IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLAUDIA OCORO, ISRAEL ROSALES, DIANA ALVARADO HARRIS, CYNTHIA WOODS JONES, GALE JONES, et al.

Plaintiffs,

v.

ARMANDO MONTELONGO JR., REAL ESTATE TRAINING INTERNATIONAL, LLC, PERFORMANCE ADVANTAGE GROUP, INC., LICENSE BRANDING, LLC.

Defendants.

Case No. 5:16-cv-01278-RCL

PLAINTIFFS' MOTION FOR LEAVE TO FILE A FIRST AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

(Fed.R.Civ.P. 15(a)(2))

Plaintiffs hereby move for leave to file a First Amended Complaint in order to join 78 plaintiffs who previously sued Defendants in this court or the Northern District of California, but who voluntarily dismissed their claims so that they could be pursued in arbitration at Defendants' insistence, as well as 114 additional plaintiffs who have not previously asserted their claims in any forum.

This motion is made pursuant to Federal Rule of Civil Procedure 15, on the grounds that the court should grant leave to amend freely when justice so requires, and that justice so requires here because Defendants have waived their right to insist on arbitration by refusing to comply with the rules and protocols of the American Arbitration Association ("AAA"), the organization specified in their purchase agreements.

This motion is based upon the below memorandum of points and authorities, the accompanying declaration of Christopher Wimmer ("Wimmer Decl."), all papers and pleadings on file in this action, and any evidence or argument that may be presented at oral argument, which Plaintiffs request pursuant to Local Rule CV-7(h).

I. FACTUAL BACKGROUND

A. Defendants' Nationwide Fraudulent Scheme

For almost a decade, defendants Armando Montelongo, Jr. ("Montelongo"), Real Estate Training International, LLC ("RETI"), Performance Advantage Group, Inc. ("PAG"), and License Branding, LLC ("LB") (collectively, "Defendants") have conducted a nationwide fraudulent scheme to sell Montelongo's worthless, dangerous, and unlawful advice about real estate investing; take advantage of his students' trust to loot their retirement and other accounts; sell the students properties at inflated prices without disclosing their stake in them; and encourage the students to pursue real estate investments using Montelongo's allies, who also victimize the students. ECF 1 ¶¶ 13, 17-

36 ("Compl."). Defendants are based in San Antonio, and conduct events there and around the country that students from all over the nation attend. Compl. ¶¶ 18, 49, 52-53.

Defendants' scheme follows a standard progression everywhere they do business: They advertise a free introduction to Montelongo's courses (the "free event"), and use that event to sell a $1,500 "three day event" taught by Montelongo's employees. At the "three day event," they sell students $18,000 to $54,000 packages that include the "bus tour," taught in part by Montelongo himself, along with "boots on the ground," "cash flow," and "asset protection" events. Defendants use these events, in turn, to sell their "master mentor" ($25,000-plus) and "market domination" programs ($25,000). Compl. ¶¶ 14-16 & 19.

B. The California Action

Defendants have asserted a series of procedural arguments to avoid the resolution of the claims brought by their former students on the merits.

In February 2016, 164 plaintiffs filed an action against Defendants in the Northern District of California under the name *Skurkis v. Montelongo*, No. 16-cv-972-KAW. In March 2016, Defendants' counsel contacted Plaintiffs' counsel to discuss potential defects with the complaint. Defendants questioned whether the pleading should have been filed as a class action, and whether there were joinder issues. In response to Plaintiffs' indication that they were open to any creative resolution of the numerous claims against Montelongo, Defendants indicated they would meet and confer before instituting any motion practice. Instead, in April 2016, Defendants filed a motion to dismiss—not on joinder grounds, but on personal jurisdiction grounds, something they had never raised with Plaintiffs' counsel. Wimmer Decl. ¶¶ 2-4.

Plaintiffs elected to obviate Defendants' motion to dismiss by filing an amended complaint that provided additional detail about Defendants' California activities. In May 2016, Defendants renewed their motion, and Plaintiffs opposed. In early

September 2016, the court partially granted and partially denied the motion, ruling that the 118 plaintiffs who were California residents or had attended Defendants' events in California could likely establish jurisdiction in the Northern District, but that the remaining 45 could not. In late September 2016, Plaintiffs voluntarily dismissed the *Skurkis* complaint so that it could be refiled in this District. Wimmer Decl. ¶¶ 5-9.

