

FILED
Court of Appeals
Division II
State of Washington
9/9/2019 4:45 PM

No. 53018-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SPRINT SOLUTIONS, INC. and ANNETTE JACOBS, Appellants,
v.

PAGECOM, INC., Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Sprint Solutions, Inc. (“Sprint”) is here seeking to be relieved from the logical, legal and equitable consequences of its own unfair contract and conduct, consequences which the trial court properly imposed by refusing to grant Sprint’s motion to compel arbitration. It was actually Respondent Pagecom, Inc. (“Pagecom”) that first sought to invoke the dispute resolution provision of the parties’ contract in order to resolve a lingering dispute that had arisen by the end of 2015. The opaque, one-sided and non-negotiable dispute resolution provision of the contract, drafted by Sprint, does provide for an arbitration . . . eventually . . . at least if *Sprint* wants to arbitrate.

But by contrast to its entreaties here, and as was detailed for the trial court, Sprint systematically blocked and rebuffed every one of Pagecom’s alternative dispute resolution efforts. In fact, Sprint abruptly took unilateral action intended to *terminate* the parties’ contract in its entirety, for a contrived reason, clearly *not* a breach of that contract, in the face of Pagecom’s renewed demands to move the dispute forward to mediation or arbitration. By its terms, the parties’ contract *explicitly denies* Pagecom any ability to contest a pending termination in the arbitration forum – the very forum in which Sprint now wishes to engage . Left without other

options, Pagecom filed suit in Pierce County Superior Court on May 11, 2018, seeking relief which includes an injunction against Sprint's threatened termination.

Even the filing of this lawsuit had been delayed--at Sprint's request--so that Sprint could reconsider its invocation of the termination of the contract. But as had been the case throughout, Sprint could not seize this opportunity to lower the temperature and simply did not contact Pagecom as it had promised to. Thus, Pagecom filed its motion for a temporary restraining order and its complaint. Sprint then extended the deadlines on its termination and subsequently withdrew the termination invocation approximately four weeks later; obviously, all this happened only *after* this suit was filed and apparently only *because* this suit was filed.

It should be noted that Sprint never gave any reason for withdrawing its termination at any time. Mr. Surprenant's other company continued to operate selling T-Mobile stores without any interruption or complaint by Sprint. Similarly, Pagecom never sold its doors. All is just as it was before the termination except that Sprint continues to refused to pay Pagecom monies owed to it. All of this makes it painfully easy to see that Sprint's termination of Pagecom was pretextual, serving only to stop Pagecom from moving ahead with its grievance for being unfairly

undercompensated and singled out for consolidation. But for the filing of the lawsuit, Sprint would have gotten away with forcing Pagecom out without a true remedy. Now Sprint accuses Pagecom of “improperly” commencing litigation.

Sprint removed the matter to the Federal District Court for Western Washington. It was then remanded to the Pierce County Superior Court on Pagecom’s motion. Sprint’s motion to compel arbitration was denied, after extensive argument and briefing, from the bench on December 24, 2018, and by the trial court’s written order of March 19, 2019. The principal bases for the trial court’s decision to deny Sprint’s motion were (1) that Sprint had waived its right to compel arbitration by its actions and (2) that Sprint’s Dispute Resolution Clause was unconscionable, two of the bases argued by Pagecom. The trial court did not reach Pagecom’s argument that Sprint’s Dispute Resolution Clause was illegal in Washington, i.e., that there was uncontroverted evidence the clause violates the Franchise Investment Protection Act, Chapter 19.100 R.C.W.

The trial court carefully considered the issues through three rounds of briefing and argument. Its reasoning was sound and its Order Denying Defendants’ Motion to Compel Arbitration and Dismiss should be

affirmed in all respects¹.

II. RESPONSE TO APPELLANTS' ASSIGNMENTS OF ERROR

Pagecom disagrees that Appellants' Assignments of Error 1 – 10 reflect any error whatsoever by the trial court. The trial court's Order of March 19, 2019 should be affirmed in all respects.

Specifically, taking Appellants' Assignments of Error in order:

1. The trial court did not err in denying Sprint's motion to compel arbitration;
2. The trial court did not err in determining that it was the proper decision maker on the issue of arbitrability;
3. The trial court did not err in its determination that the arbitration provision was unconscionable;
4. The trial court did not err in finding the arbitration agreement was ambiguous;
5. The trial court did not err by refusing to construe the ambiguities of the Dispute Resolution Clause in Sprint's favor, and Sprint is conflating two different species of ambiguity by this Assignment;

¹ Although, for reasons it does not elaborate upon, Sprint has chosen to highlight Pagecom's counsel's candid, conversational exchanges with the trial court about arbitration, those were no part of Pagecom's legal argument or the trial court's decision. This appears to be little more than a distraction from the issues in this appeal.

