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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

GORDON SCHUSTER, on behalf of himself, individually, and on behalf
of the Estate of RONALD SCHUSTER; DIANA YECKEL, individually;
PAT SCHUSTER, individually; KARL W. LAMBERT, ARNP;
REDIMEDI CLINIC; and HOUSECALL, PLLC,

Respondents/Cross-Appellants,

v.

PRESTIGE SENIOR MANAGEMENT, LLC, et al., Defendants,

v.

LA VIDA COMMUNITIES, INC.; LSREF GOLDEN OPS 14 (WA),
LLC; SERVCO OPERATING LLC; SRG LA VIDA OPPTS NW SERIES;
and SRG SERVCO LLC,

Appellants/Cross-Respondents.

BRIEF OF SCHUSTER RESPONDENTS/CROSS-APPELLANTS

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TABLE OF CONTENTS

I.	Introduction	1
II.	Assignment of Error	3
III.	Issues Presented for Review	3
IV.	Statement of the Case	4
V.	Argument	9
	A. <u>The Only Parties to the Arbitration Agreement Are Ronald Schuster, or His Estate, and LSREF, not the Remaining Plaintiffs and Defendants</u>	9
	B. <u>The Trial Court Properly Concluded that the Blossom Creek Defendants Waived the Right to Arbitrate</u>	11
	1. The Blossom Creek Defendants Acted Inconsistently with the Right to Arbitrate	13
	2 The Blossom Creek Defendants’ Inconsistent Actions Have Prejudiced the Schusters	16
	C. <u>The Unavailability of the Parties’ Chosen Forum Renders the Arbitration Agreement Unenforceable</u>	22
VI.	Conclusion	29

TABLE OF AUTHORITIES

Cases

<i>Anonymous, M.D. v. Hendricks,</i> 994 N.E. 2d 324 (Ind. Ct. App. 2013).....	24, 25
<i>Apex 1 Processing, Inc. v. Edwards,</i> 962 N.E.2d 663 (Ind. Ct. App. 2013).....	27, 28
<i>AT&T Mobility LLC v. Concepcion,</i> 131 S. Ct. 1740 (2011).....	12
<i>Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Cent. Ltd.,</i> 154 F.3d 404 (7th Cir. 1998)	21
<i>Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.,</i> 50 F.3d 388 (7th Cir. 1995)	16
<i>Carideo v. Dell, Inc.,</i> 2009 WL 3485933 (W.D. Wash.).....	28
<i>Carr v. Gateway, Inc.,</i> 944 N.E.2d 327 (Ill. 2011).....	27, 28
<i>Crewe v. Rich Dad Education, LLC,</i> 884 F. Supp.2d 60 (S.D.N.Y. 2012)	25
<i>Eagle Traffic Control, Inc., v. James Julian, Inc.,</i> 945 F. Supp. 834 (E.D. Pa. 1996)	22
<i>Fisher v. A.G. Becker Paribas Inc.,</i> 791 F.2d 691 (9th Cir. 1986)	13
<i>Geneva Roth, Capital, Inc. v. Edwards,</i> 956 N.E.2d 1195 (Ind. Ct. App. 2011).....	27
<i>Gray Holdco, Inc., v. Cassady,</i> 654 F.3d 444 (3d Cir. 2011).....	20

<i>In re Citigroup, Inc.</i> , 376 F.3d 23 (1st Cir. 2004).....	22
<i>In re Mirant Corp.</i> , 613 F.3d 584 (5th Cir. 2010)	22
<i>In Re Salomon Inc. Shareholders' Derivative Litigation 91 Civ. 5500 (RRP)</i> , 68 F.3d 554, 559 (2d Cir. 1995).....	24, 27
<i>Johnson Associates Corp. v. HL Operating Corp.</i> , 680 F.3d 713 (6th Cir. 2012)	12
<i>Lewallen v. Green Tree Servicing, L.L.C.</i> , 487 F.3d 1085 (8th Cir. 2007)	22
<i>Manos v. Geissler</i> , 321 F. Supp.2d 588 (S.D.N.Y. 2004)	15
<i>Meritage Homes Corp. v. Hancock</i> , 522 F. Supp.2d 1203 (D. Ariz. 2007)	18
<i>Miller v. GGNSC Atlanta, LLC</i> , 746 S.E.2d 680 (Ga. Ct. App. 2013).....	24, 25, 28
<i>Nicholas v. KBR, Inc.</i> , 565 F.3d 904 (5th Cir. 2009)	21
<i>Nino v. Jewelry Exchange, Inc.</i> , 609 F.3d 191 (3d Cir. 2010).....	20
<i>Otis Hous. Ass'n, Inc. v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009).....	12, 13
<i>Plows v. Rockwell Collins, Inc.</i> , 812 F. Supp.2d 1063 (C.D. Cal. 2011)	12, 17, 18
<i>Powell v. Sphere Drake Ins. P.L.C.</i> , 97 Wn. App. 890, 988 P.2d 12 (1999).....	10

<i>Powerex Corp. v. Reliant Energy Servs., Inc.</i> , 551 U.S. 224 (2007).....	24
<i>Ranzy v. Tijerina</i> , 393 Fed. Appx. 174 (5th Cir. 2010).....	24, 28
<i>Reddam v. KPMG LLP</i> , 457 F.3d 1054 (9th Cir. 2006)	23, 24
<i>Riley v. Extendicare Health Facilities, Inc.</i> , 286 N.W.2d 398 (Wis. Ct. App. 2012).....	28
<i>River House Dev. Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 272 P.3d 289 (2012).....	12
<i>Rivera v. American Gen. Financial Svcs.</i> 259 P.3d 803 (N.M. 2011)	25, 26, 27
<i>Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC</i> , 588 F.3d 963 (8th Cir. 2009)	21, 22
<i>Smith v. IMG Worldwide, Inc.</i> , 360 F. Supp.2d 681 (E.D. Penn. 2005).....	17
<i>Smith Barney, Inc. v. Critical Health Systems of N.C.</i> , 212 F.3d 858 (4th Cir. 2000)	25
<i>South Broward Hosp. Dist. v. Medquist, Inc.</i> , 258 Fed. Appx. 466 (3d Cir. 2007).....	17
<i>Southern Systems, Inc., v. Torrid Oven Ltd.</i> , 105 F. Supp.2d 848 (W.D. Tenn. 2000).....	20
<i>Steele v. Lundgren</i> , 85 Wn. App. 845, 935 P.2d 671 (1997).....	16
<i>Stewart v. GGNSC-Canonsburg, L.P.</i> , 9 A.3d 215 (P.A. Super. 2010).....	28
<i>Sunbridge Retirement Care Associates, LLC v. Smith</i> , 757 S.E.2d 157 (Ga. Ct. App. 2013).....	24, 27, 28

