

72090-2

72090-2

APPEALS DIVISION
NOV 13 2013 1:24

No. 72090-2
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

SQUARETWO FINANCIAL CORP., a Delaware corporation,

Appellant,

CACH, LLC, a Colorado limited liability company,

Defendant.

Appeal from the Superior Court of King County
The Honorable Mary Yu
No. 13-2-33354-6 SEA

**REPLY BRIEF OF APPELLANT
SQUARETWO FINANCIAL CORP.**

Benjamin J. Stone, WSBA #33436
Veris Law Group PLLC
1809 Seventh Avenue, Suite 1809
Seattle, WA 98101
Telephone: (206) 829-9590
Email: ben@verislawgroup.com
Attorney for SquareTwo Financial Corp.

 ORIGINAL

Table of Contents

I. INTRODUCTION.....1

II. ARGUMENT.....2

 A. SquareTwo is an intended beneficiary of the arbitration provision of the agreements.2

 B. If CACH is entitled to arbitration, SquareTwo is too under the doctrines of estoppel and agency.6

 C. CACH did not waive SquareTwo’s right to arbitrate by commencing and prosecuting the collection lawsuits.....10

 D. Debtors are not prejudiced by arbitrating with SquareTwo.14

III. CONCLUSION15

Table of Authorities

Cases

<i>American Bankers Ins. Group, Inc. v. Long</i> , 453 F.3d 623 (4 th Cir. 2006)	7
<i>Atlantic Marine Fla., LLC v. Evanston Ins. Co.</i> , 721 F.Supp.2d 1244, 1250 (M.D. Fla. 2010)	3
<i>Barton Enters, Inc. v. Cardinal Health, Inc.</i> , No. 4:10 CV 324 DDN, 2010 WL 2132744 (E.D. Mo. May 27, 2010)	7
<i>Cage v. CACH, LLC</i> , C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wn. May 22, 2014)	11, 13
<i>CD Partners, LLC v. Grizzle</i> , 424 F.3d 795, 800 (8 th Cir. 2005)	9
<i>Choctaw Generation Ltd. Partnership v. American Home Assurance Co.</i> , 271 F.3d 403 (2001)	7
<i>Comer v. Micor, Inc.</i> , 436 F.3d 1098, 1101 (9 th Cir. 2006)	7
<i>Dean Witter Reynolds, Inv. v. Byrd</i> , 470 U.S. 213, 217 (1985)	11
<i>Doctor's Assoc., Inc. v. Distajo</i> , 107 F.3d 126, 133 (2d Cir. 1997)	11, 14, 15
<i>Droplets, Inc. v. E*Trade Fin. Corp.</i> , 939 F.Supp.2d 336, 347 (S.D.N.Y. 2013)	3
<i>E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediaries, S.A.S.</i> , 269 F.3d 187, 202 (3d Cir. 2001)	8
<i>Fields v. Howe</i> , No. IP-01-1036-C-B/S, 2002 WL 418011, at *8 (S.D. Ind. Mar. 14, 2002)	11, 12
<i>Fisher v. A.G. Becker Paribas Inc.</i> , 791 F.2d 691, 694 (1986)	10
<i>Fisher</i> , 791 F.2d at 694	10
<i>Funderburke v. Midland Funding, L.L.C.</i> , Case No. 12-2221-JAR/DJW, 2013 U.S. Dist. LEXIS 13438, at *18-*19 (D. Kan. Feb. 1, 2013)	11
<i>Grant & Assoc. v. Gonzales</i> , 2006 Wash. App. LEXIS 2290, at *12 (Oct. 17, 2006)	14
<i>Griegson v. Creative Artists Agency L.L.C.</i> , 210 F.3d 524, 527 (5 th Cir. 2000)	9
<i>Hendrick v. Brown & Root, Inc.</i> , 50 F.Supp.2d 527 (E.D. Va. 1999)	5
<i>Hodson v. Javitch, Block & Rathbone, LLP</i> , 531 F.Supp.2d 827, 831 (N.D. Ohio 2008)	11
<i>ImagePoint, Inc. v. JP Morgan Chase Bank Nat'l Assoc.</i> , No. 12 Civ. 7183 (LAK)(GWG), 2014 WL 2884080, at *11 (S.D.N.Y. June 25, 2014)	5
<i>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</i> , 863 F.2d 315, 320-21 (4 th Cir. 1988)	9
<i>Jones Assocs., Inc. v. Eastside Props., Inc.</i> , 41 Wn. App. 462, 466, 704 P.2d 681 (1985)	10
<i>Kramer v. Toyota Mot. Corp.</i> , 705 F.3d 1122 (9 th Cir. 2013)	6
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 361, 662 P.2d 385 (1983)	2, 3
<i>Lynott v. National Union Fire Ins. Co. of Pittsburgh, PA</i> , 123 Wn.2d 678, 693, 871 P.2d 146 (1994)	13
<i>McClure v. Davis Wright & Tremaine</i> , 77 Wn. App. 312, 890 P.2d 466 (1995)	6