6. The trial court did not err in its findings of fact 1.3, 1.4, 1.5, 1.6., 1.7 and 1.11 of the March 19, 2019 Order;
7. The trial court did not err in its findings of fact 1.11, 1.12 and its conclusion of law 2.1 of the March 19, 2019 Order;
8. The trial court did not err in finding that Sprint had waived arbitration;
9. The trial court did not err in its findings of fact 1.10, 1.11 and 1.13 and its conclusion of law 2.2 of the March 19, 2019 Order; and
10. The trial court did not err in its finding of fact 1.9 of the March 19, 2019 Order, and Sprint is incorrect in its interpretation of the inferences to be drawn from that finding.

III. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Federal Arbitration Act requires resort to ordinary state law principles in determining whether an arbitration agreement will be enforced. A court is required to determine whether grounds exist, in law or equity, to prohibit the agreement's enforcement. Given the substantial showing of waiver and unconscionability by Sprint (which the trial court accepted as proven), and the unrebutted evidence of illegality on Sprint's part, is there any basis for overturning the trial court's decision to deny Sprint's motion to compel arbitration?

2. The law presumes that the court will determine the issue of arbitrability, including whether waiver has occurred. Sprint was required to demonstrate by clear and *unmistakable* evidence that the parties intended for arbitrability to be decided by the arbitrator in order to overcome that presumption. Given the presumption that the court will determine arbitrability, can the general and non-specific language upon which Sprint relies possibly satisfy its burden of proof to overcome that presumption?

3. The rule that ambiguities are construed in favor of arbitration is applied when the *scope* of arbitration is ambiguous. The parties agreed that the dispute here was within the scope of the arbitration clause's definition of "Dispute". Given that the scope of arbitration was not at issue and that Sprint drafted the parties' contract, has Sprint provided any valid argument that the usual rules governing other contractual ambiguities should be disregarded, and is there any valid reason the trial court cannot find unconscionability, in part, because of such ambiguities and Sprint's use of them?

4. The Dispute Resolution Clause drafted by Sprint provided that Pagecom had no contractual right to challenge its termination as an Authorized Representative by Sprint, no contractual right to initiate mediation, no contractual right to commence arbitration until the dispute

had been “subject to mediation” (an ambiguous phrase), no contractual rights to seek injunctive relief (though Sprint could) and the clause explicitly required Pagecom to allow a termination by Sprint to occur *before* Pagecom could challenge that termination. Sprint, after well-documented exchanges, delays, reversals of position and the like, then sent a pretextual notice of impending termination of the parties’ agreement, purportedly on the basis of investments made by Pagecom’s owner. The investments did not violate the parties’ agreement and Sprint had long known about, acquiesced to and even *encouraged* these investments. Ultimately, *but only after this action was filed*, Sprint extended the time of termination and then withdrew the threatened termination in its entirety, without giving any explanation of the reason for such withdrawal and without Pagecom “curing” as demanded in the termination notice. Given all these things, is there any question but that the trial court’s affirmative conclusions regarding unconscionability and waiver are well founded?

5. Pagecom presented a *prima facie* case, through uncontroverted testimony and evidence, that the parties’ agreement is a franchise. Sprint’s conduct in connection with the Dispute Resolution Clause, and that clause itself, present multiple illegal acts and practices under the Franchise Investment Protection Act. Can the trial court’s

denial of Sprint's motion to compel arbitration therefore also be affirmed on the basis of this illegality in the Dispute Resolution Clause itself?

IV. RESPONDENTS' RESTATEMENT OF THE CASE

A. Pagecom Has Been Exclusively Selling Sprint Products and Communication Services in Washington Since 2005.

Pagecom's business has been exclusively associated with the Sprint name and brand since it first became a Sprint Authorized Representative ("AR") in 2005. CP 18-19, ¶ 3. Since then, Pagecom's only business has been selling Sprint products and services to the consuming public. *Id.* Its retail locations have born Sprint signage. CP 19, ¶ 4. Its employees have worn Sprint uniforms. *Id.* It is required to participate in Sprint programs and promotions. CP 20-21, ¶ 10. Pagecom's use of Sprint's name and marks, and its compliance with Sprint's marketing programs, have been specific requirements of the parties' AR agreements throughout. *Id.* None of these past AR agreements, including the 2014 agreement which is pertinent to this matter, were negotiated; they were offered on a take it or leave it basis to Pagecom by Sprint. CP 346, ¶ 9.