<i>United Computer Sys., Inc. v. AT & T Corp.</i> , 298 F.3d 756 (9th Cir. 2002)	12
<i>Van Ness Townhouses v. Mar Indus. Corp.</i> , 862 F.2d 754 (9th Cir. 1988)	12, 13, 15
<i>Woodall v. Avalon Care Ctr.-Fed. Way, LLC</i> , 155 Wn. App. 919, 231 P.3d 1252 (2010)	10, 22
Other Authorities	
9 U.S.C. ch. 1	12

I. INTRODUCTION

On February 27, 2010, Ronald Schuster was found at Blossom Creek Senior Alzheimer Community (“Blossom Creek”) in Wenatchee, Washington, emaciated, hungry, thirsty and in a debilitated condition from which he would never recover. He was taken from the facility and died several months later. The Washington State Department of Social and Health Services (“DSHS”) cited Blossom Creek for failing to monitor Ronald’s nutrition and hydration. Plaintiffs Gordon Schuster, both individually as a personal representative of the estate of Ronald Schuster, Diana Yeckel, and Pat Schuster (collectively the “Schusters”) filed suit against the owners and operators of Blossom Creek relating to their malfeasance in caring for Ronald, the Schuster’s father and husband, who was a resident there from March 2009 to February 2010.¹

After litigating this case for eighteen months, the owners and operators of Blossom Creek, Defendants LSREF Golden Ops 14 (WA), LLC (“LSREF”), SRG ServCo Operating LLC, acting through SRG LaVida Ops NW Series, (“SRG”), and LaVida Communities, Inc. (“LaVida”) (collectively “Blossom Creek Defendants”), moved to compel Plaintiffs’ claims against them to arbitration. The trial court properly ruled

¹ The Schusters also filed suit against the A.R.N.P., Karl Lambert, and related entities (RediMedi Clinic and Housecall, PLLC), who treated Ronald, but they are not parties to this appeal.

the Blossom Creek Defendants had waived the right to arbitrate claims they had actively litigated for so long. In particular, LSREF—the only entity that signed a care agreement with Ronald Schuster containing an arbitration clause—filed an answer that did not raise arbitration as a defense. All of the Blossom Creek Defendants were involved in discovery, including losing a motion to compel and paying sanctions imposed by the court, without once questioning the trial court’s authority over the proceeding or raising arbitration as a defense. Other facts evidencing waiver are recited below, all of which confirm the trial court’s decision to deny the Blossom Creek Defendants’ motion to compel arbitration.

On cross-appeal, the Schusters raise an issue regarding the impossibility of enforcing the arbitration agreement due to the unavailability of the chosen forum, an issue the Court need not consider if it affirms the trial court’s ruling that the Blossom Creek Defendants waived the right to arbitrate. But it is impossible to enforce the arbitration clause according to its terms, which require administration by the National Arbitration Forum (“NAF”)—an entity that no longer performs this function due to alleged fraud, corruption, and collusion with corporate partners—according to its own rules, which are incorporated into the agreement. The trial court initially, and correctly, determined that this provision was integral to the arbitration agreement and found it

unenforceable. On reconsideration, however, the court reversed itself and decided the NAF forum was not integral to the agreement. If the Court reaches the issue, it should reverse and render judgment denying the Blossom Creek Defendants' motion to compel.

II. ASSIGNMENT OF ERROR

The trial court erred when it ruled that the unavailability of the chosen NAF forum due to alleged fraud and corruption is not integral to the arbitration agreement, thereby rendering it unenforceable.

III. ISSUES PRESENTED FOR REVIEW

The Blossom Creek Defendants present two issues on appeal, which the Schusters restate as follows:

1. Did the trial court correctly consider and rule that the Blossom Creek Defendants waived the right to arbitrate the Schusters' claims by, among other things, engaging in litigation for eighteen months and paying discovery sanctions, only then to raise arbitration at a time that would severely prejudice the Schusters? (Responsive to the Blossom Creek Defendants' two issues)

The Schusters' assignment of error gives rise to the following issue:

2. Did the trial court err when it determined that the unavailability of the chosen NAF forum, due to alleged fraud and

corruption, is not integral to the arbitration agreement, thereby rendering it unenforceable?

III. STATEMENT OF THE CASE

The Underlying Case.

Ronald Schuster was a resident of Blossom Creek from March 2009 until February 2010. CP 892. Defendant LSREF is the license holder for Blossom Creek and is by law responsible for what happens there. CP 953. LSREF entered into a contract with SRG to manage the operation of the facility. *Id.* LSREF entered into a separate contract with LaVida to handle payroll and to manage employees at the facility. *Id.*

On February 27, 2010, Ronald Schuster was found at Blossom Creek malnourished and severely weakened. CP 893. He left Blossom Creek never to return, dying from injuries he received there. *Id.* DSHS cited Blossom Creek for failing to monitor his nutrition and hydration, among other things. *Id.*

The Arbitration Clause.

In April of 2010, Gordon Schuster signed a care agreement with LSREF as agent for his father, Ronald. CP 813-38. That agreement, drafted by LSREF, reads in relevant part:

[B]y initialing the line at the end of this paragraph . . . you agree that any and all claims and disputes arising from or related to this Agreement or to our residence, care or

services at the Community, whether made against us or any other individual or entity, shall be resolved by submission to neutral, binding arbitration. . . . Arbitrations *shall* be administered by the National Arbitration Forum under the Code of Procedure then in effect. . . . [I]f the parties can not agree on an arbitrator, [then the arbitration will occur] before an arbitrator assigned by the National Arbitration Forum.

CP 831. The NAF no longer accepts consumer arbitrations due to alleged fraud, corruption and collusion with its corporate partners and will not arbitrate this matter. CP 898-903.

