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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
JANUARY -7 PM 2:52

No. 71806-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JENNIFER WIESE and CANDY BRADISON,
Individually and on behalf of all others similarly situated,

Respondents,
v.

CACH, LLC, a Colorado limited liability company,

Appellant.

REPLY BRIEF OF APPELLANT CACH, LLC

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I. INTRODUCTION

The response brief of Jennifer Wiese (“Ms. Wiese”) and Candy Bradison (“Ms. Bradison”) (collectively, “Debtors”) does not identify a single case in any jurisdiction to support its contention that the filing of a collection lawsuit waives the filing party’s right to invoke an arbitration clause in a separate lawsuit involving statutory consumer protection claims. In stark contrast, CACH cites extensive authority from throughout the country—including a 2014 Washington case—that has considered the precise textual and common law arguments raised by Debtors and found no waiver.

Moreover, *if* the Court accepts Debtors’ premise and links the putative class action and prior collection cases together as “one claim,” the consequence of accepting that premise is that Debtors are unequivocally barred from pursuing this case under the doctrine *res judicata*.

Accordingly, the Court should find no waiver and compel arbitration; or, if the Court finds waiver, it should dismiss the case outright based on *res judicata*.

II. ARGUMENT

A. **There is a Strong Judicial Presumption Favoring Arbitration and Against Finding Waiver.**

The Federal Arbitration Act (“FAA”) and the courts heavily favor arbitration as a matter of public policy. The body of case law surrounding

the FAA dictates that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *AT&T Mobility LLC v. Concepcion*, __U.S.__, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011) (recognizing that Congress enacted the FAA “in response to widespread judicial hostility to arbitration agreements” to reflect “a liberal federal policy favoring arbitration”) (internal citations and quotations omitted). When there is any ambiguity about the scope of an arbitration provision, disputes should always be resolved in favor of arbitration. *See Moses*, 460 U.S. at 25-26 (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”). A party contending that waiver has occurred therefore “has a heavy burden of proof.” *Steele v. Lundgren*, 85 Wn. App. 845, 852, 935 P.2d 671 (1997); *Creative Telecommunications, Inc. v. Breeden*, 120 F. Supp. 2d 1225, 1232 (D. Haw. 1999). Debtors do not come close to meeting this burden.

B. Courts throughout the Country that have Considered the Precise Question before this Court Found that No Waiver Occurred.

CACH's position is confirmed by the numerous jurisdictions that have addressed the precise waiver argument before this Court, each of which found that a debt collector does not waive its right to compel arbitration in a subsequent consumer protection lawsuit simply by obtaining a judgment in state court. *See Cage v. CACH*, No. C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wash. May 22, 2014) ("Bringing a lawsuit for debt collection may result in defendants' waiver of arbitration for that case, but it does not bar plaintiffs from compelling arbitration in that action or bar defendants from invoking arbitration in all future separate causes of action that plaintiffs assert against them."); *Schwartz v. CACH, LLC*, No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014) (holding that "CACH's decision not to invoke arbitration in the earlier state-court collection actions is not relevant" to the determination of waiver in a later-filed consumer protection action); *Funderburke v. Midland Funding, L.L.C.*, No. 12-2221-JAR/DJW, 2013 WL 394198, at *7 (D. Kan. Feb. 1, 2013) ("The Court agrees that Midland's prior litigation enforcing the debt against Plaintiff fails to establish waiver in this case," which involved claims raised under the Kansas Consumer Protection Act.); *Hodson v. Javitch, Block & Rathbone*,

LLP, 531 F. Supp. 2d 827, 831 (N.D. Ohio 2008); *In re Advanta Bank Corp.*, Nos. 11-07-00276-CV, 11-07-00315-CV, 2008 WL 615921, at *2 (Tex. App. Mar. 6, 2008); *Fields v. Howe*, No. IP-01-1036-C-B/S, 2002 WL 418011, at *8 (S.D. Ind. Mar. 14, 2002).