<i>Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.</i> , 460 U.S. 1, 24-25 (1983).....	5, 6
<i>Olvera v. Blitt & Gaines, P.C.</i> , 431 F.3d 285, 289 (7 th Cir. 2005).....	4
<i>Reisfeld & Sons Import. Co. v. S.A. Eteco</i> , 530 F.2d 679, 681 (5 th Cir. 1976).....	9
<i>Riensch v. Cingular Wireless LLC</i> , Nos. C06-1325 TSZ, C09-106 TSZ, 2103 WL 951012, at *5 (W.D. Wn. Mar. 12, 2013).....	11
<i>Schwartz v. CACH, LLC</i> , No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014).....	11, 12, 14
<i>Subway Equip. Leasing Corp. v. Forte</i> , 169 F.3d 324, 326 (5 th Cir. 1999).....	10, 11, 14
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 887, 224 P.3d 818 (2009).....	5
<i>Vikingstad v. Baggott</i> , 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955).....	2
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).....	4
<u>Rules</u>	
General Rule 14.1	14

I. INTRODUCTION

Respondents Jennifer Wiese and Candy Bradison (“Debtors”) oppose the appeal of appellant SquareTwo Financial Corp. (“SquareTwo”). They contend that SquareTwo is not entitled to arbitrate their claims. Their arguments fail

First, Debtors contend that SquareTwo is not a third-party beneficiary entitled to arbitration under their agreements with FIA Card Services, Inc. (“FIA”). But they ignore the plain language of the agreements, which contain an assignment clause and state that a parent company has the right to arbitration. These clauses, taken together, entitle SquareTwo to compel arbitration.

Second, Debtors argue that SquareTwo cannot compel arbitration under the doctrines of equitable estoppel and agency. Debtors claim these doctrines require that their claims against SquareTwo “rely” on the agreements. The cases cited by Debtors, however, dealt with different facts. Cases not addressed by Debtors make clear that, where there is a close corporate relationship between a signatory and non-signatory and the claims against the two are identical, such as here, arbitration is warranted. Otherwise, the strong federal policy in favor of arbitration is thwarted.

Third, Debtors contend that CACH waived SquareTwo’s right to arbitrate years ago, when it brought collection lawsuits against them. But SquareTwo was not a party to that suit and is an entity distinct from CACH. And courts have held that waiver of the right to arbitration by one company is not imputable to an affiliated company. Debtors also do not

address the federal cases that have held that in a case such as this, where there are consumer-protection-act claims being asserted based on a prior collection action, there is no waiver.

Finally, Debtors contend they would be prejudiced if compelled to arbitrate their claims against SquareTwo based on the alleged costs and inconveniences of the collection lawsuits. But these factors are not relevant under case law addressing prejudice. It is clear from those cases that Debtors have not been prejudiced. SquareTwo moved quickly to compel arbitration and there has been no discovery or dispositive motion practice in this case.

II. ARGUMENT

A. **SquareTwo is an intended beneficiary of the arbitration provision of the agreements.**

Debtors contend that SquareTwo is not a third-party beneficiary because SquareTwo is not named in the agreements and it was not involved in the drafting, execution, or performance of the agreements.

As the Washington Supreme Court has held, however, a third party is a beneficiary to a contract if the contracting “parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.” *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 361, 662 P.2d 385 (1983). The intent that is required is merely “an intent that the promisor shall assume a direct obligation to” the third-party beneficiary. *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955) (internal citations omitted).

The third-party does not have to be identified by name. In *Lonsdale*, the Washington Supreme Court held that the plaintiffs not mentioned in the contracts were nonetheless third-party beneficiaries. The court cited the fact that the plaintiffs would benefit from the performance of a particular provision of the contract. 99 Wn.2d at 362-63; *see also Droplets, Inc. v. E*Trade Fin. Corp.*, 939 F.Supp.2d 336, 347 (S.D.N.Y. 2013) (“a third party can be a third party beneficiary even if the contract does not identify that party by name”); *Atlantic Marine Fla., LLC v. Evanston Ins. Co.*, 721 F.Supp.2d 1244, 1250 (M.D. Fla. 2010) (“It is important to note that the third party need not be mentioned by name in the contract to be deemed a third party beneficiary”).