B. Pagecom's Owner has Invested Large Sums of Money in Pagecom's Sprint Brand Business, Including Brand Specific Investments Paid Directly to Sprint.

Pagecom's President and sole shareholder, Jason Surprenant, is and has been financially responsible for all the company's leasehold and

payroll obligations. CP 19, ¶ 4. He has also made multiple, brand specific payments to Sprint, totaling millions of dollars, over the course of the parties' relationship. CP 21, ¶ 11.

C. Sprint Allowed and Encouraged Mr. Surprenant to Invest in a Competing Wireless Communication Brand Through a New Entity.

In 2009, because of concerns that had by then arisen about Sprint's survival, Mr. Surprenant, began considering an additional and alternative investment in the wireless industry. CP 22, ¶ 12. He explored operating stores which would offer T-Mobile goods and services, but only in a geographic market where Pagecom did not operate. *Id.* Mr. Surprenant received assurances from Sprint's then Regional Director that if the T-Mobile investment was in a different geographic market and run through a different legal entity, that Sprint would not object. *Id.* Consequently, Mr. Surprenant formed The Wireless Stores, L.L.C. ("TWS"), which went on to operate stores selling T-Mobile goods and services in Oregon, beginning in 2009. CP 22, ¶ 13.

Sprint knew all about Mr. Surprenant's investment in TWS, even using it later as additional justification for not permitting Pagecom to open more Sprint stores. CP 22-23, ¶¶ 14, 15. In connection with those conversations, the same Sprint Regional Director who had approved his

investment in TWS encouraged Mr. Surprenant to open even *more* T-Mobile stores. CP 23, ¶ 15.

D. Paradoxically, in 2015, Sprint Suddenly Required Pagecom to Open More Sprint Stores in Order to Maintain its Compensation.

Pagecom and Sprint entered into the AR agreement relevant to this appeal in 2014. CP 20, ¶ 9. Then, in December 2015, after previously denying Pagecom's requests to open more Sprint stores, Sprint announced that a minimum of 15 stores would be required in order for ARs to retain their compensation structure, beginning one month later. The alternative would be a drastic and untenable reduction in compensation. CP 23, ¶ 16. Pagecom had only eleven stores at that time, but Mr. Surprenant obtained Sprint's permission to add four more, which required an additional \$300,000 investment in Pagecom's business. CP 23-24, ¶ 17. Given the short notice provided by Sprint of its new requirement, the added stores were not in particularly good locations. *Id.* Still, adding them made financial sense overall because it allowed Pagecom to keep its same rate of compensation. *Id.*

E. Sprint Abruptly Reversed Itself Fourteen Months Later, and Then Announced Further Significant Changes.

In February 2017, after Pagecom's and Mr. Surprenant's substantial investment in additional stores, Sprint announced that the 15 store

minimum was no longer in effect. CP 24-25, ¶ 18. One month later, Sprint announced a dramatic reduction in AR compensation, to take effect in May, 2017, in a conference call with its nationwide dealers. CP 25, ¶19. However, Mr. Surprenant subsequently learned that a separate precursory conference call was initiated by Sprint *before* the nationwide call notifying select dealers that those dealers would not be similarly impacted and that they (those on the precursor call) would receive higher compensation and other benefits. CP 25-26, ¶¶ 20, 21. When Mr. Surprenant approached Appellant Annette Jacobs on April 4, 2017 to discuss the differing treatment among dealers, Ms. Jacobs acknowledged that there were different compensation structures, but offered no relent; telling him that “consolidation is part of the industry now” and to “do whatever is best for your business”. *Id.*

F. Pagecom Was Formally Seeking a Resolution of the Parties’ Disputes by No Later Than Mid-2017.

The following sequence of events document Pagecom’s initial efforts to seek formal resolution of the dispute:

- Pagecom first contacted Sprint through counsel, seeking to resolve all issues, on June 8, 2017. CP 26, ¶ 22. Pagecom proposed a mediation; it has no power under the parties’ contract to compel mediation and cannot initiate an arbitration of a dispute that has

not been “subject to mediation”. CP 26-27, ¶ 23; CP 18, Ex. 1; CP 343, ¶ 3.

