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No. 69306-9
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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DAMON TULIP,
Petitioner-Appellant,

v.

SERVICE CORPORATION INTERNATIONAL, SCI FUNERAL AND
CEMETERY PURCHASING COOPERATIVE, INC., SCI WESTERN
MARKET SUPPORT CENTER, L.P. a/k/a SCI WESTERN MARKET
SUPPORT CENTER, INC., SCI WASHINGTON FUNERAL
SERVICES, INC., GREENWOOD MEMORIAL PARK CEMETERY &
FUNERAL HOME, JANE D. JONES, THOMAS RYAN,

Respondents-Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Petitioner-Appellant, Damon Tulip (“Mr. Tulip”) submits this brief in reply to Respondents Service Corporation International, et al.’s (“SCI”) Answering Brief filed on February 21, 2013. Mr. Tulip was granted an extension of time until April 15, 2013 to file a reply brief.

The Superior Court’s order must be reversed because the facts of this case do not support a finding of waiver, and SCI is judicially estopped from asserting it is not bound by the arbitration agreement. SCI cannot be allowed to gain an advantage from two opposing positions, as it will have done if the Superior Court’s order denying Mr. Tulip’s petition to compel arbitration is not reversed.

First and foremost, SCI has not established waiver. SCI has not established any one, let alone all three, of the elements necessary to establish waiver. SCI has not shown that: (1) Mr. Tulip had knowledge of an existing right to compel arbitration prior to the time he served his demand for arbitration in May 2011; (2) Mr. Tulip acted inconsistently with that right by opting into the *Stickle* FLSA collective action; and (3) that SCI is prejudiced by having to individually arbitrate Mr. Tulip’s state law claims instead of individually litigating those claims.

Moreover, SCI’s claim that Mr. Tulip waived his right to arbitrate his individual state law claims because he was an opt-in plaintiff in the

FLSA collective action, *Stickle, et al. v. Serv. Corp. Int'l* (“*Stickle*”), and a putative Rule 23 class member in *Bryant, et al. v. Serv. Corp. Int'l* (“*Bryant*”) and *Emmick, et al. v. Serv. Corp. Int'l, et al.* (“*Emmick*”) is directly contrary to SCI’s actions in *Reynolds, et al. v. Serv. Corp. Int'l, et al.* (“*Reynolds*”). In *Reynolds*, SCI was successful in dismissing a putative Rule 23 class action for state law wage and hour claims filed by three SCI employees in Indiana, who, like Mr. Tulip, were also opt-in plaintiffs in *Stickle* and previous putative Rule 23 class members in *Bryant*, on the basis that the *Reynolds* plaintiffs were required to individually arbitrate their claims pursuant to the terms of their arbitration agreement with SCI. Yet, only three months later, when Mr. Tulip, in reliance on SCI’s actions in *Reynolds*, served a demand for arbitration seeking to individually arbitrate his state law wage and hour claims, SCI refused to individually arbitrate his claims on the basis that he waived his right to arbitrate by participating in the *Stickle* litigation and on the basis that SCI was not even a party to the arbitration agreement, positions directly contrary to SCI’s actions in *Reynolds*.

SCI successfully argued in both *Reynolds* and *Green v. Serv. Corp. Int'l*, 4:06-CV-00833 (S.D. Tex.) (“*Green*”), when it sought to enforce the arbitration agreement against the plaintiffs in those actions, that it is bound by the arbitration agreement. SCI is estopped from now arguing to the

contrary that it is not bound by the arbitration agreement merely because its interests have changed.

II. ARGUMENT

A. SCI HAS NOT SATISFIED ITS BURDEN OF ESTABLISHING WAIVER

As SCI concedes in its Answering Brief, a three-prong test applies to establish waiver of the right to arbitrate. “A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Furthermore, waiver of a contractual right to arbitration is not favored and any party arguing waiver of arbitration bears a heavy burden of proof. *Id.*

1. **There is no Evidence That Mr. Tulip Had Knowledge of an Existing Right to Arbitrate Prior to the Time He Served His Demand for Arbitration**

The knowledge element of waiver is not satisfied where no evidence has been presented showing *when* the party seeking arbitration had knowledge of his right to arbitration. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1413 (9th Cir. 1990).

Here, although it is the plaintiff who sought to compel arbitration, there is absolutely no evidence that he was aware of such a right prior to the time he served his demand for arbitration on May 19, 2011. CP 16. SCI asserts, without any legal support, that Mr. Tulip was aware of the arbitration agreement from the date he signed it.¹ Answering Brief at 16. However, there is absolutely no evidence as to what Mr. Tulip was told, if anything, when he executed the agreement or that he was even given a copy of the agreement. By all accounts, the arbitration agreement was executed together with several other documents signed at the inception of Mr. Tulip's employment, and copies were not given to employees.