Procedural History.

By August 17, 2010, attorney Dale Foreman had written a letter to Blossom Creek notifying them of the Schusters' claims. CP 965-67. By August 30, 2010, Forsberg & Umlauf, P.S. had appeared on behalf of the Blossom Creek Defendants. CP 968-69. From August 2010 to November of 2011, the parties communicated at least twenty times, exchanging information and participating in preliminary talks. CP 970-87. At no point was arbitration ever brought up as an alternative to litigation, despite discussions of a lawsuit.

This action was filed on February 5, 2013. LSREF was served the next day, CP 1406, and filed an answer on April 2, 2013, CP 82-103. In the litigation, as previously, LSREF was represented by Forsberg &

Umlauf. *Id.* LSREF did not raise arbitration as a defense in its answer. CP 101.

On April 3, 2013, David Corey, counsel for Karl Lambert and the Redi-Medi entities, filed a notice regarding voluntary arbitration. CP 1423-25. But the Blossom Creek Defendants still did not demand arbitration; they did not even mention it.

On April 30, 2013, Plaintiffs filed an amended complaint adding SRG and LaVida. LaVida accepted service on May 6, 2013; SRG accepted service on May 22, 2013. CP 1431-35. Both entities accepted service through Forsberg & Umlauf. *Id.*

Plaintiffs sent discovery requests to LSREF on March 4, 2013 and to La Vida and SRG on June 13, 2013. CP 216. Having not received answers to its discovery, on August 20, 2013, Plaintiffs moved to compel answers. CP 209-10. On August 26, 2013, LSREF responded to Plaintiffs first set of discovery requests and produced documents. CP 894-97. On September 11, 2013, LaVida and SRG responded to Plaintiffs first discovery requests, producing documents. *Id.* While the care agreement was produced to Plaintiffs, neither SRG, LaVida nor LSREF mentioned the arbitration clause nor sought to compel arbitration at that time. *Id.* After receiving these answers, Plaintiffs struck their first motion to compel. *Id.*

On October 14, 2013, Plaintiffs filed a second motion to compel against LSREF, LaVida and SRG. CP 226-27. The Blossom Creek Defendants filed a response brief and materials on October 25, 2013. CP 454-58. A motion hearing was held on October 28, 2013, at which counsel for the Blossom Creek Defendants participated. CP 1476. LSREF, SRG and LaVida were given a chance to comply with discovery by continuing the hearing to November 12, 2013. *Id.* On November 12, 2013, the Court granted Plaintiffs second motion to compel. CP 1477. The order was entered on January 10, 2014; the court sanctioned the Blossom Creek Defendants in the amount of \$720. CP 515-20. LSREF, SRG and/or LaVida paid those sanctions in full to Plaintiffs. CP 896. Once again, the Blossom Creek Defendants did not reference the arbitration agreement, much less assert the right to arbitrate.

In December of 2013, counsel for the Blossom Creek Defendants signed a stipulation and order related to a motion for partial summary judgment filed by Lambert and RediMedi. CP 1478-83. Still, the Blossom Creek Defendants did not assert the right to arbitrate.

Subsequently, but before moving to compel arbitration, the Blossom Creek Defendants furnished supplemental answers to interrogatories and second supplemental answers to interrogatories. CP

896. Moreover, they provided answers to the Schusters' second set of discovery requests. *Id.*

The Blossom Creek Defendants also conducted discovery of their own. On February 10, 2014, counsel for the Blossom Creek Defendants deposed Gordon Schuster. CP 896. On February 11, 2014, counsel deposed Diana Yeckel and Pat Schuster. *Id.* On April 18, 2014, counsel deposed the Schusters' expert. *Id.* Moreover, on February 20, 2014, counsel attended the deposition of Karl Lambert, co-defendant. *Id.* By October 22, 2014 the Schusters had answered discovery requests sent by the Blossom Creek Defendants. *Id.* Once again, the Blossom Creek Defendants did not assert the right to arbitrate.

On July 30, 2014, counsel for the Schusters spoke with counsel for the Blossom Creek Defendants on the phone and heard the arbitration clause referenced for the first time. CP 895. Counsel for the Schusters stated he was aware of the arbitration agreement but believed the Blossom Creek Defendants had waived enforcement of this provision. *Id.*

Motion to Compel Arbitration.

When the Blossom Creek Defendants finally moved to compel arbitration on September 27, 2014, they had been in contact with the Schusters for four years and in active litigation for eighteen months. The trial court heard the motion on December 9, 2014. CP 1497-98. The court

ruled that the arbitration provision was unenforceable because the parties' chosen forum—the NAF—was not available. RP 58-60. The court also ruled that the Blossom Creek Defendants clearly waived the right to arbitrate the claims against them by acting inconsistently with that right such that the Schusters would be prejudiced by being forced into arbitration at that late date. RP 60-66.

The Blossom Creek Defendants moved for reconsideration, raising the same arguments for a second time. CP 1340-55. The trial court granted the motion on the NAF issue, but it affirmed its ruling that these defendants had waived their right to arbitrate. CP 1520-34.

The Blossom Creek Defendants appealed the trial court's decision on waiver. CP 1374-80. The Schusters cross-appealed the trial court's ruling on the unavailability of the parties chosen NAF forum. CP 1535-53. Trial is set to begin in this matter on May 2, 2016. CP 1500.

IV. ARGUMENT

A. The Only Parties to the Arbitration Agreement Are Ronald Schuster, or His Estate, and LSREF, not the Remaining Plaintiffs and Defendants.

All of the Blossom Creek Defendants seek to compel all of the Schusters and all of their claims into arbitration, arguing that the trial court erred in finding these defendants had waived that right. While the trial

court correctly ruled on the waiver issue, the scope of the clause itself reveals the error of the Blossom Creek Defendants' position.

The care agreement, which contains the arbitration provision, was signed by Gordon Schuster as agent for his father, Ronald, and by a representative of LSREF. CP 833-34. The agreement recites that it is between LSREF, Ronald (and his agent if he could not act on his own). CP 815. As Ronald has died, his estate, acting through Gordon Schuster as personal representative, is the only party arguably bound by the agreement. Thus, the other Plaintiffs, Gordon Schuster individually, Pat Schuster, and Diana Yeckel are not parties to the agreement and not bound to it. *See Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 936, 231 P.3d 1252 (2010) (heirs bringing wrongful death claim are not bound by arbitration agreement of decedent). As such, the Blossom Creek Defendants cannot compel these claims to arbitration, even if they had not waived the right entirely.