Here, SquareTwo is a third-party beneficiary. The arbitration provision of the agreements states that a number of third parties – including FIA’s parent – had the right to compel arbitration. CP 69, 74, 224, 237. FIA assigned its rights under the agreements to CACH. Another provision of the agreements, entitled We May Sell Your Account, stated: “The person or entity to whom we make any such sale, assignment or transfer shall be entitled to *all* of our rights.” CP 66, 222 (emphasis supplied). Thus, CACH stepped into the shoes of FIA and SquareTwo, as CACH’s parent, stepped into the shoes of FIA’s parent. Just like FIA’s parent, SquareTwo became a third-party beneficiary with the right to compel arbitration. Contrary to what Debtors contend, whether they specifically intended to benefit SquareTwo is immaterial. It is enough that Debtors agreed to arbitrate disputes with the parent of the other party to

the agreements. That was FIA's parent before the assignment. Now it is SquareTwo. *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005) ("the common law puts the assignee in the assignor's shoes, whatever the shoe size").

Debtors' argument that the agreements must be interpreted as excluding SquareTwo as a third-party beneficiary of the arbitration provisions is flawed for two reasons. First, it ignores the We May Sell Your Account provision of the agreements. According to Debtors, contrary to what that provision says, CACH is not entitled to *all* of FIA's rights. It receives fewer rights because, unlike FIA's parent, which could compel arbitration, CACH's parent cannot compel arbitration. This is not how contracts are interpreted under Washington law. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (holding that a contract should not be interpreted in a manner that renders any of its provisions meaningless or ineffective).

Second, Debtors misinterpret the agreements when they argue that allowing SquareTwo to arbitrate disputes "creates redundancy" because CACH is "already covered by the arbitration agreement as a 'purchaser of your account.'" Brief of Respondents at 10-11. CACH is not merely a purchaser of the account. It is also an assignee. And there is no redundancy since there can be more than one assignee. CACH can assign its rights under the agreements to a second assignee. That assignee can assign its rights to a third assignee, and so on. Each of these assignees would have the same rights, including the right to arbitration. *See, e.g.*,

ImagePoint, Inc. v. JP Morgan Chase Bank Nat'l Assoc., No. 12 Civ. 7183 (LAK)(GWG), 2014 WL 2884080, at *11 (S.D.N.Y. June 25, 2014) (multiple assignments of rights are permitted). So rather than creating a redundancy, holding that SquareTwo is a third-party beneficiary merely interprets the agreements as the agreements were intended to be interpreted, and in accordance with Washington law.

To the extent there is ambiguity about whether SquareTwo is a third-party beneficiary, that ambiguity must be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (“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, delay, or a like defense to arbitrability”); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887, 224 P.3d 818 (2009) (“If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration, unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute.”).

Debtors contend that this policy favoring arbitration does not apply here, where the issue is whether a non-signatory can enforce an arbitration agreement. Debtors are incorrect. The cases they cite concern another issue entirely – whether the policy applies when there is no agreement to arbitrate at all. *See, e.g., Hendrick v. Brown & Root, Inc.*, 50 F.Supp.2d 527 (E.D. Va. 1999) (issue was whether defendant could be compelled to

arbitrate when the contract at issue had no arbitration clause). Here, in contrast, Debtors agreed to arbitrate the claims they assert in this lawsuit. The only issue is whether they must arbitrate those claims against SquareTwo. That is a question of scope of the arbitration clause. And as the U.S. Supreme Court held, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25.

B. If CACH is entitled to arbitration, SquareTwo is too under the doctrines of estoppel and agency.

Debtors contend that the doctrine of equitable estoppel and agency are not applied by courts and, when they are, the courts require that the claims “rely” on the agreement containing the arbitration clause. Brief of Respondents at 12-15.

As an initial matter, Debtors are incorrect in asserting that Washington courts do not accept equitable estoppel as a ground for compelling arbitration. Washington courts have accepted this doctrine as an exception to the rules that only signatories can be bound by a contract. *See, e.g., McClure v. Davis Wright & Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995).

