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3 **IN THE DISTRICT COURT OF GUAM**
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5 ESTHER MARGARITA LIMA SUAREZ
6 VIUDA DE YANG, Individually and as
7 Personal Representative of the Estate of
8 CHANG CHEOL YANG, deceased, and on
9 behalf of BRANDON CHEOL YANG LIMA,
10 JI HEA YANG LIMA, and CAMILA
11 ROMINA YANG LIMA, minor children,

12 Plaintiffs,

13 vs.

14 MAJESTIC BLUE FISHERIES, LLC, a
15 Delaware limited liability company, and
16 DONGWON INDUSTRIES CO., LTD, a
17 corporation incorporated under the laws of
18 Korea,

19 Defendants.

CIVIL CASE NO. 13-00015

**DECISION AND ORDER
RE DEFENDANT DONGWON
INDUSTRIES CO., LTD.'S MOTION FOR
RECONSIDERATION OF THE COURT'S
ORDER DENYING DONGWON'S
MOTION TO DISMISS AND COMPEL
ARBITRATION**

20
21 Before the court is Defendant Dongwon Industries Co., Ltd. ("Dongwon")'s Motion for
22 Reconsideration of the Court's Order Denying Dongwon's Motion to Dismiss and Compel
23 Arbitration (ECF No. 114). After reviewing the parties' submissions, and relevant caselaw and
24 authority, the court hereby **DENIES** Defendant's Motion for Reconsideration for the reasons
stated herein.

I. PROCEDURAL OVERVIEW

The factual and procedural background of this case are stated in this court's Decision and
Order Re: Defendant Dongwon Industries Co., Ltd.'s Motion to Dismiss and Compel Arbitration
and Majestic Blue Fisheries, LLC's Joinder to Dongwon's Motion to Dismiss and Compel
Arbitration and need not be restated here. *See* Ord., ECF No. 113 (hereinafter "the Order").

1 On August 24, 2015, the court issued the Order, denying in part and adopting in part the
2 magistrate judge's Report and Recommendation. ECF No. 113. The court denied Dongwon's
3 Motion to Dismiss and Compel Arbitration, "[a]s the doctrine of equitable estoppel does not
4 apply and Dongwon cannot enforce the arbitration clause in Yang's employment contract[.]" *Id.*
5 at 16. The court granted in part Majestic Blue Fisheries, LLC ("Majestic Blue")'s Joinder to
6 Dongwon's Motion to Dismiss and Compel Arbitration because "Plaintiffs have not carried their
7 heavy burden and established that they suffered prejudice" by the acts of Majestic Blue. *Id.* at 19.
8 The court then compelled Plaintiffs to arbitrate their claims against Majestic Blue and stayed the
9 case as to Majestic Blue. *Id.* On September 8, 2015, Dongwon filed the instant Motion for
10 Reconsideration of the Order. ECF No. 114.

11 **II. STANDARD OF REVIEW**

12 A motion for reconsideration is treated as a motion to alter or amend judgment under
13 FED. R. CIV. P. 59(e). *Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892,
14 898–99 (9th Cir. 2001). A party may file a motion for reconsideration of an interlocutory order
15 only if it is immediately appealable. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466
16 (9th Cir. 1989). In the present case, the Order is appealable because it is an order denying an
17 application to compel arbitration under 9 U.S.C. § 206. *See* 9 U.S.C. § 16(a)(1)(C).

18 The Ninth Circuit has held that relief under Rule 59(e) is "an extraordinary remedy which
19 should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011)
20 (internal quotations omitted). Indeed, "a motion for reconsideration should not be granted, absent
21 highly unusual circumstances[.]" *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890
22 (9th Cir. 2000) (internal quotations omitted). The four basic grounds upon which a Rule 59(e)
23 motion may be granted are: (1) to correct manifest errors of law or fact upon which the judgment
24 rests; (2) to present newly discovered evidence or previously unavailable evidence; (3) to prevent

1 manifest injustice; or (4) to take account of an intervening change in controlling law.

2 *Allstate Ins. Co.*, 634 F.3d at 1111. The District Court of Guam has adopted Local Civil Rule
3 7(p) which allows reconsideration of an order for similar grounds.¹

4 A motion for reconsideration “may *not* be used to raise arguments or present evidence for
5 the first time when they could reasonably have been raised earlier in the litigation.” *Marlyn*
6 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal
7 quotations omitted) (emphasis in original).

8 **III. DISCUSSION**

9 Dongwon asserts that the court should reconsider its Order under Local Civil Rule
10 7(p)(1)(C) for failing to consider material facts presented to the court. Specifically, Dongwon
11 asserts that the court should reconsider for three reasons: (A) Plaintiffs admitted that Dongwon
12 was the decedent’s employer and that the decedent executed the employment contract with
13 Dongwon; (B) Plaintiffs admitted that Dongwon was the alter ego of Majestic Blue; and (C) as
14 the Order stands, there is a high potential for inconsistency with any arbitral award that Plaintiffs
15 receive, and any question of whether a claim is arbitrable should be decided by the arbitrator.