- Sprint would not agree to mediate. CP 26-27, ¶ 23; CP 343-44, ¶¶ 3,4.
- A back and forth series of discussions continued for a period of weeks and months until November, 2017, when Pagecom formally attempted to start a mediation with the AAA. CP 343-44, ¶ 4. Sprint resisted Pagecom’s efforts on the basis that the AR agreement does not give Pagecom the ability to initiate mediation and separately stated that it would not initiate mediation. CP 308-09, ¶¶ 3, 4; CP 343-44, ¶¶ 3, 4.
- On January 15, 2018, Sprint wrote Pagecom’s counsel and expressed skepticism over whether any mediation would be productive. CP 309, ¶ 5; CP 308, Ex. 3.
- On March 13, 2018, Pagecom made a written request for Sprint’s formal position on whether it would engage in ADR. CP 309, ¶ 6; CP 308, Ex. 4.
- On March 23, 2018, Sprint replied, but without taking a clear position. CP 308, Ex. 5. Sprint did, however, promise a further response. Id.

G. Sprint Suddenly Sent a Notice of Default and Termination.

At approximately 10pm Eastern Time, on the evening of March 30, 2018², Sprint sent (via email) Pagecom a 30 day of “Notice of Breach and Right to Terminate for Cause of the Authorized Representative Agreement” on the grounds that Pagecom was violating the exclusivity requirements of its AR agreement by acting as an agent for T-Mobile. CP 310, ¶ 8; CP 308, Ex. 6. Again, it was TWS, and not Pagecom, that was operating the T-Mobile stores in Oregon, and this had been with Sprint’s full knowledge, permission, and even encouragement.

Even assuming a “cure” could have been required of Pagecom, that would presumably have required the sale of either Pagecom’s business or TWS’s business, with minimal time to accomplish either. Ironically, within the (30) day window of this termination, Sprint and T-Mobile then publicly announced their prospective merger! CP 30, ¶ 33. Sprint obviously had to know that the merger announcement was forth coming when it terminated Pagecom for Mr. Surprenant’s investment in T-Mobile doors, yet issued the termination anyway, obviously as just a pretext to shutting down Pagecom’s ability to initiate a dispute.

² This callous and unexpected late-night communication on Friday night of a recognized holiday weekend, giving very short notice for Pagecom to comply, would cause additional stress and hardship on Pagecom and its counsel who would be out of town during the following spring vacation time frame.

Though a minimal extension of time was initially granted by Sprint, ultimately Pagecom was faced with a looming deadline and no contractual right to contest a termination under the Dispute Resolution Clause of the 2014 AR agreement. CP 18, Ex. 1. Although Pagecom delayed filing this action pursuant to discussions with Sprint, a promised response was not provided and this action followed. Declaration of Mark E. Bardwil, ¶ 6, filed May 11, 2018 [CP number pending].

H. The Parties Have Mediated This Action Post-Filing.

After Sprint's removal of this matter to the Federal District Court, and before that court remanded the case back to Pierce County Superior Court, the parties conducted an unsuccessful mediation of this lawsuit. That mediation was not conducted under the auspices of the American Arbitration Association and was accomplished in Seattle. The mediation was not a "full day" mediation, as represented by Sprint, but was rather cut short by Sprint in the early afternoon. Respondent suggests that Sprint did not mediate in good faith and were merely "checking" a box under advice of their new legal counsel, in order to satisfy a precursor to a motion to compel arbitration. Shortly after remand to Pierce County, Sprint filed the motion which is the subject of this appeal.

I. The Trial Court Proceeded Carefully and Methodically, Ultimately Denying Sprint's Motion to Compel Arbitration.

The parties appeared for lengthy, comprehensive, vigorous arguments on October 5, November 19, and December 24, 2018. Extensive briefing was submitted in connection with each appearance. Ultimately the trial court denied Sprint's motion, entering its detailed findings and conclusions and written order on March 19, 2019.

V. ARGUMENT

A. Standard of Review

The standard of review on the denial of a motion to compel arbitration is *de novo*. *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616, 633, 376 P. 3d 412 (2016). The trial court's findings of fact, however, are reviewed for clear error. *Id.* And heightened deference is given to factual findings that are thorough and careful. *N. Kitsap Sch. Dist. V. K.W.*, 130 Wn. App 347, 361, 123 P. 3d 469 (2005).

This matter was given extraordinary thought and consideration by the trial court; the parties presented multiple briefs and were heard on three separate occasions, in very lengthy oral hearings with back and forth discussion and debate between the parties and the court. Appellant certainly cannot deny this fact, as the hearing transcripts ordered by Appellant as part of this record certainly demonstrate. The questions were decided and thoroughly and carefully. Heightened deference is due the trial court's findings in this matter.

B. The Federal Arbitration Act (“FAA”) Requires Resort to Ordinary State Law Principles in Order to Determine Enforceability.