C. Defendants' Motion to Compel Arbitration and Other Motions in This Action

On December 20, 2016, 138 Plaintiffs filed their complaint in this action, pleading civil RICO claims, as well as claims for negligence and negligent misrepresentation. ECF 1.

On March 6, 2017, Defendants brought a motion to dismiss the claims of 36 of the plaintiffs for lack of subject matter jurisdiction and to compel these plaintiffs to arbitrate their claims. ECF 12. Defendants' motion was based on an arbitration provision included in the purchase agreements signed by each of those plaintiffs that required all disputes arising out of the purchase agreements to be submitted to the AAA for resolution. ECF 12, p. 3-5. Instead of opposing the motion, the plaintiffs identified in Defendants' motion voluntarily dismissed their claims on March 20, 2017 in order to pursue them in arbitration, thus rendering Defendants' motion moot. ECF 17, 18.

Also in early March 2017, Defendants filed a Rule 41 motion for an award of costs, based on the dismissal of the California action and refiling here; and moved to dismiss the complaint for failure to properly plead the RICO, negligence, and misrepresentation claims. Plaintiffs timely opposed those motions, which are fully briefed and await decision. ECF 9, 13, 15, 16, 19, 22.

On March 24, 2017, this matter was transferred from Chief District Judge Orlando L. Garcia to Senior United States District Judge Royce C. Lamberth. ECF 23. No case management conference has been held, and no scheduling order has been issued.

D. Defendants' Refusal to Comply with the AAA Rules, and the AAA's Refusal to Administer Arbitrations Involving Defendants

Meanwhile, on March 8, 2017, Mike and Susan Crabtree, two of Defendants' students who were not named as plaintiffs in this lawsuit, filed a request for dispute resolution services with the AAA, the organization specified in Defendants' purchase agreements. The arbitration provision of those agreements reads, in pertinent part:

> The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules are available online at www.ADR.org, [or] by calling the AAA at 1-800-778-7879. The parties agree that the validity of this arbitration agreement will be solely decided by the arbitrator. Unless otherwise agreed or provided herein this Agreement, the Parties will split only the costs and fees associated with conducting the arbitration.

Wimmer Decl. ¶ 14 & Exhs. C-D.

Consistent with this provision, the Crabtrees elected to proceed under the AAA's Consumer Arbitration Rules ("Consumer Rules"), which replaced the former Supplementary Procedures for Consumer Related Disputes, and paid the $200 filing fee called for by those Rules. *See* ECF 15-1, Exh. A, at 14 of 51, Rule R-1(a)(2) (AAA Consumer Rules apply when parties "have specified that the *Supplementary Procedures for Consumer-Related Disputes* shall apply, which have been amended and renamed the *Consumer Arbitration Rules*") (italics in original). As with the claims in the instant lawsuit, the Crabtrees alleged that they sustained damages arising out of their purchase of programs and real estate seminars from Defendants. Wimmer Decl ¶ 14 & Exh. D.

On March 22, Defendants responded to the Crabtrees' demand, contending that the purchase agreement required application of the AAA's Commercial Arbitration Rules ("Commercial Rules"), rather than the Consumer Rules, and that the Crabtrees were accordingly required to pay an initial filing fee of $4,000, rather than $200. Wimmer Decl. ¶ 16 & Exh. E.

On April 7, the AAA issued a determination that the Consumer Rules applied to the Crabtrees' claims. Wimmer Decl. ¶ 17 & Exh. F. The AAA also determined that the arbitration provision contained in Defendants' purchase agreement requiring the parties to evenly split the costs and fees of arbitration constituted a substantial deviation from the Consumer Rules and Consumer Due Process Protocol ("Consumer Protocol") that it would not apply, and that the Crabtrees' fees for the entire arbitration were capped at $200. The AAA requested that Defendants waive the cost-splitting provision, and agree to have the matter administered under the Consumer Rules and Protocol, which placed on Defendants the responsibility for all other arbitration costs. The AAA also warned:

> Absent receipt of the requested waiver, the AAA will decline to administer this dispute and possibly any future consumer arbitrations involving this business. Please note that pursuant to [] R-1(d) of the Consumer Rules, should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Wimmer Decl. Exh. F at 2.