Not surprisingly then, the only support SCI offers for the required knowledge element of waiver is that Mr. Tulip presumably knew of the agreement since he signed it and because he ultimately brought the instant petition to compel arbitration. Merely suggesting a presumption, however, does not remotely satisfy SCI's heavy burden of establishing that Mr.

¹ Notably, the February 5, 2005 date SCI refers to is the date of the arbitration agreement signed by another Washington employee, Gregory Musick. CP 12-14. Mr. Tulip attached Mr. Musick's arbitration agreement to his Petition to Compel Arbitration because SCI did not provide him with a copy of his own agreement. CP 4, n.1. However, Mr. Tulip understood, based on SCI's representation in its motion to dismiss filed on February 4, 2011 in the *Reynolds* action, that employees signed standard form arbitration agreements as a condition of employment. CP 19-27. SCI did not produce a copy of Mr. Tulip's arbitration agreement until filing its Answer to the Petition to Compel Arbitration on December 11, 2012. CP 88, 205-07.

Tulip had knowledge of his right to arbitrate prior to serving his demand for arbitration. See *Britton*, 916 F.2d at 1413; see also *Chappel v. Laboratory Corp. of America*, 232 F.3d 719 (9th Cir. 2000) (court will not lightly find waiver of the right to arbitrate).

Accordingly, SCI has not satisfied the knowledge element, and for this reason alone, it has not established waiver.

2. Mr. Tulip Did Not Act Inconsistently With His Right to Arbitrate

Even assuming, *arguendo*, Mr. Tulip had prior knowledge of his right to arbitration, which has not been established, Mr. Tulip did not act inconsistently with his right to individually arbitrate his state law claims. Rather, Mr. Tulip proceeded in the exact manner SCI represented was appropriate in *Reynolds*. The basis of SCI's argument that Mr. Tulip's participation in the FLSA litigation was inconsistent with an intent to arbitrate is that Mr. Tulip had a full and fair opportunity to adjudicate his claims, and he chose to adjudicate his claims through litigation, rather than arbitration. The record here, however, directly contradicts this finding.

As an initial matter, the individual claims Mr. Tulip seeks to arbitrate are distinct from the class certification issues litigated in the *Stickle* FLSA action. The record in this case unequivocally shows that the only issue litigated in the *Stickle* FLSA case was whether there was

sufficient evidence that SCI maintained various company-wide policies that caused plaintiffs not to be paid for all overtime worked, such that all of the named and opt-in plaintiffs' claims for unpaid overtime under the FLSA should be tried collectively. CP 198 at Dkt. No. 1995. SCI was successful in defeating certification in *Stickle*, and the conditionally certified collective action was decertified on April 25, 2011. *Id.* As a result of the determination in *Stickle* that the opt-in plaintiffs, including Mr. Tulip, could not have their claims heard collectively, all of the claims of the opt-in plaintiffs were dismissed without prejudice so that they could pursue them individually. *Id.* As such, Mr. Tulip was free to pursue his individual FLSA claims for unpaid overtime in a separate action once *Stickle* was decertified. *See e.g., Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1116 (C.D. Cal. 2011) ("If the court determines that the plaintiffs are not similarly situated, it may decertify the collection action and dismiss the opt-in plaintiffs without prejudice."). Yet, Mr. Tulip's individual FLSA claims are not even the claims he seeks to arbitrate.

Mr. Tulip seeks to arbitrate his separate Washington state law claims, which were never part of the FLSA action. In fact, at SCI's request, the state law claims of SCI employees were separated from the collective action FLSA claims and were asserted in a separate Rule 23 class action removed to the in the Northern District of California, the

Bryant action. Answering Brief at 5. Other similar state wage and hour class actions were filed against SCI on behalf of employees in other states as well, including, but not limited to, the *Emmick* action filed in Washington and the *Reynolds* action filed in Indiana. CP 363-64. Notably, Mr. Tulip was not a named plaintiff in *Emmick*. The named plaintiffs in both *Emmick* and *Reynolds*, like Mr. Tulip, were also opt-in plaintiffs in *Stickle*, and in February 2011, SCI successfully argued that the *Reynolds* Indiana state law action should be dismissed because the named plaintiffs in that action were required to individually arbitrate “all disputes arising between them, individually, and SCI regarding the associate’s employment.” CP 19.