Debtors are also incorrect that Debtors’ claims must “rely” on the agreements for SquareTwo to be entitled to arbitration. In the cases where the courts required reliance, there was no corporate relationship, no relationship between claims, and no other basis for compelling arbitration with a non-signatory. *See, e.g., Kramer v. Toyota Mot. Corp.*, 705 F.3d 1122 (9th Cir. 2013) (manufacturer seeking to compel arbitration based on

arbitration clause in contract between dealers and customers); *American Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006) (insurance company seeking to compel arbitration based on arbitration clause in contract between investors and broker); *Choctaw Generation Ltd. Partnership v. American Home Assurance Co.*, 271 F.3d 403 (2001) (surety seeking to compel arbitration based on arbitration clause in construction contract between contractor and owner).

In contrast, here, there is a close relationship between SquareTwo and CACH. Indeed, the close relationship is the sole basis for suing SquareTwo. That is enough to warrant arbitration. As the Ninth Circuit held: “signatories have been required to arbitrate claims brought by nonsignatories at the nonsignatory’s insistence because of the close relationship between the entities involved.” *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (internal citations and quotations omitted); *Barton Enters, Inc. v. Cardinal Health, Inc.*, No. 4:10 CV 324 DDN, 2010 WL 2132744 (E.D. Mo. May 27, 2010) (“Given the close relationship between Cardinal Health (a non-signatory) and MSI (a signatory), Cardinal Health may enforce the arbitration agreement against Barton Enterprises (a signatory)”).¹ Debtors’ contention that this

¹ Debtors states that *Barton Enters, Inc.* is “[t]he one case SquareTwo cites” and that the case “gets it [SquareTwo] nowhere.” Brief of Respondents at 15. The first statement is untrue. SquareTwo cited a number of cases (not just *Barton*) to support its estoppel and agency arguments. See Brief of Appellant SquareTwo Financial Corp. at 8-10. The second statement misreads the court’s decision in *Barton*. The court there provided more than one basis for compelling arbitration. One independent basis was the close relationship between the parent company (a non-signatory) and the subsidiary (the signatory).

relationship is not enough is incorrect. Indeed, it is disingenuous for Debtors to claim, on the one hand, that the relationship between SquareTwo and CACH is not enough to justify arbitration and, on the other, to allege that the companies are so close that SquareTwo is liable for CACH's actions.

Debtors also cite a case where the issue was whether a parent company could be compelled to arbitrate based on an arbitration agreement signed by its subsidiary. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediaries, S.A.S.*, 269 F.3d 187, 202 (3d Cir. 2001). Since it had never agreed to arbitrate any disputes at all, the Third Circuit explained that the parent could be compelled to arbitrate only if it had sought benefits under the contract. This was required because, to “allow it to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (internal quotations and citations omitted). In this case, in contrast, Debtors agreed to arbitrate the claims it raises in this case. Thus, the Third Circuit's ruling is not relevant to whether SquareTwo is entitled to arbitration.

In addition, arbitration is warranted since the claims against SquareTwo and CACH are identical. Courts have held that this, too, is a reason to compel arbitration with a non-signatory:

Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. ... *Second, application of equitable*

estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

Griegson v. Creative Artists Agency L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (internal citations and quotations marks omitted); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 800 (8th Cir. 2005).

To allow Debtors to simultaneously litigate and arbitrate the same claims against SquareTwo and CACH would enable them to circumvent the arbitration provision they agreed to when they received their activated and used their credit cards. It would also undermine the strong federal policy favoring arbitration of disputes. Courts around the country have held that this result should be avoided. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *Griegson*, 210 F.3d at 527 (if parties to an arbitration agreement could litigate claims alleging concerted misconduct against non-signatories “the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted”) (internal italics omitted); *Sam Reisfeld & Sons Import. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976) (“If the parent corporation was forced to try the case [that the subsidiary was arbitrating] the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted”).

C. CACH did not waive SquareTwo’s right to arbitrate by commencing and prosecuting the collection lawsuits.

Debtors contend that a “condition precedent” to arbitration is the following clause of the agreements: “Arbitration 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 67, 74.

This is not a “condition precedent.” A “condition precedent is an event occurring after the making of a valid contract which must occur before a right to immediate performance arises.” *Jones Assocs., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 466, 704 P.2d 681 (1985). Not obtaining a judgment is not an “event.” It is a non-event. Thus, not obtaining a judgment cannot be a condition precedent.

The provision Debtors cite is, instead, a contractual waiver. Under federal law, which governs here, there is a strong presumption in favor of arbitration and federal courts impose a “heavy burden” on a litigant arguing waiver. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (1986); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999). Debtors must establish (among other things) that SquareTwo engaged in “acts inconsistent with” the right to compel arbitration. *Fisher*, 791 F.2d at 694. Debtors cannot do this for two reasons.