On April 21, Defendants responded to the AAA's determination by letter, objecting to the application of the Consumer Rules, insisting again that the Crabtrees pay a $4,000 filing fee, and arguing that the Crabtrees should be required to split the arbitration costs. Wimmer Decl. Exh. G.

On May 2, the Crabtrees replied to Defendants' letter, and asked the AAA to "1. Determine the Consumer Rules, by delegation, govern this arbitration; 2. Require from Claimant a filing fee no greater than $200; and 3. Reject Respondents' proposed even split of costs and fees." Wimmer Decl. Exh. H.

On June 20, the AAA stated by email that, after considering the parties' comments and objections, it had reaffirmed its determination to apply the Consumer Rules and require Defendants to waive the cost-splitting provision. Wimmer Decl. Exh. I. On July 5, the AAA set a deadline of July 12 for Defendants to provide the requested

waiver, or "we will close our file on this matter." Wimmer Decl. Exh. J. Defendants requested, and were granted, an extension to July 18. Wimmer Decl. Exh. K.

On July 18, Defendants restated their positions by email, and again refused to waive the cost-splitting provision. Accordingly, the AAA issued a letter that day declining to administer the dispute and closing its file on the Crabtree matter. Wimmer Decl. Exh. L. The AAA further advised that, pursuant to R-1(d) of the Consumer Arbitration Rules, "either party may choose to submit its dispute to the appropriate court for resolution." It also indicated its intent not to administer any future matters involving Defendants, due to their refusal to comply with the AAA's Consumer Rules and Consumer Protocol.

> Further, because the business' failure to remit the waiver constitutes a failure to adhere to our policies regarding consumer claims, we may decline to administer future consumer arbitrations involving Armando Montelongo, Jr., Real Estate Training International, LLC, Performance Advantage Group, Inc., and License Branding, LLC.

Wimmer Decl. Exh. M.

E. This Motion, and Certificate of Conference

Plaintiffs now seek to amend their complaint to join the 42 plaintiffs from the California action who did not join this action, because of Defendants' stated intent to enforce the arbitration provision; the 36 plaintiffs who voluntarily dismissed their claims in this action based on Defendants' motion to compel arbitration; and an additional 114 plaintiffs who have not previously asserted their claims in any forum. Wimmer Decl. ¶ 18 & Exh. N.

Plaintiffs offered Defendants two opportunities to stipulate to the relief sought by this motion. On June 30, Plaintiffs requested by letter that Defendants:

> either provide the cost-splitting waiver to the AAA and confirm that waiver applies to all claims brought by any consumer who signed an arbitration agreement with Respondents, or confirm you will not object to the prosecution of those consumers' claims in the currently pending *Ocoro* action in the Western District of Texas. If Respondents do neither, we will

> seek a ruling from the court that Respondents have waived their right to insist on arbitration, and seek to bring all our many clients' claims in that court.

Wimmer Decl. ¶ 19 & Exh. O.

Additionally, on September 11, Plaintiffs emailed Defendants seeking to meet and confer as required by Local Rule CV-7(i). Counsel for the parties spoke by telephone on September 13, but Defendants refused to stipulate to the proposed amendment on three grounds: (1) The motion was premature, because the court had not yet ruled on Defendants' pending motions to dismiss and for costs; (2) all plaintiffs who previously voluntarily dismissed their claims were barred by res judicata from rejoining this action; and (3) plaintiffs who signed purchase agreements containing the arbitration provision rejected by the AAA were still contractually obligated to arbitrate their respective claims with an alternative arbitration provider. Wimmer Decl. ¶ 20.

II. LEGAL ARGUMENT

The motion should be granted, because the Federal Rules liberally permit amendment, and no reason to deny amendment exists. As more than 21 days have passed since Defendants served their motion to dismiss pursuant to Rule 12(b)(6), and as Defendants have declined to stipulate, Plaintiffs' motion to amend requires the court's leave. *See* Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id*. The Fifth Circuit has held that "the language of this rule evinces a bias in favor of granting leave to amend." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (internal quotation marks and citations omitted).