It was in reliance on SCI’s own position in *Reynolds* that the state law claims should be arbitrated on an individual basis that Mr. Tulip, who was only an unnamed Rule 23 class member in *Bryant* and *Emmick*, served a Demand for Arbitration of his state law claims on SCI on or about May 19, 2011, in accordance with the terms of his arbitration agreement. CP 16-17. Hence, SCI has conceded that participation as an opt-in plaintiff in *Stickle* does not constitute a waiver of the right to individually arbitrate separate state law claims.

Furthermore, the collective action FLSA claims are distinct from the individual state law claims. Mr. Tulip’s certification-related discovery

responses in *Stickle* pertained to various alleged SCI policies that caused him not to be paid for overtime. CP 207-24. In contrast, Mr. Tulip's individual state law claims—the claims he seeks to arbitrate—are not based on the existence of any alleged SCI company-wide policies. Hence, Mr. Tulip may rely on different facts specific to his own location and employment in support of his individual state law claims for unpaid wages independent of the existence of any company-wide policies, as alleged in the FLSA collective action.

Accordingly, the record here clearly shows that the individual state law claims Mr. Tulip seeks to arbitrate are distinguishable from his FLSA collective claims. SCI certainly thought so when it successfully sought to have the FLSA claims heard separately from the state law claims. Therefore, SCI's argument that these claims are the same such that litigation of whether the FLSA claims could proceed on a collective basis waived Mr. Tulip's right to individually arbitrate his separate individual state law claims must be rejected.

In addition to the fact that Mr. Tulip's state law claims were not even part of the FLSA litigation, the only issue that was litigated in the FLSA actions was whether the FLSA claims could be tried collectively based on the existence of company-wide policies. The discovery that took place in *Stickle* was solely concerned with the issue of whether the opt-in

plaintiffs' claims were similar enough to be tried together and was focused on the existence of common policies. CP 207-24. Litigation of the collective certification issue is largely, if not wholly, irrelevant to the merits of any individual claims, which are not dependent upon the existence of any common policies.

It is for this very reason that decertification or denial of class certification does not constitute an adjudication of any individual class members' claims on the merits. *See, e.g., Mitchell*, 841 F. Supp. 2d at 1116. Opt-in or putative class members still retain the right to pursue their claims on an individual basis. Here, Mr. Tulip elected to arbitrate his individual claims in accordance with the terms of his arbitration agreement, rather than commence a separate individual lawsuit. According to SCI's argument, however, Mr. Tulip's only option after the denial of class and collective certification was to litigate his individual claims because his participation in the collective action constituted a waiver of his right to individually arbitrate, even after certification was denied. Such an assertion, however, is devoid of any factual or legal support.

There is nothing inconsistent about litigating the collective action issue and then seeking to adjudicate individual claims through arbitration. Furthermore, in seeking to arbitrate his individual state law claims, Mr.

Tulip was only doing what SCI itself represented was appropriate in the *Reynolds* action only three months before Mr. Tulip served his demand for arbitration. Accordingly, Mr. Tulip did not act inconsistently with his right to arbitrate his individual state law claim.

3. Mr. Tulip Did Not Unreasonably Delay Before Seeking Arbitration

Mr. Tulip did not unreasonably delay by seeking to arbitrate his individual state law claims after no Washington state law class was certified in *Bryant* or *Emmick* and after SCI itself successfully argued in another state law class action, *Reynolds*, that the state law claims of opt-ins in the FLSA actions should be individually arbitrated.

It is well-settled that the commencement of a class action tolls the statute of limitations for all putative members of the class who would have been parties had a class been certified until class certification is denied. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392 (1983). Hence, the commencement of the *Bryant* action tolled the statute of limitations for Mr. Tulip's state law claims, which, as SCI acknowledges in its Answering Brief, were part of the *Bryant* putative class action until the *Bryant* court granted the parties' Stipulation and Order voluntarily dismissing those claims without prejudice. Answering Brief at 8. The Washington state law claims were re-filed as a separate

Rule 23 putative class action in Washington state court on October 5, 2010, and Mr. Tulip was a putative member of that class until that action was dismissed without prejudice and prior to the certification of any Rule 23 class on May 17, 2011. Answering Brief at 9. Mr. Tulip served his demand for arbitration of his individual state law claims two days later on May 19, 2011. CP 16-17. Instead of filing an individual lawsuit, as he could have done after the voluntary dismissal of the putative Rule 23 class action, Mr. Tulip timely demanded that his individual claims be arbitrated as required by the arbitration agreement.

Mr. Tulip had a legitimate reason for not demanding arbitration of his individual claims sooner—to await the outcome of class certification of his Washington state law claims in the *Bryant* and *Emmick* actions. Had Rule 23 certification of the Washington state law claims been granted in those actions, Mr. Tulip’s individual claims could have been resolved as part of that action. However, once the Rule 23 putative class action was voluntarily dismissed, Mr. Tulip, who was only a putative class member, not a party, in those actions, timely demanded arbitration of his individual state law claims, as SCI itself represented was appropriate only three months prior in the *Reynolds* action.

