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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JEFFREY CUENCO and LINDA HONG,  
12 individually and on behalf of all others  
13 similarly situated,

14 Plaintiffs,

15 v.

16 CLUBCORP USA, INC., CLUBCORP  
17 HOLDINGS, INC., CCA CLUB  
18 OPERATIONS HOLDINGS, LLC,  
19 CLUBCORP CLUB OPERATIONS,  
20 INC., CLUBCORP SYMPHONY  
21 TOWERS CLUB, INC., CLUBCORP  
22 SAN JOSE CLUB, INC., and DOES 1 to  
23 10, inclusive,

24 Defendants.

Case No.: 20cv774 DMS (AHG)

**ORDER DENYING WITHOUT  
PREJUDICE DEFENDANTS' (1)  
MOTION TO COMPEL  
ARBITRATION, AND DISMISS OR  
STAY, (2) MOTION TO DISMISS,  
AND (3) MOTION TO STRIKE**

25 On January 4, 2021, this case was reassigned to the undersigned judge. At that time,  
26 there were three fully-briefed motions pending before the Court: (1) a motion to dismiss,  
27 (2) a motion to strike, and (3) a motion to compel arbitration. This Court has now reviewed  
28 the motions, and denies them without prejudice for the reasons set out below.

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I.

**BACKGROUND**

On December 27, 2018, Plaintiff Jeffrey Cuenco submitted an application for membership to the University Club atop Symphony Towers (“University Club”) in San Diego, California, through the DocuSign platform.<sup>1</sup> (Decl. of Brian Lee in Supp. of Mot. (“Lee Decl.”) ¶9, Ex. 3.) The final section of the application includes a heading entitled, “Membership Policies,” which states:

If accepted into membership, I/we agree to conform to and be bound by the enrollment terms contained herein, the Bylaws, the Rules and Regulations, and written membership policies of the Club (‘Membership Documents’) as they may be amended from time to time. ... I/We hereby acknowledge receipt of a copy of the Bylaws and the Rules and Regulations of the Club.

(Lee Decl., Ex. 3.) The application goes on to state:

**I/WE ACKNOWLEDGE THE MEMBERSHIP BYLAWS AND THE RULES AND REGULATIONS PROVIDE THE DETAILS OF THE CLUB’S MEMBERSHIP POLICIES, CONDUCT AND OBLIGATIONS, INCLUDING, BUT NOT LIMITED TO, PROVISIONS IN THE EVENT OF DIVORCE, FOR ARBITRATION OF DISPUTES, RESIGNATION, REDEMPTION OF MEMBERSHIPS, FINANCIAL OBLIGATIONS, DISCIPLINARY ACTION, RELEASE OF LIABILITY FOR PERSONAL INJURY AND THEFT. I/WE HEREBY FULLY RELEASE AND DISCHARGE THE CLUB, ITS EMPLOYEES, AGENTS, SHAREHOLDERS, MEMBERS, MANAGERS, AFFILIATES AND ASSIGNS FROM ANY LIABILITY, INJURY, LOSS, DAMAGE OR CLAIM ARISING FROM MY/OUR USE OF THE CLUB FACILITIES.**

(*Id.*) Mr. Cuenco’s application for membership was approved, and he thereafter began paying monthly dues in the amount of \$169. (Compl. ¶10.)

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<sup>1</sup> According to Defendants, “DocuSign is a recognized Cloud platform that allows organizations to manage electronic agreements by allowing e-signatures to be captured and transferred on documents, sent and received via email.” (Mem. of P. & A. in Supp. of Mot. at 8 n.3.)

1 On November 14, 2019, Plaintiff Linda Hong applied for membership in the Silicon  
2 Valley Capital Club (“SV Club”) through the Club’s website. (Decl. of Dani Bongatti in  
3 Supp. of Mot. (“Bongatti Decl.”) ¶8.) According to screen shots of the application process,  
4 there is a screen with a heading, “Terms & Conditions,” under which states: “By checking  
5 this box and clicking the ‘Next’ button at the bottom of this page, you agree to be bound  
6 by all of the terms and conditions related to the Membership Information, Membership  
7 Policies, and privacy policies.” (Bongatti Decl., Ex. 5.) Ms. Bongatti states the underlined  
8 phrases are hyperlinks, and that applicants must check the box stating “I Accept” before  
9 proceeding to the next page. (Bongatti Decl. ¶5.) However, it is unclear whether the  
10 applicant must click through all of the hyperlinks or may simply check the “I Accept” box  
11 on the “Terms & Conditions” screen. Assuming Ms. Hong clicked on the hyperlink for  
12 “Membership Policies,” that page states, similar to Mr. Cuenco’s membership application:  
13 “I/We agree that if accepted into Membership, I/we agree to conform to and be bound by  
14 the enrollment terms, the Membership Bylaws, the Rules and Regulations, and written  
15 Membership policies of the Club as they may be amended from time to time.” (Bongatti  
16 Decl., Ex. 5.) It also states:

17 I/WE ACKNOWLEDGE THE MEMBERSHIP BYLAWS AND THE  
18 RULES AND REGULATIONS PROVIDE THE DETAILS OF THE  
19 CLUB’S MEMBERSHIP POLICIES, CONDUCT AND OBLIGATIONS,  
20 INCLUDING, BUT NOT LIMITED TO, PROVISIONS IN THE EVENT OF  
21 DIVORCE, FOR ARBITRATION OF DISPUTES, RESIGNATION,  
22 REDEMPTION OF MEMBERSHIPS, FINANCIAL OBLIGATIONS,  
23 DISCIPLINARY ACTION, RELEASE OF LIABILITY FOR PERSONAL  
24 INJURY AND THEFT. **I/WE HEREBY FULLY RELEASE AND**  
25 **DISCHARGE THE CLUB, ITS EMPLOYEES, AGENTS,**  
**SHAREHOLDERS, MEMBERS, MANAGERS, AFFILIATES AND**  
**ASSIGNS FROM ANY LIABILITY, INJURY, LOSS, DAMAGE OR**  
**CLAIM ARISING FROM MY/OUR USE OF THE CLUB FACILITIES.**

26 (*Id.*) Ms. Hong was accepted into the Club on November 15, 2019, and thereafter began  
27 paying monthly dues in the amount of \$199.75. (*Id.*)

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1 Plaintiffs allege that in March 2020, both the University Club and the SV Club were  
2 closed due to the COVID-19 pandemic. (First Am. Compl. (“FAC”) ¶¶ 4-5.) Despite those  
3 closures, Plaintiffs were still charged their monthly dues.

4 As a result, Mr. Cuenco filed the present case on behalf of himself and all others  
5 similarly situated. In his original Complaint, he named ClubCorp USA, Inc. as the sole  
6 Defendant, and alleged that it was “the operator of more than 20 private clubs nationwide,  
7 including private clubs in California.” (Compl. ¶11.) Mr. Cuenco alleged claims for  
8 violation of California’s Consumer Legal Remedies Act, violation of California’s Unfair  
9 Competition Law, violation of California’s False Advertising Law, breach of contract,  
10 unjust enrichment, and money had and received. In response to the original Complaint,  
11 ClubCorp filed a motion to compel arbitration and a motion to dismiss. Mr. Cuenco then  
12 filed a First Amended Complaint, adding Ms. Hong as a Plaintiff and adding as Defendants  
13 ClubCorp Holdings, Inc., CCA Club Operations Holdings, LLC, ClubCorps Club  
14 Operations, Inc., ClubCorp Symphony Towers Club, Inc. d/b/a University Club atop  
15 Symphony Towers, and ClubCorp San Jose Club, Inc. d/b/a Silicon Valley Capital Club.  
16 The FAC also includes additional claims for breach of express warranty and conversion.<sup>2</sup>  
17 In response to the FAC, Defendants filed the present motions.

## 18 II.

### 19 MOTION TO COMPEL ARBITRATION

20 Defendants move to compel arbitration of Plaintiffs’ claims pursuant to the Bylaws  
21 of each Plaintiff’s respective Club, which Defendants argue are incorporated by reference  
22 in each Plaintiff’s membership application. (Mem. of P. & A. in Supp. of Mot. at 8, 11.)  
23 Plaintiffs do not dispute that they submitted membership applications to the Clubs, but do  
24 dispute whether the Club Bylaws were incorporated therein, and thus whether there exist  
25 arbitration agreements between the parties.

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28 <sup>2</sup> The Court notes Plaintiffs withdrew their breach of express warranty claim in their  
opposition to Defendants’ motion to dismiss. (*See* ECF No. 30 at 1 n.1.)

1 The FAA governs the enforcement of arbitration agreements involving interstate  
2 commerce. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232–33 (2013). “The  
3 overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements  
4 according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility LLC*  
5 *v. Concepcion*, 563 U.S. 333, 344 (2011). “The FAA ‘leaves no place for the exercise of  
6 discretion by the district court, but instead mandates that district courts *shall* direct the  
7 parties to proceed to arbitration on issues as to which an arbitration agreement has been  
8 signed.” *Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (quoting  
9 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)) (emphasis in original).

10 Consistent with these principles, the Court’s role under the FAA is to determine “(1)  
11 whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement  
12 encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d  
13 1126, 1130 (9th Cir. 2000). In this case, the parties dispute whether there is an agreement  
14 to arbitrate, therefore the Court turns first to that issue.