> As outlined by the Supreme Court, [the Fifth] Circuit examines five considerations to determine whether to grant a party leave to amend a complaint: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment.

Id.

In this case, all five considerations weigh in favor of granting leave to amend. The amendment sought by the Plaintiffs is necessary because Defendants have

repeatedly asserted the arbitration provisions contained in their purchase agreements to force the plaintiffs in the actions to arbitrate their claims. Relying on Defendants' statements in the California action, and the motion to compel arbitration in this action, 78 of those plaintiffs either did not file suit in this action, or voluntarily dismissed their claims here in favor of arbitration. Before the AAA, however, Defendants refused to comply with that organization's Consumer Rules, which led to the AAA declining to administer those claims. Additionally, due to the widespread nature of Defendants' scheme and the harm it caused, 114 additional plaintiffs have retained the undersigned counsel in the ten months since this action was filed to pursue claims against Defendants. As a result, an amended complaint is needed so that the claims of these plaintiffs can be litigated.

There is no undue delay, bad faith, or dilatory motive. Plaintiffs brought their motion within two months of the AAA's declination, and nothing has occurred in this case since Defendants filed their motions to dismiss in March. By the same token, this motion is also not premature: Plaintiffs' assertion of this amendment *before* the court has ruled on Defendants' pending motions is the most efficient course of action, as any Plaintiff not joined at the time of the court's ruling will not be bound by it.

There is also no undue prejudice to Defendants, as Plaintiffs only seek to join additional parties with nearly identical claims to this case; they do not seek to add any other factual allegations or bring any new claims. Furthermore, this is Plaintiffs' first motion to amend, so there has been no repeated failure to cure any prior deficiencies.

Finally, the amendment is not futile. For the reasons stated in Plaintiffs' opposition to Defendants' Rule 12 motion to dismiss, the current pleading states civil RICO and other claims on behalf of the current Plaintiffs. ECF 19. The proposed additional plaintiffs will be asserting the same claims. Moreover, even if the Defendants' motion to dismiss were meritorious, Plaintiffs would still have an opportunity to amend their factual allegations. *See* ECF 19 at p. 15.

Defendants' other arguments are also of no merit. The voluntary dismissals filed by various Plaintiffs in both this action and the California action were entered without prejudice (Wimmer Decl. ¶ 9 & Exh. B; ECF 17), and "[c]onsequently [they] can have no res judicata effect." *Plumberman, Inc. v. Urban Systems Development Corp.*, 605 F.2d 161, 162 (5th Cir. 1979). Even if that preclusion doctrine somehow applied here, Defendants should be barred from advancing it, because the dismissals resulted from their own machinations: The plaintiffs who filed dismissals did so because Defendants insisted on their right to arbitration under their purchase agreements. Defendants cannot be permitted to insist on that contractual right, refuse to abide by its terms, and then point to their own contractual breach as a basis for denying Plaintiffs their day in court. *See Moch v. E. Baton Rouge Parish Sch. Bd.*, 548 F.2d 594, 597 (5th Cir. 1977) (courts may decline to apply bar and estoppel doctrines such as res judicata "when their use would violate an overriding public policy or result in manifest injustice").

Lastly, by refusing to comply with the AAA's Consumer Rules, Defendants have waived any right to compel arbitration under the terms of the arbitration provision, which specifically requires that claims be arbitrated by the AAA under those rules. *See generally Cooper v. WestEnd Capital Management, L.L.C.*, 832 F.3d 534, 542 (5th Cir. 2016) ("The right to arbitrate a dispute, like all contract rights, is subject to waiver.") (quoting *Nicholas v. KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009)). Defendants' claim that Plaintiffs are contractually obligated to arbitrate in some other forum, under some other set of rules, finds no basis in the language of the purchase agreements they unilaterally drafted and forced on Plaintiffs.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that they be granted leave to file the proposed First Amended Complaint. Plaintiffs also request that the court rule on and deny Defendants' pending motions to dismiss and for costs under Rule 41.

Dated: September 22, 2017

Respectfully submitted,

By: s/ Christopher Wimmer
Christopher Wimmer

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record listed below, who are deemed to have consented to electronic service, are being served this 25th day of September 2017 with a copy of this document via the court's CM/ECF system per Local Rule CV-5.

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