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8 CLUBCORP HOLDINGS, INC.,  
9 CCA CLUB OPERATIONS HOLDINGS, LLC,  
10 CLUBCORP CLUB OPERATIONS, INC.,  
11 CLUBCORP SYMPHONY TOWERS CLUB, INC.,  
12 CLUBCORP SAN JOSE CLUB, INC.

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

13 JEFFREY CUENCO and LINDA HONG,  
14 individually and on behalf of all others  
15 similarly situated,

15 Plaintiffs,

16 vs.

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

21 Defendant.

Case No. 3:20-cv-00774-DMS-AHG

Assigned to Hon. Dana Sabraw

**DEFENDANTS' MOTION FOR  
RECONSIDERATION OF  
MARCH 2, 2021 ORDER  
REGARDING MOTION TO  
COMPEL ARBITRATION**

Hearing:

Date: April 16, 2021

Time: 1:30 P.M.

Place: 13A

*[Notice of Motion and Motion,  
Declaration of Ana Tagvoryan, and  
[Proposed] Order Filed Concurrently  
Herewith]*

1 **I. INTRODUCTION.**

2 On March 2nd, 2021, the honorable Court issued an order denying without  
3 prejudice Defendants ClubCorp USA, Inc., ClubCorp Holdings, Inc., CCA Club  
4 Operations Holdings, LLC, ClubCorp Club Operations, Inc., ClubCorp Symphony  
5 Towers Club, Inc. (“Symphony”), and ClubCorp San Jose Club, Inc.’s (“SJC” and  
6 collectively, “Defendants”) motion to dismiss, motion to strike, and motion to  
7 compel arbitration (the “Order”). More specifically, the motions to dismiss and  
8 strike were denied without prejudice as premature in light of the arbitrability issue.  
9 With regard to the motion to compel arbitration, the Court found relevant a  
10 perceived factual dispute about whether the University Club’s Bylaws and the SV  
11 Club’s Bylaws (collectively, the “Bylaws”) were readily available to Jeffrey  
12 Cuenco and Linda Hong (collectively, “Plaintiffs”) when they submitted their  
13 applications for membership—i.e., whether there was direct evidence that  
14 Defendants provided a copy of the Bylaws to Plaintiffs via mail or email.  
15 Defendants respectfully apprise the Court that there was clear error in denying  
16 Defendants’ motion to compel arbitration for the reasons stated below, and  
17 additional discovery would be unjust.

18 Specifically, California case law is clear that a document need not be  
19 physically provided to the contracting parties to be incorporated into a document  
20 executed by the parties; the document to be incorporated need only be “easily  
21 available” to the parties. The law is also clear that a document is easily available if  
22 it is available upon request or soon after the parties’ execution of the executed  
23 document. Defendants submitted undisputed evidence that the Bylaws were  
24 available to Plaintiffs upon request. Defendants also submitted undisputed evidence  
25 that the Bylaws were immediately available to Plaintiffs online on University  
26 Club’s or SV Club’s respective intranets after Plaintiffs executed and submitted  
27 their application memberships. Indeed, Mr. Cuenco conceded this fact and  
28 submitted a declaration stating that he retrieved the University Club’s bylaws from

1 the University Club’s intranet. Notwithstanding Defendants’ undisputed evidence,  
2 the Court denied Defendants’ motion to compel arbitration. In doing so, the Court  
3 found that there was a “factual dispute about whether the Bylaws were readily  
4 available to Plaintiffs when they submitted their applications...” because  
5 Defendants did not “provide[] any direct evidence that Defendants provided a copy  
6 of the Bylaws to Plaintiffs via mail or email” and because it is “unclear whether  
7 either Plaintiff had access to the Bylaws before their membership applications were  
8 approved.” As detailed in Defendants’ briefs in support of its Motion<sup>1</sup> and set forth  
9 below, whether Symphony and SJC *actually* provided a copy of the Bylaws to  
10 Plaintiffs and whether Plaintiffs *actually* requested or accessed the Bylaws online  
11 before their membership applications were approved does not change the fact that  
12 the Bylaws were made available to Plaintiffs. Accordingly, under applicable case  
13 law, Defendants respectfully request that the Court reconsider the Order and grant  
14 Defendants’ motion to compel arbitration.