Arbitration is not preferred to litigation; the FAA simply expresses Congressional intent that *enforceable* arbitration agreements be adhered to. *Schuster*, 193 Wn. App. at 633 (citing *Dean, Witter, Reynolds, Inc. v. Byrd*, 470 US 213, 219-20, 105 S. Ct. 1238 (1985)). But for an arbitration agreement to be enforceable, no legal or equitable grounds can exist to invalidate it. 9 U.S.C. § 2.

Sprint offers the observation that the FAA preempts state law, which by itself is unenlightening³. In fact, “[t]o evaluate the validity of an arbitration agreement, . . . courts, 'should apply ordinary state-law principles that govern the formation of contracts.'" *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2002) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995)). The ordinary state law principles of waiver, unconscionability and illegality were all properly offered in Pagecom’s attack upon the enforceability of the Dispute Resolution Clause, considered by the court, and a part of the court’s ruling.

C. The Trial Court was Required to Decide Arbitrability.

³ Federal preemption under the FAA only matters when a state law appears to single out arbitration for harsher treatment than it does for contracts generally. That is not an issue in this case and Sprint does not contend it is an issue here.

Sprint begins a discussion of this issue by incorrectly stating that the trial court was presented the question of whether the parties' dispute was encompassed in the AR agreement's arbitration provisions. *See, Brief of Appellants* at page 18. But the scope of the applicable arbitration provision was never in dispute, which Sprint also seems to concede two pages later. *See, Id.* at page 20. Still, Sprint initially conflates this issue of *scope*—again, a non-issue here—with the question of whether the trial court or an arbitrator was the proper decision maker on the issue of *arbitrability*, i.e., the question of whether grounds at law or equity barred enforcement of the Dispute Resolution Clause. The trial court properly determined, separately, carefully and *before* reaching its decision on Sprint's motion to compel, that it was required to decide the issue of arbitrability.

In fact, it is presumed that the court decides the threshold question of arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 US at 944 – 45. In order to overcome that presumption, *unmistakable* evidence that the parties intended for the arbitrator to decide the arbitrability issue is required. *Id.* Sprint cites to two cases in support of its argument that the presumption was overcome. Sprint's reliance is misplaced.

Contrary to Sprint's assertions, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 US 63, 130 S. Ct. 2772 (2010), is not helpful to its position. Sprint

claims the contractual language in *Rent-A-Ctr.* is “substantially similar” to the language in this case. That is not correct. Rent-A-Center’s contract provided an explicit, strong delegation stating that the arbitrator had “*exclusive* authority to resolve any dispute relating to the . . . *enforceability* . . . of [the] Agreement including, but not limited to any claim that all or any part of [the] Agreement is void or voidable”. *Rent-A-Ctr.*, 561 U.S. at 68 (emphasis supplied). There is not a remotely similar delegation of authority to any arbitrator in this case.

Second, the employee in *Rent-A-Ctr.* actually agreed that this language was intended to grant the arbitrator the authority to decide the issue of arbitrability. *Rent-A-Ctr.*, 561 U.S. at 69 - 70, note 1. So essentially, the *Rent-A-Ctr.* parties’ interpretations and intentions regarding delegation to the arbitrator were not in conflict or dispute. *Rent-A-Ctr.* is, therefore, mostly distinguishable from, not similar to the current matter.

Sprint also cites to *Paine Webber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996). Even assuming this 2-1 decision is instructive, at best it does no more than offer authority for the proposition that in a case with language submitting “any and all controversies” to arbitration, the parties have delegated arbitrability to the arbitrator. The case may have been correctly decided—or not--but it is plainly unlike the case before this

court. The contract language is different from the language in this case, entirely unequivocal and somewhat unique.

Sprint separately argues that “issues of waiver of [sic] are presumed to be decided by the arbitrator”, citing to *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 134 S. Ct. 1198 (2014). Brief of Appellants at page 31. But this reliance is also misplaced and the proposition offered by Sprint is erroneous. Clearly the *BG Grp.* case stands for the proposition that the arbitrator may entertain arguments about whether a contractual *pre-condition* to arbitration has been waived. That is a procedural question under the parties’ contract to arbitrate. It is not a question of whether the *arbitration itself* has been waived, which is the issue before this Court. Waiver, like other *arbitrability* issues, remains a question for the court absent unmistakable evidence to the contrary.

Sprint did not overcome the presumption that the trial court should decide the threshold question of arbitrability. The language of the Dispute Resolution Clause at issue contains no unmistakable evidence of any intention to delegate that issue to an arbitrator. The trial court was plainly correct in deciding that it had to rule on the threshold issue of arbitrability in the absence of evidence of an unmistakable contrary intent.