16 **A. Judicial Admissions.**

17 Dongwon contends that Plaintiffs admitted in the Complaint that Dongwon was the
18 decedent’s employer and that the decedent executed the subject contract with Dongwon.

19 Dongwon cites to the following statements in the Complaint:

20 ¹ Local Civil Rule 7(p) states, in pertinent part: “(1) Standard. Motions for reconsideration are generally disfavored.
21 A motion for reconsideration of the decision on any motion may be made only on the grounds of:
22 (A) a material difference in fact or law from that represented to the Court before such decision that in the exercise of
23 reasonable diligence could not have been known to the party moving for reconsideration at the time of such
24 decision, or
(B) the emergence of new material facts or a change of law occurring after the time of such decision, or
(C) a manifest showing of a failure to consider material facts presented to the Court before such decision.
No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in
opposition to the original motion except to the extent necessary to demonstrate manifest error. Failure to comply
with this subsection may be grounds for denial of the motion.”

1 (1) “On March 23, 2010, Mr. Yang executed an employment contract with Dongwon
2 Industries Co., Ltd. to act as Chief Engineer of the F/V MAJESTIC BLUE.” Compl.
3 at ¶ 15, ECF No. 1.

4 (2) “Majestic Blue and Dongwon were at all material times the Jones Act Employers of
5 the decedent, Chang Cheol Yang.” *Id.* at ¶ 12.

6 Dongwon further contends that the court did not consider these judicial admissions² when
7 determining that Dongwon cannot enforce the arbitration agreement, and therefore asks the court
8 to reconsider them now.

9 However, as Plaintiffs correctly identify, the court has already considered these facts and
10 determined in the Order that they were not enough to find that Dongwon may enforce the
11 arbitration clause. In the Order, the court determined that under applicable law, Dongwon, a
12 nonsignatory to the arbitration agreement, could enforce the arbitration agreement under
13 equitable estoppel only in two circumstances:

14 (1) when a signatory must rely on the terms of the written agreement in asserting its
15 claims against the nonsignatory or the claims are “intimately founded in and intertwined
16 with” the underlying contract, and (2) when the signatory alleges substantially
17 interdependent and concerted misconduct by the nonsignatory and another signatory and
18 “the allegations of interdependent misconduct [are] founded in or intimately connected
19 with the obligations of the underlying agreement.”

20 *See* Ord. at 14, ECF No. 113 (quoting *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128–29
21 (9th Cir. 2013) (quoting *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 219–221, (Cal. Ct.
22 App. 2009)) (internal citations omitted)).

23 The court determined that because Plaintiffs’ claims are dependent upon statute, not upon

24 ² The court may take allegations in a complaint as a judicial admission of fact. *See, e.g., Hakopian v. Mukasey*, 551 F.3d 843, 846 (9th Cir. 2008).

1 the contract itself, neither circumstance was present for equitable estoppel to apply. *Id.* at 15–16.
2 In so holding, the court stated that, “even in the second circumstance, ‘allegations of
3 substantially interdependent and concerted misconduct by signatories and nonsignatories,
4 standing alone, are not enough: the allegations of interdependent misconduct must be founded in
5 or intimately connected with the obligations of the underlying agreement.’” *Id.* at 15 (quoting
6 *Goldman*, 173 Cal. App. 4th at 219). In the present case, because “Plaintiffs’ allegations of
7 Defendants’ interdependent misconduct (i.e., negligence and providing an unseaworthy vessel)
8 are founded in obligations imposed by law rather than obligations imposed by Yang’s
9 employment contract,” the doctrine of equitable estoppel did not apply and Dongwon could not
10 enforce the arbitration agreement. *Id.* at 15–16.

11 Because the court already considered the facts of interdependent misconduct, and
12 determined that these facts alone were not enough to allow Dongwon to enforce the arbitration
13 agreement, there is no manifest showing of a failure to consider material facts presented to the
14 court. *See* CVLR 7(p)(1)(C).

15 Dongwon counters that the court need not examine these facts under the doctrine of
16 equitable estoppel because Plaintiffs themselves acknowledge in the Complaint that the decedent
17 entered into the employment contract with Dongwon. This contention is groundless. Dongwon
18 conceded that it is not a signatory to the employment contract. This court determined in its Order
19 that “a nonsignatory to an arbitration agreement may compel arbitration ‘if the relevant state
20 contract law allows the [nonsignatory] to enforce the agreement.’” *See* Ord. at 13, ECF No. 113
21 (citing *Kramer*, 705 F.3d at 1128). The court then applied the relevant state contract law to these
22 facts and determined that Dongwon cannot compel arbitration. Accordingly, the court did
23 consider the facts that Dongwon claims were not considered by the court and therefore DENIES
24 the Motion for Reconsideration based on this argument.

1 **B. Alter Ego.**

2 Dongwon next contends that Plaintiffs alleged an alter ego relationship between Majestic
3 Blue and Dongwon in the Complaint, and that this compels the court to reconsider the Order.
4 Besides the statements in the Complaint described above (that the decedent executed an
5 employment contract with, and was employed by, Dongwon), Dongwon cites to the following
6 statements in the Complaint:

7 (1) “Majestic Blue was at all times material hereto, Dongwon’s agent and alter ego, as
8 Dongwon was the de facto owner of and completely controlled and dominated,
9 Majestic Blue.” Compl. at ¶ 10, ECF No. 1.