Further, the Blossom Creek Defendants attempt to gloss over the various entities involved, generically referring to themselves as "LaVida" and never stating just who comprises that group. But SRG and LaVida are not parties to the care agreement, so they cannot compel arbitration thereunder in absence of some exception to the general rule. *See Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 894, 988 P.2d 12 (1999)

(arbitration is a matter of contract law). SRG and LaVida must prove such an exception and cannot hide behind generic labels and generalizations.

Even if the Blossom Creek Defendants prevail in compelling the estate's claims to arbitration, they will be forced to try the remaining claims in the trial court. Thus, they are not benefitting from the usual purposes of arbitration—speed and savings—by both arbitrating and litigating. Indeed, the only apparent purpose of pursuing arbitration at this juncture is to delay the trial and increase the Schusters' costs of pursuing their claims.

B. The Trial Court Properly Concluded that the Blossom Creek Defendants Waived the Right to Arbitrate.

Once the parties to the arbitration agreement are clarified, the waiver issue comes into sharper focus. LSREF, the only Blossom Creek Defendant that is a party to the agreement, filed an answer in April 2013 and failed assert arbitration as a defense. CP 101. In addition, all of the Blossom Creek Defendants participated in substantial written discovery, depositions, and motion practice, including a motion to compel that resulted in sanctions, which they paid without once speaking of arbitration. The trial court reviewed the evidence and correctly determined that these defendants waived the right to compel arbitration.

Courts treat an arbitration agreement like any other contract and enforce it per its terms. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011). When reviewing an arbitration provision, a court must consider (1) if the arbitration agreement is valid; and (2) if the parties' dispute falls within the scope of the agreement. *United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002). While federal law generally favors arbitration, *see, e.g.*, 9 U.S.C. ch. 1; *Concepcion*, 131 S. Ct. at 1745, parties can waive their contractual right to arbitrate, *see Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988). If a party has waived its right to arbitrate, the court need not order arbitration. *See id.* This Court reviews an order denying a motion to compel arbitration de novo. *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 586, 201 P.3d 309 (2009).

Waiver is the "voluntary and intentional relinquishment of a known right." *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 237, 272 P.3d 289 (2012). Waiver occurs when a party's actions are consistent only with intent to abandon arbitration, *id.*, such as extended silence and participation in litigation, *Van Ness*, 862 F.2d at 759; *see also Plows v. Rockwell Collins, Inc.*, 812 F. Supp.2d 1063, 1067 (C.D. Cal. 2011); *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713 (6th Cir. 2012); *River House*, 272 P.3d at 237-39. "A party to a

lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” *Ha*, 165 Wn.2d at 588; *see also Van Ness*, 862 F.2d at 759.

“A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Van Ness*, 862 F.2d at 758 (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)). The party asserting waiver bears the burden of proof. The Blossom Creek Defendants do not dispute the first element, that they knew of the right to compel arbitration, leaving only the second and third elements for the Court’s consideration.

1. The Blossom Creek Defendants Acted Inconsistently with the Right to Arbitrate.

Since August of 2010, the Schusters’ counsel has been in contact with counsel for LSREF. At no point during this time did LSREF bring up the arbitration clause at issue, despite substantial pre-litigation contact. Forty-nine months after LSREF had both knowledge of the claim and knowledge of the arbitration clause they demanded arbitration. Given this passing of time, it is hard to imagine that LSREF intended anything other than waiving its right to arbitrate.

Moreover, LSREF has been actively litigating this matter in open court since February of 2013. After litigating the issue for eighteen months, answering the complaint with no reference to arbitration, losing discovery motions, taking depositions, propounding discovery, answering two sets of discovery, supplementing discovery, failing to object to orders of the trial court and being sanctioned by the court, LSREF finally brought the issue to the court's attention in a motion filed September 27, 2014. There can be no doubt that LSREF, and all other Blossom Creek Defendants, actively litigated this matter for eighteen months before attempting to enforce its right to arbitration.²

Further, as the trial court found, the extensive discovery sought and obtained by the parties is beyond the scope of what would be allowed under the agreed upon rules of arbitration promulgated by the NAF. CP 1531. The Blossom Creek Defendants participated in this discovery without comment and with raising arbitration as a defense. If the purpose of arbitration is to secure a quick and inexpensive resolution of disputes, the Blossom Creek Defendants have utterly abandoned that purpose. If allowed to arbitrate at this juncture, they will have used the trial court and its discovery rules to prepare the case and obtain all relevant information

² The Blossom Creek Defendants never identified exactly which entities were moving to compel arbitration in the trial court, CP 792, a pattern they continue in this Court, App. Br. at 1.

before presenting the case to an arbitrator for the final decision (assuming they don't further delay the trial by seeking to relitigate the discovery disputes before the arbitrator). Such conduct is not consistent with an intent to seek arbitration; it is consistent with an intent to abandon that right.

The Blossom Creek Defendants have never plausibly explained the delay in seeking arbitration, perhaps because there is no good explanation, especially with trial a mere nine months away. CP 1500. Despite being asked repeatedly, these defendants have yet to offer a compelling reason why they waited so long to assert this right. The only reasonable conclusion is that they chose not until such a time that arbitration served a tactical purpose of making the case more difficult and expensive for the Schusters to pursue. Because of their intentional conduct relinquishing the right to arbitrate, this Court should affirm the trial court's denial of the Blossom Creek Defendants' motion to compel arbitration. *See Van Ness*, 862 F.2d at 759 (Defendant's "extended silence and much-delayed demand for arbitration indicates a conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims. This choice was inconsistent with the agreement to arbitrate those claims.") (quotation marks omitted, alteration in original); *Manos v. Geissler*, 321 F. Supp.2d 588 (S.D.N.Y. 2004) (Party waived right to arbitrate claims by waiting

eighteen months after suit was commenced to assert right, participating in discovery, participating in deposition of the plaintiff and participating in discovery motions).