15 “Under California law, the party seeking to compel arbitration has the burden of  
16 proving ... by a preponderance of the evidence” the existence of an agreement to arbitrate.  
17 *Newton v. Am. Debt Servs., Inc.*, 854 F.Supp.2d 712, 721 (N.D. Cal. 2012) (citing  
18 *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 413 (1996)). Here, Defendants  
19 assert the parties’ agreements to arbitrate are found in Section 7.5 of the Clubs’ Bylaws.<sup>3</sup>

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22 <sup>3</sup> Section 7.5 of the University Club Bylaws states: “Any controversy (other than collection  
23 cases brought by the Owner against a Member for nonpayment of dues, charges and  
24 accounts and disciplinary matters for which a decision has not been rendered by the Club)  
25 arising out of, or relating in any way to these Bylaws, or the Rules and Regulations, or  
26 any Member’s membership shall be settled by binding arbitration administered  
27 by an arbitrator selected by the American Arbitration Association (the  
28 “Arbitrator”), in accordance with its rules. A judgment upon an award rendered by the  
Arbitrator may be entered in any court having jurisdiction. The initiating party shall give  
written notice to the other party of its decision to arbitrate by providing a specific  
statement setting forth the nature of the dispute, the amount involved, the remedy sought,  
and the hearing locale requested. The initiating party shall be responsible for all filing

1 Defendants contend Plaintiffs assented to these agreements when they submitted their  
2 applications for membership in their respective Clubs. In support of this contention,  
3 Defendants cite the applications themselves, wherein Plaintiffs agreed “to conform to and  
4 be bound by the enrollment terms contained herein, the Bylaws, the Rules and Regulations,  
5 and written membership policies of the Club (‘Membership Documents’) as they may be  
6 amended from time to time.” (Lee Decl., Ex. 1.) Defendants also cite the following  
7 paragraph of the membership application, which states:

8 I/WE ACKNOWLEDGE THE MEMBERSHIP BYLAWS AND THE  
9 RULES AND REGULATIONS PROVIDE THE DETAILS OF THE  
10 CLUB’S MEMBERSHIP POLICIES, CONDUCT AND OBLIGATIONS,  
11 INCLUDING, BUT NOT LIMITED TO, PROVISIONS IN THE EVENT OF  
12 DIVORCE, FOR ARBITRATION OF DISPUTES, RESIGNATION,  
13 REDEMPTION OF MEMBERSHIPS, FINANCIAL OBLIGATIONS,

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14 requirements and the payment of any and all fees according to the rules of the Arbitrator.  
15 The Arbitrator shall award to the prevailing party, if any, as determined by the Arbitrator,  
16 all of its costs and expenses including reasonable attorney’s fees, Arbitrator’s fees, and  
17 out-of-pocket expenses of any kind. The Owner and Member agree that the Arbitrator  
18 cannot award more than the Initiation Payment paid for the membership pursuant to  
19 the Member’s Candidate Application, and in no event shall the Owner or the Club be liable  
20 for any incidental, indirect, speculative, special, consequential, punitive, or exemplary  
21 damages of any kind. The parties agree to waive any right to trial by jury as well as any  
22 rights to appeal the final arbitration finding (but not the waiver of any rights to make  
23 interlocutory appeals with respect to any preliminary or procedural arbitration  
24 findings). The arbitration shall be limited solely to the dispute or controversy between  
25 the Member, the Owner and the Club, except that affiliates of the Owner and the  
26 Club may also participate at the sole election of the Owner and the Club. Member  
27 cannot act as a class representative, a private attorney general or in any representative  
28 capacity, or participate as a member of a class with respect to claims that are subject to  
arbitration hereunder. Should any Member, Member’s spouse, Spousal Equivalent or  
Spousal Designee, or children (or representative for any children) fail to abide  
by the jurisdictional forums provided for in this Section and institute a lawsuit or  
action against or involving the Club or the Owner, the Member’s membership may  
be terminated, and the Member’s transferability rights, if any, shall be forfeited.” (Lee  
Decl., Ex. 2.) Section 7.5 of the SV Club Bylaws contains a similar provision. (Bongatti  
Decl., Ex. 10.)

1 DISCIPLINARY ACTION, RELEASE OF LIABILITY FOR PERSONAL  
2 INJURY AND THEFT.

3 (*Id.*) Defendants argue that by these two provisions, the membership applications  
4 “incorporated by reference” the Clubs’ respective Bylaws, (Mem. of P. & A. in Supp. of  
5 Mot. at 8), thereby demonstrating the existence of valid agreements to arbitrate.