D. The Trial Court Correctly Found that Sprint’s Conduct and its Dispute Resolution Provisions are Unconscionable.

Sprint's protests that its Dispute Resolution Clause is "clear", or that Pagecom's rights to commence arbitration 45 days after requesting mediation were "obvious". These complaints ring hollow because Sprint preferred the impenetrability of its AR agreement at all times prior to this action, and there is absolutely nothing in the parties' agreement that reflects *any* explicit right of Pagecom to initiate dispute resolution *ever*. Thus, the trial court's finding 1.9 regarding pre-litigation discussions, which Sprint misinterprets as imposing a duty upon it to tell Pagecom that it had the right to commence arbitration, really represents nothing more than the trial court's observation that Sprint had previously preferred to maintain the existing ambiguity rather than reach any shared understanding. The trial court explicitly found that using this ambiguity, "Sprint has delayed, sidestepped, and otherwise attempted to avoid bringing this dispute to a head." RP Vol. II, p. 57: 1-25. Moreover, it was uncontroverted that Sprint's counsel advised that only Sprint could initiate the ADR process. CP 309, ¶3.

Prior to this litigation, it is not debatable that Pagecom could not, and uncontroverted that Sprint would not initiate mediation. It is uncontroverted and undisputed that Sprint told Pagecom that Pagecom could not initiate the ADR process but that only Sprint could. It is not debatable that a dispute had to have been "subject to mediation" before

Pagecom could invoke arbitration. It is not debatable that under the AR agreement, Pagecom could only contest a termination by Sprint after it had already occurred, though Sprint could seek an injunction at will. It is not controverted that Sprint successfully resisted Pagecom's attempts to initiate mediation. It is not controverted that Sprint issued a breach and termination notice to Pagecom based upon TWS's operation of T-Mobile stores in Oregon, that TWS's operations represented no breach of Pagecom's contract with Sprint and that Sprint had long before known of, agreed to and encouraged TWS's business activities in this respect. And it is not controverted that the AR agreements were drafted by Sprint and presented on a take it or leave it basis to Pagecom.

Sprint's engagement in mediation, its withdrawal of the purported termination and its fervent expression of its current desire to arbitrate are all phenomena that arose only *after* this litigation was filed. *See*, CP 438, Findings of Fact 1.11, 1.12. And Sprint's objections that the ambiguities of its AR agreement are not being construed in favor of arbitration by the trial court once again invokes the *scope of arbitration* caselaw. *See*, Brief of Appellants at pages 26 - 27. The ambiguities identified by the trial court had nothing to do with the scope of arbitration, which *again* was not at issue. The trial court was not resolving ambiguities about the scope of arbitration in this case. And it is obviously more correct to say that the

trial court saw Sprint's tactical use of these ambiguities as part and parcel of its unconscionable behavior.

Similarly, Sprint complains that the court did not sever what it alleges is a single, unconscionable provision, but this entirely ignores the fact that the trial court's view of what would be required in order to make the agreement enforceable was not limited to removing one provision. *See*, RP Vol. II, p. 57:1-16⁴. In fact, the trial court found a massive rewrite would be required, making severance improper. *See, Gandee v. LDL Freedom Enters., Inc.*, 176 Wn. 2d 598, 603, 293 P.3d 1197 (2013)(where unconscionability pervades the entire arbitration agreement, the court will refuse to enforce it in its entirety).

And finally, this is not to ignore the fact that Pagecom has presented an uncontroverted case that it is a franchisee under its AR agreement with Sprint. CP 18; Declaration of Mark E. Bardwil, filed May 11, 2018 [CP number pending]; Motion for Temporary Restraining Order, filed May 11, 2018 [CP number pending]. Although the trial court

⁴ THE COURT: Well, if I sever the clause, which part of it do I sever? Do I sever the part that requires termination? Do I sever the part in paragraph 2 that says that, at least in one method of reading, Sprint may require that the dispute be submitted to mediation and that there is no right to compel mediation on behalf of the AR? And then if Sprint doesn't submit the dispute to resolution, what part of paragraph 3 do I sever, the part that says, you know, the AR may only initiate arbitration after the 45th calendar day following the date the request for mediation of such dispute was first submitted when, in fact, by some reading of the language, they don't have a right to request such a mediation? I don't think that cutting and pasting -- you know, the Court's preference as to the contract language through this mechanism of severance is the solution to the problem.

did not enter any findings on the issue, if this Court agrees that that case has been made, then without limitation, the Dispute Resolution Clause would require Pagecom to submit to an unlawful termination of its franchise, specifically in violation of *R.C.W. 19.100.180(2)(j)* and a waiver of punitive damages in violation of *R.C.W. 19.100.180(2)(g)*. These constitute unfair or deceptive acts or practices under *Chapter 19.86 R.C.W.*, our Consumer Protection Act. *R.C.W. 19.100.190(1)*.