First, Debtors contend that CACH waived SquareTwo’s right to arbitration years ago, by litigating the collection lawsuits. This is incorrect. As previously shown (in SquareTwo’s initial brief), a subsidiary cannot waive a parent company’s contractual right to arbitration. Brief of Appellant SquareTwo Financial Corp. at 15-18.

Debtors' bald contention that SquareTwo controlled the collection lawsuits is not enough to deprive SquareTwo of its right to arbitration. If Debtors' were correct, the corporate form would lose all meaning and significance.

CACH's commencement of the collection lawsuits is not enough to constitute waiver for another reason. As discussed previously (in SquareTwo's main brief), federal courts have found waiver only when the claims being litigated and arbitrated are the same. *Dean Witter Reynolds, Inv. v. Byrd*, 470 U.S. 213, 217 (1985); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999); *Doctor's Assoc., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997); *Riensch v. Cingular Wireless LLC*, Nos. C06-1325 TSZ, C09-106 TSZ, 2103 WL 951012, at *5 (W.D. Wn. Mar. 12, 2013); *Cage v. CACH, LLC*, C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wn. May 22, 2014); *Schwartz v. CACH, LLC*, No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014); *Hodson v. Javitch, Block & Rathbone, LLP*, 531 F.Supp.2d 827, 831 (N.D. Ohio 2008); *Funderburke v. Midland Funding, L.L.C.*, Case No. 12-2221-JAR/DJW, 2013 U.S. Dist. LEXIS 13438, at *18-*19 (D. Kan. Feb. 1, 2013); *Fields v. Howe*, No. IP-01-1036-C-B/S, 2002 WL 418011, at *8 (S.D. Ind. Mar. 14, 2002) (no waiver because "the state court case is a collection action" and the "federal court case is an action for alleged violation of federal and state laws").

In this case, the claims are not the same. Although Debtors now contend they seek only "vacatur" of the judgments in the collection

lawsuits, the complaint they filed show that they seek much more than that relief. They seek compensatory damages, exemplary damages, attorney's fees, declaratory relief, and injunctive relief, among other things. CP at 19-21. The CPA, civil conspiracy, declaratory, and injunctive relief claims Debtors assert, on a class-wide basis, are simply not the same as the breach of contract claims CACH asserted in the collection lawsuits. Indeed, federal courts have held that claims arising out of state court collection proceedings are not the same as claims asserted in the collection proceedings and, therefore, cannot constitute waiver. *Fields v. Howe*, 2002 WL 418011, at *8 ("The fact that the present action arose because of Discover's alleged improper conduct in the course of that state court proceeding does not render this cause one and the same as Discover's state court case."); *Schwartz*, 2104 WL 298107, at *3 ("CACH's decision not to invoke arbitration in the earlier state-court collection actions is not relevant" for determining waiver in a later-filed consumer protection action").

Debtors contend that this Court should not consider these federal court cases because, here, the arbitration provision defines "claim" as "any claim or dispute." Brief of Respondents at 17-18. Debtors contend that its claims against SquareTwo are part of the same "dispute" as CACH's earlier collection lawsuits. Debtors' analysis is flawed. It is based on the Black's Law Dictionary definition of "dispute." Courts resort to English dictionary definitions of words and will not rely on legal definitions unless it is clear "that *both* parties to the contract intended that the language have

a legal technical meaning.” *Lynott v. National Union Fire Ins. Co. of Pittsburgh, PA*, 123 Wn.2d 678, 693, 871 P.2d 146 (1994). Regardless, the United States District Court for the Western District of Washington considered the same language cited by Debtors in a case identical to this case and found there was no waiver. *Cage v. CACH, LLC*, 2014 WL 2170431, at *1. Notwithstanding 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 and dispute 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).

D. Debtors are not prejudiced by arbitrating with SquareTwo.

Finally, Debtors contend that they have suffered prejudice. But this argument suffers from a number of flaws.

First, Debtors rely entirely on *Grant & Assoc. v. Gonzales*, 2006 Wash. App. LEXIS 2290, at *12 (Oct. 17, 2006). This is an unreported Washington appellate court case and, as such, may not be cited as authority. General Rule 14.1.