2. The Blossom Creek Defendants' Inconsistent Actions Have Prejudiced the Schusters.

As Division I of this Court has noted, some federal courts have deemphasized the need for prejudice when finding a party has waived the right to arbitrate. *Steele v. Lundgren*, 85 Wn. App. 845, 856, 935 P.2d 671 (1997) (citing *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995)). Such a rule is logical given that prejudice is not required in the ordinary waiver context. *Cabinetree*, 50 F.3d at 390. Even presuming the need for waiver, however, the Blossom Creek Defendants' extreme delay in asserting the right and the increased costs associated with that delay are sufficiently prejudicial to meet any standard.

The Schusters filed this action in the trial court and would be prejudiced if compelled at this late date to arbitrate in another forum, particularly with trial scheduled for next May. CP 1500. Not only have they expended large amounts of attorney labor advancing their claims, CP 896-97, the Schusters would need to re-expend much, if not all, of that labor, in another forum. If arbitration was ordered, the Schusters may well

be forced to re-conduct depositions, re-litigate discovery issues, and to backtrack on a strategy they have spent significant amounts of time and money preparing. Moreover, the Schusters would be exposed to the potentially crushing costs of arbitration. For these reasons, the Schusters would be substantially prejudiced by being compelled to arbitration at this stage.

To date, the Schusters have expended over \$70,000.00 in billable time litigating this matter against LSREF and the other Blossom Creek Defendants. *Id.* This has included time sending discovery requests to them, time interviewing their witnesses, time defending depositions, time filing motions to compel, time negotiating with them with a jury trial in mind, and other normal expenses of litigation. Moreover, the Schusters have paid over \$10,000.00 in expenses in preparation for trial. This factor weighs heavily in favor of denying the Blossom Creek Defendants' motion to compel. *See South Broward Hosp. Dist. v. Medquist, Inc.*, 258 Fed. Appx. 466 (3d Cir. 2007) (unpublished) (finding prejudice and holding that sixteen month delay and significant expense incurred by opposing party justified finding of waiver); *Smith v. IMG Worldwide, Inc.*, 360 F. Supp.2d 681 (E.D. Penn. 2005) (finding prejudice and holding that sixteen month delay and significant expense, including discovery and motion practice, mandated waiver); *Plows*, 812 F. Supp.2d 1063 (finding

prejudice and holding that 13 month delay along with substantial legal expense mandated a finding of waiver).

To compound this problem, much of this discovery and motion practice may have to be re-done in the arbitration, or perhaps would not be allowed in arbitration at all. Or the discovery obtained may not be admissible in arbitration, and the Schusters' interviews of numerous witnesses of the Blossom Creek Defendants may have to be re-done based upon the rules of discovery in the forum chosen, which at this point are unknown. At the very least, many of these issues will have to be litigated and determined by the arbitrators, at a substantial cost to the Schusters. *See Meritage Homes Corp. v. Hancock*, 522 F. Supp.2d 1203 (D. Ariz. 2007) (finding prejudice and holding eleven-month delay and the spending of tens of thousands of dollars engaging in theories and disputes that simply would not have been present in arbitration).

Moreover, as the trial court opined, RP 64-65, the Schusters' litigation strategy would have differed in arbitration. *See Plows*, 812 F. Supp.2d at 1068 (*presuming* that the plaintiff would have made different choices in his litigation strategy in arbitration). Understanding that arbitration with NAF is not possible and for purposes of example only, in arbitration with the National Arbitration Forum the rules of evidence do not apply. The Schusters have obtained nine declarations from former

Blossom Creek employees. CP 897. Had arbitration been proposed from the beginning, they would have tailored the declarations ensure admissibility at the hearing under whatever standards the arbitration rules imposed. Further, discovery through the NAF is limited to twenty-five written questions. CP 928. The Schusters could not have propounded extensive interrogatories and requests for production had the matter been placed in arbitration. Nor could they have filed motions to compel on some of those requests.

In addition, the Schusters' strategy surely would have changed due to the limiting costs of arbitration and the circumstances of this case. Hourly rates of arbitrators can be up to \$500 an hour, sometimes more. These costs would be a crushing burden to the Schusters. Assuming one arbitrator, an hourly rate of \$350 a day, and a three week trial, arbitration costs will reach approximately \$100,000.00.³ If a panel of three arbitrators is imposed or the hourly rate of the arbitrator(s) is higher, costs would be even more. This expense would severely impact the Schusters' ability to pursue their case. Their handicap would be worse if this Court compels arbitration at this late stage of the litigation, with trial only nine months away. The Schusters have spent substantial sums of money making headway in discovery and would be forced to spend more money

³ Fifteen days of trial (three weeks), at ten hours a day = \$52,500.00, plus at least that much time in motions, preparation, a decision and related matters.

educating an arbitrator. The complexity of this case and the thousands of documents guarantee significant expense to the Schusters.

Reversal of course at this point, when discovery has been obtained and litigated, would prejudice the Schusters severely, particularly when coupled with the delay that has occurred already and will occur if arbitration is ordered. *See Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191 (3d Cir. 2010) (finding prejudice and holding that delay of fifteen months along with propounding discovery, providing disclosures, exchanging requests for production, participating in four depositions and participating in a motion to compel discovery required a finding of waiver); *Gray Holdco, Inc., v. Cassidy*, 654 F.3d 444 (3d Cir. 2011) (finding prejudice and waiver where the party elicited the testimony of five adverse witnesses at hearing and participated in a ten month delay in moving for arbitration); *Southern Systems, Inc., v. Torrid Oven Ltd.*, 105 F. Supp.2d 848 (W.D. Tenn. 2000) (finding prejudice and that engagement in extensive discovery, along with an eighteen month delay in moving for arbitration, necessitated waiver).

The truth is that only after the Blossom Creek Defendants decided that they could make the Schusters' case much more difficult by splitting the case up did they decide to invoke the arbitration provision. If they are successful in seeking arbitration of the claims at issue now, they stand to

gain substantially: (1) they make the Schusters pursue their cause of action in two different forums, one of those which is currently unknown; (2) both Defendant Lambert and the Blossom Creek Defendants receive the benefit of an empty chair defense at trial; (3) the Schusters incur more costs, requiring them to pay for an arbitrator, having to re-educate an arbitrator about the issues of the case and potentially having to re-litigate issues already decided by the trial court. *See Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 409 (7th Cir. 1998) (the policy rationale in favor of arbitration “is not well served by allowing a party to elect arbitration when he has allowed the case to proceed in court until he makes a tactical decision”); *Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009). The prejudice to the Schusters is far from the “self-inflicted” harm the Blossom Creek Defendants continually reference. As the trial court noted, under that standard, no expenses incurred in trial preparation would ever amount to prejudice. CP 1533.