Sprint's Dispute Resolution Clause explicitly interferes with Pagecom's ability to preserve its rights under the Consumer Protection Act as well as under *Chapter 19.100 R.C.W.*, the *Franchise Investment Protection Act ("FIPA")*; this amounts to additional substantive unconscionability on Sprint's part. *See, McKee v. ATT Corp.*, 164 Wn. 2d 372, 396 – 401, 191 P.3d 845 (2008); *see also, Burnett v. Pagliacci Pizza, Inc.*, ___ Wn. App. ___, ___ P.3d ___ (June 17, 2019) (interference with employee's right to pursue statutory remedies and a confidentiality requirement rendered arbitration clause unconscionable).

E. The Trial Court Properly Concluded that Sprint had Waived Arbitration.

Sprint blocked *any* formal dispute resolution for about one year, until it abruptly sought to terminate Pagecom's dealership on the basis of a *different* party's business activities. In other words, Sprint's complaint

was apparently with TWS's (not Pagecom's) representation of T-Mobile. Then, once sued and faced with the issue of its illegal termination in court, it "magnanimously" withdrew its termination and reinstated Pagecom without any further discussion about its alleged violation of the contract. Sprint wanted to create an appearance of acting in good faith once that it was under the spotlight of the Washington Court.

Prior to the filing of this action, Sprint simply refused to engage in ADR with Pagecom, using its contractual leverage to dissuade Pagecom from proceeding in any direction, all in the face of a well understood dispute. And Sprint effectively required Pagecom to file this action, because there was no other arbitration forum in which Pagecom could contest the unlawful termination of its AR agreement.

Sprint protests that it "had no right to arbitration" until Pagecom sued it. This is really a feigned powerlessness. Sprint could have *cooperated* with Pagecom's attempts to initiate ADR at any time. Moreover, Sprint allegedly had its own issues with Pagecom but avoided ADR and opted to go straight to termination⁵. Sprint asks why it would

⁵ CP 308 (Exhibit 6 to Declaration of Mark E. Bardwil filed September 25, 2018) demonstrates Sprint's clear and obvious avoidance of ADR. In one fell swoop, in response to Pagecom's last request for ADR, Sprint invokes termination thus unmistakably rendering arbitration impossible until after termination has been completed and making the same undeniable certain by expressly refusing to mediate. This demonstrates Sprint's clear and intentional avoidance of ADR.

“sue itself”? But in fact, Sprint did allege to have a dispute with Pagecom (violation of its exclusivity clause) which is the basis in which Sprint tried to terminate Pagecom. Rather than attempt the nuclear option of termination, Sprint could have demanded ADR regarding Pagecom’s alleged breach of contract. But Sprint did not want to engage in *any* forum. Sprint just wanted to block Pagecom’s ability to seek relief.

Sprint bided its time, obstructed Pagecom’s attempts to initiate ADR, and when it looked like Pagecom was running out of patience and seemed likely to consider advancing its complaints without Sprint’s cooperation, Sprint dropped a bombshell—a completely baseless breach and termination notice. Pre-litigation conduct can constitute waiver. *See, e.g., JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008) (pre-litigation interference with other party’s efforts to arbitrate can evidence waiver). Sprint plainly resisted and obstructed Pagecom’s efforts to engage in *any* form of dispute resolution.

Sprint argues that this Court should be bound by Ninth Circuit precedent regarding waiver. Presumably that is because the Ninth Circuit attaches a relatively strict prejudice requirement for waivers of arbitration. But, as our state Supreme Court has explicitly stated, “We have never held that an opinion from the Ninth Circuit is more or less persuasive than, for example, the Second, Sixth, Seventh, Eighth, or Tenth Circuits” *In re*

Pers. Restraint of Markel, 154 Wn.2d 262, 271 n.4, 111 P.3d 249 (2005).

State courts are not bound to follow Ninth Circuit precedent. *Feis v. King County Sheriff's Dep't*, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011).

Clearly, as the *Schuster* court has said, Ninth Circuit precedent is unsound on this issue given the state law concept of waiver the courts are supposed to apply. *See, Schuster*, 193 Wn App. at 639 (2016) (noting that prejudice is not normally required under the doctrine of waiver). And Federal Law on waiver and prejudice in connection with arbitration is irreconcilable. The *Schuster* court expressed the matter thusly:

A Nordic smorgasbord of United States Circuit Court of Appeals decisions greets us on the subject of prejudice for purposes of arbitration waiver. Oodles of federal appeals court decisions analyze the nature and extent of prejudice required and whether the nonmoving party suffered prejudice sufficient to harness waiver. The various circuits take differing views and apply distinct tests. Some courts consider the effects of the conduct of the moving party that was inconsistent with arbitration to constitute sufficient prejudice to the nonmoving party, thus blending the inconsistent action and prejudice prongs of waiver.