## 15 **II. LEGAL STANDARD.**

16 Federal Rule of Civil Procedure 59(e) provides for the filing of a motion to  
17 alter or amend a judgment. Fed. R. Civ. P. 59(e). A motion for reconsideration is  
18 “appropriate if the district court (1) is presented with newly discovered evidence;  
19 (2) committed clear error or the initial decision was manifestly unjust, or (3) if there  
20 is an intervening change in controlling law.” *Aho v. AmeriCredit Fin. Servs., Inc.*,  
21 No. 10CV1373 DMS BLM, 2011 WL 5404026, at \*1 (S.D. Cal. Nov. 8, 2011)  
22 (Sabraw, D) (citing *School Dist. No. 1J, Multnomah County, Oregon v. ACandS,*  
23 *Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)). A motion for reconsideration may not be  
24 used to relitigate old matters, or to raise arguments or present evidence for the first  
25 time that reasonably could have been raised earlier in the litigation. *Exxon Shipping*  
26 *Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008); see *Kona Enterprises, Inc. v. Estate of*  
27 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (“A [motion for reconsideration] may not  
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<sup>1</sup> See ECF 25-1 at 8 n. 4, 18; ECF 31 at 7-9; 14:17-20.  
159138.00601/125315586v.2 3

1 be used to raise arguments or present evidence for the first time when they could  
2 reasonably have been raised earlier in the litigation.”<sup>2</sup>

3 **III. THE COURT MADE A CLEAR ERROR OF APPLICATION OF LAW**  
4 **TO THE FACTS.**

5 **A. The Terms of An Incorporated Document Need Not Be Actually**  
6 **Provided For The Document To Be Easily Available.**

7 “For the terms of another document to be incorporated into the document  
8 executed by the parties[,], the reference must be clear and unequivocal, the reference  
9 must be called to the attention of the other party and he must consent thereto,<sup>3</sup> and  
10 *the terms of the incorporated document must be known or easily available to the*  
11 *contracting parties.” Lemberg v. LuLaRoe, LLC, No. EDCV1702102ABSHKX,*  
12 *2018 WL 6927844, at \*3 (C.D. Cal. Apr. 17, 2018) (quoting Wolschlager v.*  
13 *Fidelity Nat’l Title Ins. Co., 111 Cal. App. 4th 784, 790 (2003) (emphasis added)).*  
14 “[T]he terms of an incorporated document must only have been easily available to  
15 [plaintiff]; they need not have *actually* been provided.” *Lucas v. Hertz Corp., 875*  
16 *F. Supp. 2d 991, 999 (N.D. Cal. 2012) (emphasis added).* As discussed in  
17 Defendants’ reply brief (ECF 31 at 8 n. 5), courts have repeatedly held that an  
18

19 \_\_\_\_\_  
20 <sup>2</sup> In addition, Local Civil Rule 7.1(i)(1) provides that a motion for reconsideration  
21 must include an affidavit or certified statement of a party or attorney “setting forth  
22 the material facts and circumstances surrounding each prior application, including  
23 inter alia: (1) when and to what judge the application was made, (2) what ruling or  
24 decision or order was made thereon, and (3) what new and different facts and  
25 circumstances are claimed to exist which did not exist, or were not shown upon  
26 such prior application.” Local Civ. R. 7.1(i)(1).

27 <sup>3</sup> The Court acknowledged that Plaintiffs do not reasonably challenge the first two  
28 requirements. ECF 36 at 7: 16-18. Both Ms. Hong’s and Mr. Cuenco’s  
membership applications explicitly stated that Plaintiffs’ “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... for arbitration of disputes...” ECF 25-2, PAGE ID 257; ECF 25-3,

1 incorporated document is easily available to the contracting party when the  
2 document is available upon request. *See, e.g., Koffler Elec. Mech. Apparatus*  
3 *Repair, Inc. v. Wartsila N. Am., Inc.*, No. C-11-0052 EMC, 2011 WL 1086035, at  
4 \*4 (N.D. Cal. Mar. 24, 2011) (holding that a document containing an arbitration  
5 clause that was not provided to the plaintiff, but was available upon request, was  
6 properly incorporated by reference into a purchase agreement); *Botorff v. Amerco*,  
7 No. 2:12-CV-01286-MCE, 2012 WL 6628952, at \*5 (E.D. Cal. Dec. 19, 2012)  
8 (“the fact that Plaintiff had not been provided with the Rental Contract Addendum  
9 prior to signing the rental contracts has no bearing on the enforceability of the  
10 arbitration agreement contained within the Addendum so long as the Addendum  
11 was available to Plaintiff upon request.”); *Socialcom, Inc. v. Arch Ins. Co.*, No.  
12 220CV04056RGKAGR, 2020 WL 6815039, at \*3 (C.D. Cal. July 7, 2020)  
13 (“Although [plaintiff] contends that the Terms and Conditions were unavailable to  
14 them through Insperity’s website, it does not contend that it was unavailable upon  
15 request. Even assuming that [plaintiff] was unaware that the Terms and Conditions  
16 contained a forum-selection clause, that fact does not render the clause  
17 unenforceable if it was made available and [plaintiff] simply did not seek out and  
18 read it.”). Courts have also held that an incorporated document is easily available  
19 even when the documents are not provided to the contracting party until after the  
20 agreement that references the document is signed. *Botorff*, No. 2:12-CV-01286-  
21 MCE, 2012 WL 6628952, at \*5; *Lucas*, 875 F. Supp. 2d at 998-99 (emphasis  
22 added) (holding that plaintiff was bound to an arbitration agreement in a “rental  
23 jacket” even though plaintiff “either was never given a copy of the folder jacket or  
24 was given it after he signed the rental agreement.”).