Second, Washington law does not determine whether there is prejudice. Since arbitration here arises under the Federal Arbitration Act, federal law governs. Finally, Debtors applies the wrong test. As the Second Circuit explained: "prejudice ... refers to the inherent unfairness – in terms of delay, expense, or damage to a party's legal position – that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Doctor's Assocs, Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir.), *cert. denied*, 522 U.S. 948 (1997); *Subway Equip. Leasing Corp.*, 169 F.3d at 327. In *Distajo*, the franchisees made the same arguments that Debtors make here. They contended they were prejudiced by prior litigation brought by affiliates of DAI, the parent company that was seeking arbitration. The Second Circuit Court of Appeals found there was no prejudice and, hence, no waiver:

First, the franchisees admit that DAI did not delay in moving to compel arbitration of their present claims in state court. ... Moreover, legal expenses inherent to litigation, “without more,” do not constitute prejudice requiring a finding of waiver. ... Finally, the franchisees have not shown that they will suffer “substantive” prejudice to their state-court claims if they are forced to arbitrate. ... DAI has neither conducted discovery with respect to these claims nor made any motions going to the merits of the claims.

Doctor's Assocs., Inc., 107 F.3d at 126.

Similarly, in this case, Debtors cannot show prejudice. In arguing delay, Debtors points to the length of time between the collection lawsuits and this lawsuit. But as the Second Circuit held in *Doctor's Assocs., Inc.*, the length of time that is considered is the time from the filing of the lawsuit that is to be arbitrated to the date the motion to compel arbitration is filed. SquareTwo did not delay in moving to compel arbitration. It filed its motion before it even answered the complaint. There has been no discovery in this case and no substantive motions have been filed. Debtors are left with the expenses they incurred in the collection lawsuits. But as the Second Circuit made clear, this is not prejudice.

III. CONCLUSION

As the federal cases cited above demonstrate, this appeal is typical. Debtors, like the plaintiffs in those cases, agreed to arbitration. Now they wish to avoid it. Not because they cannot present their claims and obtain relief in arbitration. They can. It is because they lose the opportunity to profit from class litigation. But the overwhelming body of law holds that they are not entitled to engage in class-action litigation – or any litigation – since they voluntarily agreed to arbitrate their claims on an individual basis.

In addition, SquareTwo is one of the parties entitled to arbitration of the claims asserted by Debtors. SquareTwo is a third-party beneficiary. In addition, the doctrines of estoppel and agency warrant arbitration of claims against SquareTwo. Indeed, to allow Debtors to litigate claims against SquareTwo while compelling Debtors to arbitrate those same claims against CACH would be contrary to the agreements signed by Debtors and violate federal and state law favoring arbitration.

SquareTwo therefore respectfully requests that the decision of the lower court be reversed and that Debtors be compelled to arbitrate the claims they have against SquareTwo.

DATED this 7th day of November, 2014,

VERIS LAW GROUP PLLC

By 

Benjamin J. Stone, WSBA #33436

VERIS LAW GROUP PLLC

1809 Seventh Ave, Suite 1400

Seattle, WA 98101

206.829.9590 (t)

Attorneys for Appellant SquareTwo
Financial Corp

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following persons via the methods indicated:

Brad Moore, WSBA #21802
Stritmatter Kesler Whelan
Coluccio, LLC
200 2nd Avenue West
Seattle, WA 98119
206.448.1777
brad@stritmatter.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Jack Landskroner, Ohio
#0059227
Drew Legando, Ohio #0084209
Landskroner Grieco Merriman,
LLC
1360 West 9th Street, Suite 200
Cleveland, OH 44113
216.522.9000
jack@lgmlegal.com
drew@lgmlegal.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Michael E. Withey, WSBA
#4787
Law Office of Michael Withey
Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101
206.405.1800
mike@withey.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Bradley Thoreson
Samuel T. Bull
Bryce C. Blum
Foster Pepper PLLC
1111 3rd Ave Ste 3400
Seattle, WA 98101-3264
United States
thorb@foster.com
bulls@foster.com
blumb@foster.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal Messenger
- Facsimile
- E-mail

Brad Fisher
Ross C. Siler
Davis Wright Tremaine LLP
1201 3rd Ave Ste 2200
Seattle, WA 98101-3045
United States
bradfisher@dwt.com
ross.siler@dwt.com

- Overnight Delivery via Fed Ex
- First Class Mail via USPS
- Hand-Delivered via ABC Legal
Messenger
- Facsimile
- E-mail

Dated at Seattle, Washington, this 7th day of November, 2014.


Alison Sepavich

4850-2034-4352, v. 2