6 “Under California law, parties to an agreement can incorporate the terms of another  
7 document into the agreement by reference.” *Pulido v. Caremore Health Plan, Inc.*, No.  
8 CV2002730ABAFMX, 2020 WL 5077353, at \*4 (C.D. Cal. May 12, 2020) (quoting *Ko v.*  
9 *Anthem Companies, Inc.*, No. SACV 19-2436 JVS (DFMx), 2020 WL 1467336, at \*5 (C.D.  
10 Cal. Mar. 26, 2020)).

11 “For the terms of another document to be incorporated into the document  
12 executed by the parties, the reference must be clear and unequivocal, the  
13 reference must be called to the attention of the other party and he must consent  
14 thereto, and the terms of the incorporated document must be known or easily  
available to the contracting parties.”

15 *Id.* (quoting *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997)).

16 Here, Plaintiffs argue that last element is not met. Specifically, they assert the terms  
17 of the Bylaws were neither known nor easily available to either Plaintiff when they  
18 submitted their applications. Defendants respond that the Bylaws were available to each  
19 Plaintiff, and that Plaintiff Cuenco, in particular, acknowledged receipt of the Bylaws in  
20 his membership application.

21 “Whether a document purportedly incorporated by reference was ‘readily available’  
22 is a question of fact.” *Baker v. Osborne Dev. Corp.*, 159 Cal. App. 4th 884, 895 (2008)  
23 (quoting *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 644-45 (1986)).  
24 Here, the facts are in dispute. Defendants’ Declarants, Mr. Lee and Ms. Bongatti, both  
25 state “[i]ndividuals have access to the Bylaws online and may ask for a copy via mail or  
26 email”, (Lee Decl. ¶6; Bongatti Decl. ¶12), but neither provides any direct evidence that  
27 Defendants provided a copy of the Bylaws to Plaintiffs via mail or email. It is also unclear  
28 whether either Plaintiff had access to the Bylaws online before their membership

1 applications were approved. Indeed, Mr. Lee suggests Plaintiff Cuenco only had access to  
2 the Bylaws after he was accepted for membership in the Club. (Lee Decl. ¶7) (stating  
3 Cuenco was accepted for admission to the Club on June 13, 2017, and “[t]hereafter, [he]  
4 had continuous access to the Bylaws.”) (emphasis added). That would be consistent with  
5 Plaintiff Cuenco’s statement that he did not receive a copy of the Bylaws when he  
6 submitted his application, and that he had to log in to his private online membership portal  
7 to access the Club’s Bylaws. (Cuenco Decl. ¶7.) Defendants do not dispute that  
8 individuals may access the Club Bylaws through the membership portal, (see Reply at 6)  
9 (stating Plaintiff Cuenco “retrieved a copy of the Bylaws *from the member portal*”)  
10 (emphasis added), but this, of course, assumes the individual has been accepted for  
11 membership. It does not address whether or how an *applicant* for admission would gain  
12 access to the Bylaws.

13 On this evidence, there is a factual dispute about whether the Bylaws were readily  
14 available to Plaintiffs when they submitted their applications, and hence, whether the  
15 Bylaws were incorporated by reference into those applications. If the Bylaws were  
16 incorporated by reference, then there was an agreement to arbitrate, but if they were not,  
17 then there was no such agreement. In light of this dispute, the Court must try the issue.  
18 *See* 9 U.S.C. § 4 (“If the making of the arbitration agreement . . . be in issue, the court shall  
19 proceed summarily to the trial thereof.”)

### 20 III.

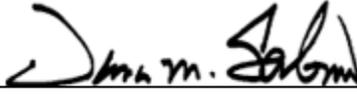
### 21 CONCLUSION AND ORDER

22 For the reasons set out above, Defendants’ motion to compel arbitration and to  
23 dismiss or stay this case is denied. *See Postmates Inc. v. 10,356 Individuals*, No. CV 20-  
24 2783 PSG (JEMx), 2021 WL 540155, at \*12 (C.D. Cal. Jan. 19, 2021) (denying motion to  
25 compel arbitration in light of “factual disputes as to the existence of a valid agreement to  
26 arbitrate”). The parties shall meet and confer and submit a joint report to the Court on how  
27 they would like to proceed with this case under Section 4 of the FAA, or otherwise. That  
28 report shall be filed on or before **March 12, 2021**. Pending that report and resolution of

1 this threshold issue, the Court denies without prejudice Defendants' motion to dismiss and  
2 motion to strike.

3 **IT IS SO ORDERED.**

4 Dated: March 2, 2021

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7 Hon. Dana M. Sabraw, Chief Judge  
8 United States District Court  
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