10 (2) “Dongwon . . . was the legal owner, operator, and/or manager of, and/or maintained
11 and/or controlled the F/V MAJESTIC BLUE, doing business in Guam by and through
12 its wholly owned subsidiary and/or agent Majestic Blue Fisheries, LLC.” *Id.* at ¶ 8.

13 Dongwon asserts that the court did not consider these alter ego statements when determining that
14 Dongwon cannot enforce the arbitration agreement.

15 First, as discussed *supra*, the court already considered any facts of interdependent
16 misconduct and determined that these facts alone were not enough to allow Dongwon to enforce
17 the arbitration agreement.

18 Second, Plaintiffs’ allegations in the Complaint regarding alter ego cannot be accepted as
19 judicial admissions. Judicial admissions are “formal admissions in the pleadings which have the
20 effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the
21 fact.” *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (internal quotations
22 omitted). In the present case, Plaintiffs’ alter ego statements are not statements of fact—they are
23 statements of legal argument, which are not considered to be binding judicial admissions. *See,*
24 *e.g., Lam Research Corp. v. Schunk Semiconductor*, 65 F. Supp. 3d 863, 870 (N.D. Cal. 2014)

1 (internal quotations omitted).

2 Third, for Dongwon to assert that Plaintiffs “cannot hide” from their alter ego statements
3 is the incorrect focus of a motion for reconsideration; the focus is on Dongwon’s failure to raise
4 the alter ego argument, not on Plaintiffs’ mention of the argument in the Complaint. *Marlyn*
5 *Nutraceuticals, Inc.*, 571 F.3d at 880. Dongwon is improperly raising an alter ego argument for
6 the first time in this Motion. A motion for reconsideration “may not be used to raise arguments
7 or present evidence for the first time when they could reasonably have been raised earlier in the
8 litigation.” *Id.*; *see also Kona Enters., Inc.*, 229 F.3d at 890.

9 Therefore, the court DENIES the Motion for Reconsideration based on this argument.

10 **C. Threat of Inconsistency or Question of Arbitrability.**

11 Dongwon contends that because the court’s Order excludes Dongwon, but not Majestic
12 Blue, from any future arbitration proceeding, if Plaintiffs receive a favorable arbitration award,
13 they could enforce it against Dongwon, possibly under an alter ego theory, resulting in
14 inconsistency. Further, Dongwon contends that any question of whether Plaintiffs’ claims against
15 Dongwon are arbitrable is for the arbitrator to decide—not this court.

16 Dongwon is incorrect for two reasons. First, Dongwon could have raised the
17 inconsistency argument before the issuance of the Order, but it failed to do so. Parties are
18 responsible for considering the practical effects of a court’s order and arguing the matter before
19 the order is issued. *See, e.g., Kona Enters., Inc.*, 229 F.3d at 890–91. In *Kona Enterprises*, the
20 Ninth Circuit affirmed the district court’s decision to deny a Rule 59(e) motion for
21 reconsideration when the plaintiffs raised a choice-of-law issue for the first time, claiming that
22 they had no reason to question the choice-of-law issue until the district court ruled that their
23 claims were governed by Hawaiian law instead of North Carolina law. *Id.* In so affirming, the
24 Ninth Circuit stated that the plaintiffs were aware that the district court could possibly apply

1 Hawaiian law at least four months before the district court issued the order, and thereafter had
2 numerous opportunities to argue that North Carolina law should apply. *Id.* at 891.

3 In the present case, Majestic Blue joined Dongwon's Motion to Dismiss and Compel
4 Arbitration on August 25, 2014, which is after Dongwon had finished briefing, but prior to the
5 oral arguments before the magistrate judge on October 7, 2014 and before this court on July 30,
6 2015. At the oral arguments, Dongwon thus was aware that the court could possibly decline to
7 compel arbitration as to one or both Defendants, but it failed to argue any threat of inconsistency
8 from such a ruling.

9 Second, this court did not improperly decide that Plaintiffs' claims against Dongwon
10 were not arbitrable. Where there is an absence of clear and unmistakable evidence that plaintiffs
11 agreed to arbitrate the question of arbitrability with nonsignatories, the district court has the
12 authority to decide whether the instant dispute is arbitrable. *Kramer*, 705 F.3d at 1127. In the
13 present case, the arbitration agreement did not clearly indicate whether the dispute between
14 Dongwon and Plaintiffs was arbitrable, or that the question of arbitrability was arbitrable, and
15 thus the court had the authority to decide that Dongwon was unable to enforce the agreement.

16 Therefore, the court DENIES the Motion for Reconsideration based on this argument.

17 **IV. CONCLUSION**

18 Based on the discussion above, the court **DENIES** Defendant's Motion for
19 Reconsideration of the Court's Order Denying Dongwon's Motion to Dismiss and Compel
20 Arbitration.

21 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge

Dated: April 11, 2016