In this case, it is clear that the Blossom Creek Defendants knew of the right to arbitrate from the beginning. Moreover, it is clear that eighteen months in active litigation can only be deemed inconsistent with the right to arbitrate. Because the unexplained delay and increased cost prejudices the Schusters, the law mandates a finding that the Blossom Creek Defendants have waived the right to arbitrate. *See Se. Stud &*

Components, Inc. v. Am. Eagle Design Build Studios, LLC, 588 F.3d 963, 969 (8th Cir. 2009); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1093-94 (8th Cir. 2007); *Eagle Traffic Control, Inc., v. James Julian, Inc.*, 945 F. Supp. 834 (E.D. Pa. 1996); *In re Mirant Corp.*, 613 F.3d 584 (5th Cir. 2010); *In re Citigroup, Inc.*, 376 F.3d 23 (1st Cir. 2004).

Finally, it bears repeating that even if this Court were to compel arbitration of the estate's claims against LSREF, the claims of Plaintiffs against Mr. Lambert and the Redi-Medi entities would remain in this Court. Moreover, claims of Pat Schuster, Diana Yeckel, and Gordon Schuster against the Blossom Creek Defendants would remain in court. *Woodall*, 155 Wn. App. 919. That is, even if arbitration were compelled, the trial court would still conduct a trial in which the Blossom Creek Defendants and Mr. Lambert would participate. Compelling arbitration in this case is extremely inefficient for all parties, including the Blossom Creek Defendants. The only reason it is being pursued is to make the case more difficult for the Schusters. There is no other logical reason.

B. The Unavailability of the Parties' Chosen Forum Renders the Arbitration Agreement Unenforceable.

As mentioned, the Court needs to decide this issue raised in the Schusters' cross-appeal only if it reverses the trial court on the waiver

issue. While the Schusters believe the trial court correctly ruled that the Blossom Creek Defendants waived the right to arbitrate, they present this issue in the alternative to give the Court another basis to reach the same result.

The care agreement between LSREF and Ronald Schuster reads in part:

Arbitration *shall* be administered by the National Arbitration Forum under the Code of Procedure then in effect. Arbitrations *shall* be conducted by a single arbitrator agreed to by the parties, or if the parties can not agree upon an arbitrator, before an arbitrator assigned by the National Arbitration Forum.

CP 831 (emphases added). Due to alleged fraud, corruption and collusion with its corporate partners, the NAF no longer accepts the arbitration of consumer claims involving health care. CP 898-903.⁴ Without the sole agreed-upon arbitration forum available to the parties, the agreement is void due to impossibility.

Under the Federal Arbitration Act, where an arbitration agreement provides for a specific term and that term becomes impossible to perform, courts look to whether the term was an integral part of the agreement to determine whether the agreement is enforceable or void due to impossibility. *E.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir.

⁴ See also the multiple cases cited herein demonstrating that the National Arbitration Forum no longer accepts “consumer” cases and/or cases involving “health care.”

2006), *abrogated on other grounds by Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007). If the term was “integral” to the agreement than an alternative forum can not be imposed and the agreement is not enforced. *Id.* If the term was an “ancillary practical concern,” the term can be enforced. *Id.* By law, the parties’ choice of the NAF in this case was an integral part of the agreement. As such, the arbitration agreement is void due to impossibility and this Court can not impose an alternative forum on Plaintiffs.

Courts throughout the United States have examined several factors to determine if the parties’ chosen forum is integral to the arbitration agreement, always bearing in mind the ultimate purpose of determining the parties’ intent. First, courts have noted when the parties used mandatory, as opposed to permissive, language in reference to the selection of the forum. *See, e.g., Sunbridge Retirement Care Associates, LLC v. Smith*, 757 S.E.2d 157, 160 (Ga. Ct. App. 2013); *Anonymous, M.D. v. Hendricks*, 994 N.E. 2d 324 (Ind. Ct. App. 2013); *In Re Salomon Inc. Shareholders’ Derivative Litigation 91 Civ. 5500 (RRP)*, 68 F.3d 554, 559 (2d Cir. 1995); *Ranzy v. Tijerina*, 393 Fed. Appx. 174 (5th Cir. 2010) (unpublished). Next, courts have looked for evidence of intent to choose a single arbitration forum or a single set of rules under which the arbitration should be conducted. *See, e.g., Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d

680, 686 (Ga. Ct. App. 2013); *Rivera v. American Gen. Financial Svcs.*, 259 P.3d 803, 812–13 (N.M. 2011); *Smith Barney, Inc. v. Critical Health Systems of N.C.*, 212 F.3d 858, 862 (4th Cir. 2000). Finally, courts look to see if the parties provided an alternative procedures or policies regarding unavailability of a proposed forum. *See, e.g., Hendricks*, 994 N.E. 2d at 330; *Crewe v. Rich Dad Education, LLC*, 884 F. Supp.2d 60 (S.D.N.Y. 2012).

Here, the arbitration agreement at issue mandates the use of the National Arbitration Forum by using the word “shall.” CP 831. The arbitration agreement details only the National Arbitration Forum *and* its rules. The arbitration agreement also fails to leave the door open to an alternative procedure should the original forum be unavailable. Based upon these factors, the choice of forum is integral to the care agreement, which is void due to impossibility as the NAF is no longer accepting these cases.