Washington courts have already joined this long line of precedent. When the United States District Court for the Western District of Washington considered the identical arbitration language cited by Debtors in a highly analogous consumer protection class action, it found there was no waiver. *Cage v. CACH, LLC*, 2014 WL 2170431, at *1. Notwithstanding the inclusion of the word “dispute” in the arbitration clause, the United States District Court Judge rejected the argument of waiver, holding:

Although the decision to file a suit, participate in litigation, and later seek to compel arbitration may constitute a waiver, this case does not involve the party that initiated the lawsuit later seeking to compel arbitration in the same matter. Rather, plaintiffs initiated this separate lawsuit against defendants, and defendants responded by invoking the arbitration agreements. Nor do defendants' earlier debt collection suits against plaintiffs suggest that they initiated litigation that they now seek to abandon in favor of arbitration. Defendants' previous collection actions are separate from the suit plaintiffs now bring against defendants. Bringing a lawsuit for debt collection may result in defendants' waiver of arbitration for that case, but it does not bar plaintiffs from compelling arbitration in that action or bar defendants from invoking arbitration in all future separate causes of action that plaintiffs assert against them.

Id.

The word in the arbitration clause that is relevant here is not “dispute” but “any,” which comes before “claim or dispute.” That word confirms that each claim must be viewed separately in deciding whether there has been waiver. The United States District Court for the District of Massachusetts reached this result when it addressed this language:

CACH’s decision not to invoke the arbitration in the earlier state-court collection actions is not relevant. The contract here provides that either party can elect arbitration as to “**any** claim.”... It does not require that the parties either litigate **all** claims or arbitrate **all** claims. The collection actions, which CACH brought against plaintiff, are distinct from the claims brought by plaintiff here.

Schwartz, 2014 WL 298107, at *3 (emphasis added). Debtors have not identified a single authority in any jurisdiction to support their contention that filing a collection lawsuit waives the creditor’s right to invoke an arbitration clause in a separate lawsuit involving statutory consumer protection claims.

C. Debtors Fail to Engage the Long Line of Common Law Surrounding Waiver.

Debtors’ Response Brief merely skirts around the issues before the Court. In stark contrast, CACH’s waiver argument follows a basic progression: (1) waiver is determined on a claim-by-claim basis, and (2) the consumer protection claims at issue in the present putative class action are distinct from the breach of contract claims presented in the underlying collection matters.

Debtors do not challenge this basic framework; nor could they. Instead, Debtors attempt to misdirect the Court by framing the “central dispute” of the two actions as the same. Debtors contend that “the central dispute between CACH and the Plaintiffs—in both the collection actions and in this vacatur action—is whether CACH is entitled to collect on the credit card accounts.” Resp. at 3. Yet waiver law does not turn on whether the “central dispute” in separate actions is the same. As the ample case law cited by CACH makes clear, a party only waives the right to compel arbitration of a **claim** by litigating that **claim**—the amorphous concept of the “central dispute” never enters the analysis.

In the underlying breach of contract lawsuits, neither Ms. Bradison nor Ms. Wiese ever alleged that CACH had violated the Washington Consumer Protection Act or the Washington Collection Agency Act, that CACH was involved in a civil conspiracy, or that the Court should enter declaratory or injunctive relief. Waiver is the *intentional* relinquishment of a *known* right, and it is nonsensical to suggest that CACH could have knowingly relinquished its right to compel arbitration of these claims when they were never raised or considered in the previous suits.