Accordingly, SCI’s argument that Mr. Tulip unreasonably delayed before seeking arbitration must be rejected here.

4. SCI Was Not Prejudiced

Finally, SCI has not been prejudiced. SCI claims that the staleness of the claims, the discovery that occurred in *Stickle* and the expenses SCI incurred in defeating certification in *Stickle* all establish substantial prejudice. Answering Brief at 20. However, none of these factors, taken together or separately, establish prejudice.

First, SCI's "staleness" argument is without merit. The record clearly shows that SCI was on notice of Mr. Tulip's claims through the *Bryant*, *Emmick* and *Stickle* litigation, and SCI has made no showing that any delay associated with litigation resulted in lost evidence.

Second, SCI's contention that it was prejudiced by the discovery conducted in *Stickle* is without merit. All of the certification-related discovery that took place in *Stickle* would have occurred regardless of whether Mr. Tulip had opted in to that action. Additionally, SCI cannot argue that Mr. Tulip used the discovery process to gain information that would not have been available in arbitration. The arbitration agreement here does not prohibit discovery, but rather provides that the arbitration shall be conducted in accordance with the Washington statute governing arbitration or in accordance with the rules of the American Arbitration Association ("AAA"). CP 41. Washington's Arbitration statute provides for whatever discovery the arbitrator deems appropriate, including the

production of documents, witness subpoenas and depositions. RCW 7.04A.170. The AAA rules permit discovery of documents at the very least. *Flores v. West Covina Auto Group*, 212 Cal. App. 4th 895, 917, 151 Cal. Rptr. 3d 481 (2013). Furthermore, the discovery that occurred in *Stickle* was reciprocal, and courts are hesitant to declare such reciprocal discovery prejudicial. *Id.* at 918.

Finally, costs and legal expenses incurred in litigation are insufficient to establish prejudice. *St. Agnes Med. Ctr.*, 31 Cal. 4th at 1203, 8 Cal. Rptr. 3d 517. In any case, Respondents would have incurred those costs and expenses regardless of Mr. Tulip's participation in the FLSA litigation.

Accordingly, this factor, along with all of the others, weighs against a finding of waiver and warrants reversal of the Superior Court's denial of the Petition to Compel Arbitration.

B. SCI IS JUDICALLY ESTOPPED FROM CLAIMING IT IS NOT BOUND BY THE ARBITRATION AGREEMENT

It is absurd for SCI to claim that judicial estoppel does not apply here.² Judicial estoppel "precludes a party from gaining advantage by

² SCI's contention that judicial estoppel should apply to Mr. Tulip based on an argument contained in a brief filed by different plaintiffs in *Reynolds* must be rejected, since Mr. Tulip was not even a party to *Reynolds*, and plaintiffs in that case withdrew their brief, conceding that their claims must be arbitrated.

asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position.” *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (2005). Judicial estoppel applies “if a litigant's prior inconsistent position benefited the litigant or was accepted by the court.” *Id.* (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001)). Many of the same respondents in this action successfully compelled arbitration of another employee’s claims in an action in the Southern District of Texas captioned *Green v. Serv. Corp. Int’l* by successfully arguing that they are bound by the very same arbitration agreement they now claim does not bind them. CP 29-72. Similarly, in *Reynolds*, many of the same respondents successfully dismissed a state law wage and hour action filed by former SCI employees in Indiana on the basis that those employees must individually arbitrate their claims, rather than litigate them. CP 19-27.

SCI should not be allowed to assume a contrary position here simply because it has decided it is no longer in SCI’s interest to comply with its own arbitration agreements.

III. CONCLUSION

For all of the reasons set forth herein and in Mr. Tulip’s opening brief, the order appealed from should be reversed, and this matter remanded to the Superior Court with directions that Mr. Tulip’s petition to

compel arbitration be granted and that he be awarded attorney's fees on his motion and this appeal, together with such other and further relief as this Court deems just and proper.

Respectfully submitted this 15th day of April, 2013.

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CERTIFICATE OF SERVICE

I, Janet Francisco, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served the foregoing document upon counsel of record at the address and in the manner described below, on April 15, 2013: **APPELLANT'S REPLY BRIEF.**

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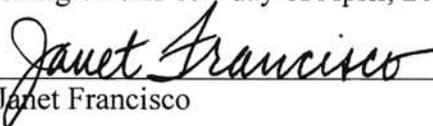
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I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 15th day of April, 2013.



Janet Francisco