The following cases illustrate that where a specific arbitration forum is detailed as mandatory and no alternative is provided in the agreement courts have consistently held the selection of a particular forum to be integral. Many of these cases deal specifically with the NAF. In *Rivera*, for example, the New Mexico Supreme Court addressed an arbitration agreement that named the NAF as arbitrator, stating:

“Arbitration will be conducted pursuant to the rules of the [NAF].” 259 P.3d at 807. The agreement continued: “Arbitration will be conducted under the rules and procedures of the [NAF] or successor organization.” *Id.*

The *Rivera* court analyzed the language of the arbitration provision and noted that where it “evidences the parties’ intention to resolve disputes solely through a specific arbitration provider, the parties’ intent would be frustrated if a court appointed a different arbitration provider.” *Id.* at 812. The court noted that an express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement to arbitrate. *Id.*

In finding that it could not impose another arbitration forum on the parties in place of the National Arbitration Forum, the court stated:

The pervasive references to the NAF in the contract compel our conclusion that the parties intended for the NAF to be the exclusive arbitrator in any out-of-court dispute resolution. The parties explicitly specified that arbitration would proceed under NAF rules and procedures. Arbitration is a matter of consent, not coercion, and the parties may . . . specify by contract the rules under which that arbitration will be conducted. We conclude that [t]he unavailability of NAF as arbitrator . . . threaten[s] to eviscerate the core of the parties’ agreement. We hold that arbitration before the NAF was integral to the agreement to arbitrate.

Id. at 812-813 (quotation marks and citation omitted; alterations in original).

Likewise, in *Salomon*, the Second Circuit similarly concluded that when the New York Stock Exchange refused to arbitrate issues among employees and an employer, the court could not substitute an arbitrator pursuant to the FAA. 68 F.3d at 559. The agreement stated that the three employees “shall” arbitrate any cause of action related to their employment under the “[c]onstitution and rules then obtaining of the [NYSE].” *Id.* at 558. The court held that the parties, by contract, agreed that *only* the NYSE could arbitrate the matter. *Id.* at 559.

In *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011), the Illinois Supreme Court agreed and held that a provision whereby Carr and Gateway agreed to arbitrate through the National Arbitration Forum was integral to the agreement. In coming to that conclusion, the Court found that the language provided for a single forum under a single set of rules, contained mandatory language and did not contain any language regarding what would occur should arbitration with that forum be unavailable. 944 N.E.2d at 335.

Courts have reached similar results in the following additional cases: *Sunbridge*, 757 S.E.2d 157; *Geneva Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011); *Apex 1 Processing, Inc. v.*

Edwards, 962 N.E.2d 663 (Ind. Ct. App. 2013); *Miller*, 746 S.E.2d 680; *Carideo v. Dell, Inc.*, 2009 WL 3485933 (W.D. Wash.); *Riley v. Extendicare Health Facilities, Inc.*, 826 N.W.2d 398 (Wis. Ct. App. 2012); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (P.A. Super. 2010); *Ranzy*, 393 Fed. Appx. 174 (unpublished).

The care agreement, read in tandem with the incorporated NAF Code of Procedure, further supports the interpretation that the chosen NAF forum is integral to the agreement. The care agreement states that the arbitration “shall be conducted by the National Arbitration Forum under the Code of Procedure then in effect.” CP 831. The National Arbitration Forum Code of procedure currently in effect states that the “[c]ode shall be deemed incorporated by reference in every Arbitration Agreement, which refers to the National Arbitration Forum.” CP 908 (NAF Rule 1(A)). The Code further states that it “shall be administered only by the National Arbitration Forum.” *Id.*

The reading of these provisions as a whole leads to only one conclusion: by its very terms, the care agreement, in conjunction with the NAF Code, do not permit arbitration in another forum, as numerous courts have concluded. *See Miller*, 746 S.E.2d 680; *Sunbridge*, 757 S.E.2d 157; *Carr*, 944 N.E.2d 327. If it reaches the issue, this Court should hold that the NAF forum was integral to the care agreement, and the unavailability

of that forum renders the arbitration provision unenforceable and on that basis reverse the trial court's ruling and render judgment denying the Blossom Creek Defendants' motion to compel arbitration.

Should the Court compel arbitration, the parties will be forced to confront several thorny issues, such as which who will serve as arbitrator and which rules will apply, making already difficult, complex, time-consuming, expensive litigation even more burdensome. The Court should decline the Blossom Creek Defendants' request to force an unavailable and tardily-sought arbitration upon the Schusters to their harm.

V. CONCLUSION

For the reasons stated, the Schusters respectfully ask the Court to affirm the trial court's order denying Blossom Creek Defendants' motion to compel arbitration on the basis of waiver. Should the Court reach the NAF issue, the Schusters respectfully ask the Court to reverse the trial court's order and to render judgment denying the motion to compel.

Dated this 22nd day of July, 2015.

FOREMAN, APPEL, HOTCHKISS & ZIMMERMAN, PLLC



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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that I am over the age of eighteen and not a party to this action, and that on July 22, 2015, I served a true and correct copy of the foregoing document as indicated below:

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Nancy Focht

2009 WL 3485933

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Kristin CARIDEO, et al., Plaintiffs,

v.

DELL, INC., Defendant.

No. C06-1772JLR. | Oct. 26, 2009.

Attorneys and Law Firms

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ORDER

JAMES L. ROBART, District Judge.

*1 The class action waiver is now a familiar provision in consumer purchase agreements nationwide. Under Washington law, a class action waiver may be deemed unenforceable on grounds of substantive unconscionability in limited circumstances based on the facts of a particular case. This case returns on remand from the United States Court of Appeals for the Ninth Circuit for the court to determine whether the case presents one such instance of unconscionability.

Specifically, in light of the Washington Supreme Court's decision in *McKee v. AT & T Corp.*, 164 Wash.2d 372, 191 P.3d 845 (Wash.2008), the Ninth Circuit directs the court to reconsider its order denying Plaintiffs' original Federal Rule of Civil Procedure 60(b) motion for relief from this court's order compelling arbitration. See *In re Carideo*, 550 F.3d 846 (9th Cir.2008). Having reviewed Plaintiffs' supplemental Rule 60(b) motion (Dkt. # 71), all papers filed in support of and opposition to the motion, as well as Plaintiffs'

original Rule 60(b) motion (Dkt.# 43), Defendant Dell, Inc.'s ("Dell") motion to compel arbitration (Dkt.# 14), various supplemental filings, and the balance of the record, and having heard the argument of counsel, the court GRANTS Plaintiffs' supplemental Rule 60(b) motion (Dkt.# 71).