**1. Waiver is Determined on a Claim-by-Claim Basis—
Debtors Do Not Argue Otherwise.**

A party only invokes the judicial process—waiving its right to arbitrate—when it litigates a **specific claim** that it subsequently seeks to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); *Rienschel v. Cingular Wireless LLC*, Nos. C06-1325 TSZ, C09-106 TSZ, 2013 WL 951012, at *5 (W.D. Wash. Mar. 12, 2013) (“A party’s acts are inconsistent with the right to compel arbitration where the party makes a conscious decision to continue to seek judicial judgment **on the merits of the arbitrable claims.**”) (emphasis added) (internal quotations omitted); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999) (“We hold today that a party only invokes the judicial process to the extent it litigates **a specific claim it subsequently seeks to arbitrate.**”) (emphasis added). This claim-based approach to the FAA is intended to promote the federal policy favoring arbitration, even at the expense of judicial efficiency. *See Byrd*, 470 U.S. at 217 (requiring the separate litigation and arbitration of claims deriving from the same nucleus of facts). Washington law has adopted the same approach. *See Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 91-92, 246 P.3d 205 (2010) (rejecting that the claims at issue were waived because **“the trial court did not, was not asked to,**

and was not authorized to find facts or make conclusions of law pertaining to the breach of contract and related claims Verbeek now seeks to arbitrate”) (emphasis added); *Otis Hous. Ass’n, Inc. v. Ha*, 165 Wn.2d 582, 588, 201 P.3d 309 (2009) (noting that a party who has litigated a particular claim “may not later seek to relitigate the **same issue** in a different forum”) (emphasis added). Debtors do not cite a single authority to challenge this well-established body of law.

2. The Claims Presented in this Class Action Are Not the Same as Those Presented in the Collection Matters—Debtors Do Not Argue Otherwise.

Debtors also do not argue that the claims at issue in this putative class action are the same as those in the underlying collection matters. Nor could they.

The collection matters solely considered breach of contract claims raised by CACH. Conversely, the present action involves three different claims, all of which are raised by Debtors: (1) alleged violation of the Consumer Protection Act (RCW 19.86 *et seq.*); (2) alleged violation of the Washington Collection Agency Act (RCW 19.16 *et seq.*); and (3) civil conspiracy. These claims were not raised or considered in the underlying collection actions.

By any standard, the claims in these separate lawsuits are not the same. They are different causes of action, require different elements of proof, and involve different *prima facie* cases.

Debtors attempt to steer the Court away from this basic fact by arguing that the “central dispute” in the two actions is the same. This argument is irrelevant to the Court’s waiver determination, which Washington and Federal law make clear revolves around the **claims** at issue. Moreover, Debtors contention that waiver occurs when the “central dispute” of an action has already been resolved is facially unworkable. Debtors offer no standard for how courts will decide what constitutes the “central dispute” of a case, or any precedent to show previous applications of this concept.

3. CACH Has Not Engaged in Any Conduct in the *Present Litigation* that is Inconsistent with Its Right to Compel Arbitration—Debtors Do Not Argue Otherwise.

Debtors’ waiver argument—including the contention that they will be prejudiced if CACH is permitted to compel the arbitration of the newly raised consumer protection claims—solely focuses on CACH’s actions in the underlying collection matters. This conduct has no bearing on CACH’s right to invoke the valid arbitration agreements in this instance.

In order to demonstrate waiver, Debtors must show that CACH acted inconsistently with its right to invoke the arbitration agreements with

respect to the claims that are currently at issue. Since the claims presented in this litigation were neither raised nor considered in the underlying collection matters, CACH's conduct in those suits is irrelevant to the waiver question before this Court.

Debtors do not argue that CACH acted inconsistently with its right to compel arbitration through any conduct that has occurred *since the present putative class action was filed*. Nor could they. CACH made its demand that the current claims be moved to arbitration before taking any other substantive steps. CP at 121.

Debtors' arguments are nothing more than smoke and mirrors. They do not challenge the fundamental legal principles invoked by CACH or attempt to argue that the claims in the two actions are the same. CACH therefore did not waive its right to compel arbitration of Debtors' claims.

D. The Text of the Arbitration Agreements Reinforces a Claim-Based Interpretation of Waiver in this Instance.

Debtors' principal argument is that since CACH successfully obtained judgments on its breach of contract claims, it is now barred from demanding arbitration with respect to Debtors' brand-new and never-before-litigated CPA and tort claims. Debtors' argument is based on the solitary sentence within the arbitration agreements that states “[a]rbitration may be selected at any time unless a judgment has been

rendered or the other party would suffer substantial prejudice by the delay in demanding arbitration.” CP at 95, 102.