Id. at 637.

However, as in *Schuster*, there was prejudice to Pagecom in Sprint's lengthy, repeated, tactical delays—Sprint's “heads I win, tails you lose” use of its one-sided agreement. The evidence on the topic was uncontroverted. And in an unpublished opinion, Division I has held delay

alone is prejudice in the absence of any explanation. *Graham v. Mascio*, No. 76967-7-1 (Wash. Ct. App. Dec. 3, 2018).

Further, “unexcused delay” is the kindest way to describe Sprint’s conduct—there is no dispute that Sprint sprung a surprise termination of Pagecom’s dealership in the face of Pagecom’s continuing efforts to initiate some form of dispute resolution to the parties’ long-standing dispute. At that point, as Sprint has conceded to the trial court, the contract of the parties would have required Pagecom to suffer the termination before arbitrating any dispute, including the lawfulness of the termination. The matter is before this Court because Sprint obstructed every single effort by Pagecom to engage in ADR. That is waiver, and that waiver cannot be “un-waived” by a post-filing agreement to mediate the issues in *this lawsuit*.

Anything reasonable that Sprint has done here has only come in response to this lawsuit. But there is no doctrine of “unwaiver” once waiver has occurred. Pagecom tried ADR Sprint’s way and was repeatedly put off or told it had no rights to commence ADR. Then Pagecom got mugged on the eve of a holiday weekend for its efforts. Pagecom had to scramble, at great expense, and come to court; it had nowhere else it could go. Sprint has clearly waived arbitration, and

prejudice, whether required for waiver or not, has been suffered by Pagecom.

F. Although not Addressed by the Trial Court, Pagecom has Presented Uncontroverted Evidence that it is a Franchisee, Entitled to FIPA's Protections; Sprint's Dispute Resolution Clause is Rife with Illegality.

As noted in Section D, above, if this Court considers Pagecom's uncontroverted evidence that the AR agreements are franchises, the facts of this case would present several violations, in the Dispute Resolution Clause itself, of the "Franchisee Bill of Rights" contained in R.C.W. 19.100.180(2). These acts and practices by Sprint are explicitly declared "unlawful" by R.C.W. 19.100.180(2). Illegality is a traditional and ordinary state law principle which will render a contract unenforceable. *See, e.g., Cellular Engineering v. O'Neill*, 118 Wn. 2d 16, 820 P.2d 941(1991). An additional basis for affirming the trial court would be the inherent illegality of Sprint's Dispute Resolution Clause.

VI. Conclusion

From 2015 until the emergency created by Sprint, which led to filing of this action in 2018, Pagecom made vigorous efforts to engage with Sprint on the issues existing between these parties, employing the assistance of counsel in the effort in 2017 in an explicit attempt to commence formal ADR. Sprint ducked and dodged and reversed its

course, refusing to engage throughout, and using its unconscionable contract leverage and obstructionist tactics in an apparent effort to bleed Pagecom to death in lieu of dealing with the concerns of its long-time Washington dealer.

The trial court's thorough consideration of the matter, through three lengthy and contested hearings, concluded with well documented findings of waiver and unconscionability on the part of Sprint, rendering the Dispute Resolution Clause unenforceable. And the trial court decided this without having to reach any conclusions about the illegality of the Dispute Resolution Clause and the violation of Pagecom's franchise and consumer protection rights under Washington law through Sprint's use of that provision, though the application of those laws to these facts is uncontroverted and also supports this decision of unenforceability.

It is much too late for Sprint to position itself as "pro-arbitration" now and sanctimoniously insist that its tactical invocation of the parties' Dispute Resolution Clause somehow furthers the policies of the FAA. Sprint's sudden desire to arbitrate arose only after it had spent months and years refusing to commit and engage, and finally, only after it had created the urgent necessity that Pagecom file this action. The trial court properly imposed upon Sprint the consequences of its own actions and inactions. The trial court should be affirmed.

Respectfully submitted this 9th day of September, 2019.

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September 09, 2019 - 4:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53018-0
Appellate Court Case Title: Pagecom, Inc., Respondent v. Sprint Solutions, Inc., et al, Appellants
Superior Court Case Number: 18-2-08038-5

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