (emphasis added)). In interpreting section 4, the Ninth
8 Circuit in *Concierge* determined the venue provision in an arbitration agreement may
9 be disregarded. *See also Textile Unlimited, Inc. v. A. BMH & Co., Inc.*, 240 F.3d
10 781, 785 (9th Cir. 2001 (holding “§ 4 only confines the *arbitration* to the district in
11 which the petition to compel is filed. It does not require that the petition be filed
12 where the contract specified that arbitration should occur.” (citing *Continental Grain*,
13 118 F.2d at 969)). This has not changed and nothing in *Epic Systems* overrules any
14 part of *Continental Grain*, which, as the Court has noted, is the “law of this circuit.”
15 (Prior Order 20.) Accordingly, the Court **DENIES** Concierge’s Motion for
16 Reconsideration.

17 **IV. MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL**

18 Concierge argues if the Court does not grant its motion for reconsideration, it
19 should certify its April 13, 2018 order for interlocutory appeal. (Mot. 18.) Except
20 as provided in 28 U.S.C. § 1292(b), “an appeal may not be taken from an
21 interlocutory order . . . granting arbitration to proceed” under 9 U.S.C. § 4. Thus,
22 Concierge makes its request pursuant to 28 U.S.C. § 1292(b) which provides

23 [w]hen a district judge, in making in a civil action an order
24 not otherwise appealable under this section, shall be of the
25 opinion that such order involves a controlling question of
26 law as to which there is substantial ground for difference
27 of opinion and that an immediate appeal from the order
may materially advance the ultimate termination of the
litigation, he shall so state in writing in such order.

28 28 U.S.C. § 1292(b). The Ninth Circuit cautions that district courts should only

1 certify an interlocutory appeal in “rare circumstances” because “[s]ection 1292(b) is
2 a departure from the normal rule that only final judgments are appealable, and
3 therefore must be construed narrowly.” *James v. Price Stern Sloan, Inc.*, 283 F.3d
4 1064, 1067 n.6 (9th Cir. 2002). Thus, certification pursuant to section 1292(b) is
5 appropriate “only in exceptional situations.” *In re Cement Antitrust Litig.*, 673 F.2d
6 1020, 1026 (9th Cir. 1982) (citing *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th
7 Cir. 1966) (per curiam); & *Milbert v. Bison Labs.*, 260 F.2d 431, 433–35 (3d Cir.
8 1958)). The party seeking the interlocutory appeal bears the burden of establishing
9 that the requirements for certification are met. *Couch v. Telescope Inc.*, 611 F.3d
10 629, 633 (9th Cir. 2010).³

11 The Court finds Plaintiffs have not proven the requirements of 28 U.S.C. §
12 1292(b), particularly that certification would “materially advance the ultimate
13 termination of litigation.” Certification “materially advances the ultimate
14 termination of the litigation” when “allowing an interlocutory appeal would avoid
15 protracted and expensive litigation,” saving both the court and the parties
16 “unnecessary trouble and expense.” *Hawaii ex rel. Louie v. JP Morgan Chase & Co.*,
17 921 F. Supp. 2d. 1059, 1067 (D. Haw. 2013) (quoting *United States v. Adam Bros.*
18 *Farming, Inc.*, 369 F. Supp. 2d 1180, 1182 (C.D. Cal. 2004) & *In re Cement Antitrust*
19 *Litig.*, 673 F.2d at 1026). Here, proceeding to arbitration, rather than certification of
20 interlocutory appeal, will advance the termination of this litigation. Certification of
21 the Court’s April 13, 2018 order for appeal would delay, rather than advance, the
22

23 ³ Further, 28 U.S.C. § 1292(b) provides the Court of Appeals may permit an appeal to be taken
24 from the order “if application is made to it within ten days after the entry of the order.” Plaintiffs
25 argue Concierge’s application is untimely under this provision because the application was filed
26 more than ten days after the Court’s April 13, 2018 order. Plaintiffs misread the statute. If a district
27 court issues certification under 28 U.S.C. § 1292(b), then a party may petition the appellate court
28 for leave to appeal. That application “must be made within ten days of the entry of the order
certifying the underlying order for appeal.” *In re Benny*, 791 F.2d 712, 719 (9th Cir. 1986) (citing
28 U.S.C. § 1292(b)). This does not require the motion for interlocutory appeal be made at any
specific time.

1 termination of this case because it would “require the parties to undertake
 2 proceedings at the appellate level before any arbitration could take place.”
 3 *Kaltwasser v. AT&T Mobility, LLC*, No. C 07-411 JW, 2011 WL 5417085, at *2
 4 (N.D. Cal. Nov. 8, 2011) (citing *Owner–Operator Indep. Drivers Ass’n, Inc. v. Swift*
 5 *Trans. Co.*, No. CV 02-1059-PHX, PGR, 2004 WL 5376210, at *1 (D. Ariz. July 28,
 6 2004) (declining to certify an order compelling arbitration for interlocutory appeal,
 7 in part because “the appeal process would realistically take far longer than would the
 8 arbitration process, an interlocutory appellate ruling . . . would only prolong the
 9 termination” of the case)). For the foregoing reasons, Concierge’s motion for
 10 certification of interlocutory appeal is **DENIED**.

11 **V. MOTION TO STAY**

12 Concierge argues if the Court does not direct arbitration in New York, it
 13 “should stay the AAA’s arbitration proceedings so that Concierge can either obtain
 14 an order directing arbitration from a District Court in New York or pursue an
 15 interlocutory appeal.” (Mot. 21.)⁴ The Court finds no reason to stay arbitration
 16 proceedings that it has compelled so that Concierge can file a case in federal court in
 17 New York. *See Rocky Mtn. Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F.
 18 Supp. 2d 1187, 1197 (D. Mont. 2013) (“Absent from the Federal Arbitration Act is
 19 any mechanism whereby a Court can stay arbitration pending resolution of related
 20 litigation.”)⁵ The Court **DENIES** this request.

21 **VI. CONCLUSION**

22 For the foregoing reasons, the Court **DENIES** Concierge’s Motion. (ECF No.
 23


24 ⁴ Given the Court has declined to certify its April 13 order for interlocutory appeal in this Order, it
 25 appears Concierge’s remaining request is for the Court to stay arbitration proceedings so Concierge
 26 can file a separate case in New York. Concierge does not explain how that hypothetical case would
 be viable given the present case.

27 ⁵ Concierge cites *Morgan Stanley and Co. LLC v. Couch*, 659 F. App’x 402 (9th Cir. 2016) in
 28 support of its request to stay. In that case, the Ninth Circuit analyzed a request to enjoin arbitration
 proceedings, and the reasoning is inapplicable here. Concierge is not requesting the Court enter an
 injunction.

1 37.) The Parties are to proceed to arbitration as per the Court’s prior orders, (ECF
2 Nos. 30, 36). This case remains stayed and administratively closed. (See ECF No.
3 30, at 21–22.)

4 **IT IS SO ORDERED.**

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6 **DATED: October 1, 2018**

7 
8 **Hon. Cynthia Bashant**
9 **United States District Judge**

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