Debtors’ argument fails for a very simple reason—no judgment has been entered on their claims. In fact, none of the claims at issue in this class action has ever been raised.

Likewise, Debtors’ use of the word “dispute” to frame their argument is disingenuous. Debtors ignore the fact that the word “dispute” is subsumed into the defined term “Claim”—otherwise known as a cause of action. *Black’s Law Dictionary* 282 (9th ed. 2009) (defining claim as “a demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for”). As the defined term that sets the framework for the arbitration provisions, the word “Claim” is used twenty-three (23) times; the word “dispute” only appears once. CP at 95, 102.

Debtors do not engage these arguments; instead, they pull the word “dispute” and the judgment exception language out of context in an attempt to circumvent the plainly claim-specific focus of the arbitration agreements. This attempt cannot be squared with Washington law, where courts are required to interpret contracts according to the “context rule.” *See Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222, 229 (1990). As the Washington Supreme Court has noted, “meaning can almost never

be plain except in a context.” *Id.* (citing Restatement (Second) of Contracts § 212, comment b (1981)).

In this case, the context of the agreements clearly supports CACH’s claim-based interpretation of the waiver provision. The fact that the arbitration agreements determine waiver on a “Claim” by “Claim” basis is to be expected. These provisions merely contractually adopt the long-established waiver law described above.

Debtors’ position also cannot be squared with the strong public policy favoring arbitration. As the U.S. Supreme Court has plainly established, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver.” *Moses*, 460 U.S. at 25-26. This Court should interpret the arbitration provisions in this case consistent with the public policy favoring arbitration and the uniform case law upholding the enforceability of similar arbitration provisions.

Viewed in this light, it is not surprising that the two federal courts that considered the **identical** waiver provision this year found that CACH did not waive the right to compel arbitration of consumer protection class action claims by previously obtaining judgments to collect the underlying debts. *See Cage v. CACH*, C13-01741RSL, 2014 WL 2170431, at *1

(W.D. Wash. May 22, 2014); *Schwartz v. CACH, LLC*, No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014).

Thus, the text of the arbitration provisions confirms CACH's position that it has the right to compel arbitration of the "Claims" at issue.

E. Debtors' Arguments Attempt to Stand the Doctrine of *Res Judicata* on its Head.

The arguments made by Debtors present a textbook example of *res judicata*. If the Court holds that the claims involved in the collection matters and the present putative class action are the same for evaluating waiver, Debtors' class action claims should be barred by the doctrine of *res judicata*, which prohibits the re-litigation of a claim or cause of action. *See Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) ("*Res judicata*, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action."). In an attempt to circumvent this basic application of *res judicata*, Debtors rely on the long-defunct, seldom applicable concept of the independent action in equity.¹ These arguments are without merit.

¹ The more common method for vacating judgments under Washington law is the statutory procedure provided under CR 60. Debtors conceded at oral argument that their challenge to the collection judgments is not under CR 60. CP at 217-18, 17:24-18:6.

1. Independent Actions in Equity Are Extremely Rare and Heavily Disfavored.

The three (3) cases cited by Debtors do not support their attempt to circumvent basic *res judicata* principles. See *Corp. Loan & Sec. Co. v. Peterson*, 64 Wn.2d 241, 391 P.2d 199 (1964); *Stolze v. Stolze*, 111 Wash. 398, 191 P. 641 (1920); *Boylan v. Bock*, 60 Wash. 423, 111 P. 454 (1910). At most, this trio of cases merely stands for the proposition that independent actions in equity were formerly recognized in Washington. It has not been favorably applied in more than fifty (50) years.

2. Debtors Waived this Argument by Failing to Raise it in the Previous Actions.

The doctrine of *res judicata* applies to any claim that has been litigated or “on which there has been an **opportunity to litigate.**” *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949) (emphasis added). CACH’s decision not to obtain a license was a matter of public record. Debtors’ certainly had the opportunity to raise the defenses presented in the present putative class action in the underlying collection matters. Their failure to do so should bar them from being raised in this instance.