25 In *Lemberg*, the court held that defendants’ retailer agreements incorporated  
26 by reference defendants’ policies and procedures, which included an arbitration  
27 provision, where the retailer agreements explicitly referenced and stated that the  
28 policies and procedures are incorporated by reference and defendants submitted a

1 declaration stating that “if a retailer or potential new retailer requested the Policies  
2 and Procedures, [defendants] would provide it to the retailer or potential new  
3 retailer” and the policies and procedure were available to the retailer on defendants’  
4 intranet. No. EDCV1702102ABSHKX, 2018 WL 6927844, at \*3-\*4. The court  
5 held that “*while it seems that retailers are not able to access [the intranet] until*  
6 *they have agreed to the Retailer Agreement, courts have concluded that consumers*  
7 *assented to arbitration agreements in scenarios where the arbitration agreement*  
8 *was provided after the consumers had already agreed to receive the products or*  
9 *services. Id. at \*4 (emphasis added) (citing *Amirhamzeh v. Wells Fargo Bank, N.A.*,*  
10 *No. 14-cv-02123, 2014 WL 12610227, at \*1-2 (N.D. Cal. Oct. 31, 2014) (holding*  
11 *that the consumer was bound to arbitrate where consumer “did not receive the*  
12 *Terms and Conditions materials that included the arbitration agreement until after*  
13 *enrolling in the service”)). The court stated, “[r]egardless, [d]efendants put forth*  
14 *evidence stating that if a potential new retailer requested the Policies and*  
15 *Procedures, [defendants] would provide it to the [] new retailer, demonstrating that*  
16 *the Policies and Procedures were easily available to [p]laintiffs.” *Id.**

17 In the Order, the Court acknowledged that terms of another document can be  
18 incorporated into the document executed by the parties if the terms of the  
19 incorporated document are “known or easily available to the parties.” ECF No. 36  
20 at 7:13-14. Notwithstanding, the Court mistakenly indicated that whether Plaintiffs  
21 actually received a copy of the Bylaws was relevant, if not necessary, to the finding  
22 of whether the Bylaws were available to Plaintiffs:

23 Defendants’ Declarants, Mr. Lee and Ms. Bongatti, both state “[i]ndividuals  
24 have access to the Bylaws online and may ask for a copy via mail or email”,  
25 (Lee Decl. ¶6; Bongatti Decl. ¶12), but neither provides any direct evidence  
26 that Defendants provided a copy of the Bylaws to Plaintiffs via mail or email.  
27 It is also unclear whether either Plaintiff had access to the Bylaws online  
28 before their membership applications were approved ...

On this evidence, there is a factual dispute about whether the Bylaws were  
readily available to Plaintiffs when they submitted their applications, and





1 **IV. IN THE ALTERNATIVE, THE COURT SHOULD ISSUE AN ORDER**  
2 **PERMITTING LIMITED DISCOVERY ON THE AVAILABILITY OF THE**  
3 **BYLAWS.**

4 Defendants acknowledge that the Order directed the parties to meet and  
5 confer and submit a joint report regarding how they would like to proceed with the  
6 case under Section 4 of the FAA, or otherwise. The parties met and conferred  
7 pursuant to the Court’s order on March 8<sup>th</sup>. Defendants expressed concern that the  
8 Order regarding a trial related to arbitrability under Section 4 of the FAA is  
9 overbroad and potentially prejudicial, given that there are six affiliated defendants  
10 named in this case, and Plaintiffs have failed to differentiate between them as to  
11 liability and wrongdoing in the Complaint.<sup>4</sup> If the Court denies Defendants’ motion  
12 for reconsideration, Defendants request an order permitting only very limited  
13 discovery regarding the availability of the Bylaws. As set forth above, Plaintiffs’  
14 actual receipt of the Bylaws from Symphony and SJC is not required for a finding  
15 that the Bylaws were available to Plaintiffs. Thus, Defendants propose that  
16 Symphony and SJC submit additional declarations setting forth additional facts  
17 regarding how individuals, including Plaintiffs, could receive the Bylaws from  
18 Symphony and SJC upon request.

19 **V. CONCLUSION**

20 For the foregoing reasons, Defendants respectfully request that the Court  
21 grant their Motion for Reconsideration and direct Plaintiffs to arbitrate their claims  
22 on an individual, non-class basis pursuant to the Bylaws. In the alternative,  
23 Defendants request an order permitting limited discovery regarding the issue of the  
24 availability of the Bylaws as set forth above.

25  
26  
27 <sup>4</sup> For this reason, Defendants also moved to dismiss alter-ego allegations and  
28 superfluous allegations in the Complaint, but such motion was denied without  
prejudice by the Court.



1 DATED: March 9, 2021

**BLANK ROME LLP**

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