3. Debtors Failed to Establish Any of the Elements Required for an Independent Action in Equity.

Debtors have not demonstrated that they have adequate grounds for vacating the collection judgments. In order to warrant such an extreme remedy, Debtors would have to establish:

(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) **fraud**, accident, or mistake **which prevented the defendant in the judgment from obtaining the benefit of his defense**; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Nat'l Surety Co. v. State Bank, 120 F. 593, 599 (8th Cir.1903) (emphasis added). These elements are conjunctive; in order to seek to overturn a previous judgment through an independent action in equity, Debtors were required to prove that each element is met in this instance.

However, Debtors offer nothing more than a cursory, one (1) page analysis meant to establish that independent actions in equity are permitted within Washington. These arguments are unpersuasive, as Debtors cannot cite a single case within the last fifty (50) years that favorably applied the doctrine. But more importantly, Debtors' arguments fail on their face because they did not establish any of the elements required to support the independent vacation of the final judgments from the collection matters. *See Nat'l Surety Co.*, 120 F. at 599.

Debtors' brief does not even contend that the current situation presents "exceptional circumstances" or a "gross miscarriage of justice." They do not contest their debts or their obligation to render payments under their respective contracts. CP at 218, 19:20-19:23 ("In most cases, these debtors owe the debts. And a properly registered and licensed debt

collector might be able to pursue those debts, and those would be separately litigated.”). Instead, Debtors rely on a technical legal challenge to CACH’s right to collect their debts based on its failure to be licensed under the Washington Collection Agency Act (RCW 19.16 *et seq.*). Debtors characterize this argument as fraud. Resp. Brief at 2. This contention fails on the face of the rule.

Alleged fraud only provides a sound basis for an independent action in equity when the conduct at issue “prevented the defendant in the judgment from obtaining the benefit of his defense.” *See Nat’l Surety Co.*, 120 F. at 599. CACH did not attempt to deceive the courts—as noted above, its failure to be licensed was a matter of public record. In choosing not to obtain a license under the WCAA, CACH relied on a good faith interpretation of existing law that it was not required to obtain a license. As the Washington Supreme Court recently recognized, the previous version of the WCAA did not make clear whether debt buyers were required to be licensed:

Indeed, the Collection Agency Board (Board)-the agency charged with administering the WCAA-struggled to determine whether debt buyers fall under the statutory definition due to this ambiguity. *See* RCW 19.16.41. In a July 2004 meeting, the Board adopted an interpretation that debt buyers that collect solely on their own claims and in their own names are not covered by chapter 19.16 RCW.

Gray v. Suttell & Associates, 334 P.3d 14, 19 fn. 7 (Wash. 2014). Based on the Collection Agency Board’s 2004 decision, CACH was led to believe that it was not required to be licensed. While the law has since been amended and the Supreme Court has clarified that debt buyers are required to be licensed, CACH’s conduct surely cannot be characterized as fraud. These circumstances are far from the type of “gross miscarriage of justice” required to bring an independent action in equity. *See Nat’l Surety Co.*, 120 F. at 599. As a result, this action cannot circumvent basic *res judicata* principles—if the Court finds that the claims in this action are the same as those presented in the underlying collection matters, this action should be barred as a matter of law.

III. CONCLUSION

For the foregoing reasons, the Court should either grant CACH’s motion, compelling arbitration of the claims, or dismiss the case outright.

RESPECTFULLY SUBMITTED this 7th day of November, 2014.

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CERTIFICATE OF SERVICE

I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen, and I am competent to be a witness herein. On November 7, 2014 I caused the foregoing document to be served on the following counsel via hand-delivery:

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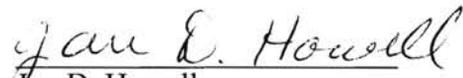
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EXECUTED in Seattle, Washington on November 7, 2014


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