I. BACKGROUND

The parties are familiar with the facts and procedural posture of this case. Plaintiffs Kristin Carideo and Catherine Candler purchased allegedly defective laptop computers from Dell at prices of approximately \$1,300 and \$1,700, respectively. (Declaration of Kristin Carideo (Dkt.# 31) ¶ 4; Declaration of Catherine Candler (Dkt.# 32) ¶ 5.) As putative class representatives, they allege violations of Washington's Consumer Protection Act ("CPA"), breach of express and implied warranties, fraudulent concealment, and unjust enrichment. (Am.Compl.(Dkt.# 10) ¶¶ 8.1-12.5.)

Dell moved to compel arbitration based on an arbitration clause in the "Terms and Conditions of Sale" ("Agreement") that it presents to customers at the time of purchase, and again with the shipment of the computer. (Declaration of Mary Pape ("Pape Decl.") (Dkt.# 15) ¶¶ 5, 6, Exs. A & B.)¹ The arbitration clause provides that any claims related to the Agreement shall be resolved by binding arbitration administered by the National Arbitration Forum ("NAF").² The arbitration clause includes a class action waiver pursuant to which the customer waives her ability to pursue a class action against Dell and vice versa. (Pape Decl., Ex. A, ¶ 13.) The Agreement selects the substantive law of Texas to govern contract disputes. (*Id.* ¶ 2.)

In June 2007, the enforceability of the Agreement was presented to the court through a choice-of-law question: whether the Agreement's class action waiver violated Washington's fundamental public policy such that the parties' express choice of Texas law could not be honored. See *Carideo v. Dell, Inc.* ("*Carideo I*"), 492 F.Supp.2d 1283, 1288 (W.D.Wash.2007). The court noted that "[a]bsent a legislative enactment or declaration from the highest court that class action waivers of the sort presented here violate public policy of the State of Washington, the court declines to invalidate the Agreement's choice of law provision." *Id.* The court therefore applied Texas law, stayed this action, and compelled arbitration. *Id.*

*2 After June 2007, developments in Washington law led the court to revisit its analysis on Plaintiffs' motion for relief under Federal Rule of Civil Procedure 60(b). First, in *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000, 1006-08 (Wash.2007), the Washington Supreme Court held that the class action waiver contained in Cingular Wireless's ("Cingular") consumer arbitration agreement violated the public policy embodied in Washington's CPA and improperly exculpated Cingular from wrongful conduct. Second, in *Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 167 P.3d 1112, 1121 (Wash.2007), the Washington Supreme Court clarified that it would apply section 187 of the *Restatement (Second) Conflict of Laws* (1971) to conflict of laws problems in which the parties have made an express contractual choice of law. Third, a number of other courts had weighed-in on the issue of class action waivers in arbitration agreements.

In September 2007, the court heard oral argument on Plaintiffs' original Rule 60(b) motion. Plaintiffs argued that *Scott* stands for the proposition that a class action waiver of the type found in the Agreement is unconscionable and, therefore, unenforceable as a violation of Washington's fundamental public policy. The court disagreed. Although it concluded that *Scott* directs courts to examine the enforceability of class action waivers based on the totality of the circumstances, the court ultimately found that the Agreement was enforceable because it was neither substantively nor procedurally unconscionable. *See Carideo v. Dell, Inc.* ("*Carideo II*"), 520 F.Supp.2d 1241, 1249 (W.D.Wash.2007).

Plaintiffs petitioned the Ninth Circuit for a writ of mandamus. While the petition remained pending, the Washington Supreme Court issued its decision in *McKee v. AT & T Corp.*, 164 Wash.2d 372, 191 P.3d 845 (Wash.2008), in which the court, applying *Scott*, held that the class action waiver contained in an agreement for AT & T telephone services was substantively unconscionable. 191 P.3d at 857-58. The Ninth Circuit subsequently denied Plaintiffs' petition for writ of mandamus without prejudice and ordered as follows: "In light of the intervening authority of *McKee v. AT & T Corp.*, 164 Wash.2d 372, 191 P.3d 845 (Wash.2008), this case is remanded to the district court to reconsider its order denying Petitioners' Rule 60(b) motion for relief from its order compelling arbitration." *In re Carideo*, 550 F.3d at 846. The Ninth Circuit did not rule on the merits of *Carideo II*.

Plaintiffs filed a supplemental Rule 60(b) motion, which comes before this court not only in the wake of *McKee*

but also in the current of steady developments in the case law. First, a range of courts, applying Washington law, have now addressed the issue of class action waivers, thereby applying *Scott* to a somewhat more factually-diverse group of cases. *See, e.g., Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1217-19 (9th Cir.2008) (holding class action waiver substantively unconscionable under *Scott* in case involving improper telephone service charges); *Coneff v. AT & T Corp.*, 620 F.Supp.2d 1248, 1256-60 (W.D.Wash.2009) (holding class action waiver substantively unconscionable under *Scott* in case of telephone service fees involving claims ranging from \$4.99 to \$175); *Olson v. The Bon, Inc.*, 144 Wash.App. 627, 183 P.3d 359, 364-65 (Wash.Ct.App.2008) (holding class action waiver substantively unconscionable under *Scott* in case of credit protection program involving claims of "less than a couple of hundred dollars"). Second, in *Oestreicher v. Alienware Corp.*, 322 F. App'x. 489, 492 (9th Cir.2009) (unpublished), the Ninth Circuit, applying California law, concluded that a claim for \$4,000 constituted a small amount in the context of a dispute involving defective notebook computers and thus that the class action waiver contained in the purchase agreement was substantively unconscionable. Third, in *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1094-97 (9th Cir.2009), the Ninth Circuit, applying Oregon law, held that a class action waiver was substantively unconscionable in a case involving claims of \$696.63.

*3 After oral argument, this case took an unexpected turn when news broke that NAF had ceased arbitrating consumer disputes of the sort at issue here. (*See* Dkt.78-80.) The court need not explore the reasons motivating NAF's decision for present purposes. In any event, having reviewed the parties' supplemental briefing on this development, it is clear that NAF does not arbitrate consumer disputes filed after July 24, 2009, and the parties agree that NAF is no longer available to arbitrate this dispute. The parties disagree, however, as to the effect of this development on the arbitration clause in the Agreement. Dell argues that the court should merely appoint a substitute arbitrator. (Def.Supp.(Dkt.# 85) at 5-6.) By contrast, Plaintiffs argue that the court should deny arbitration on this ground. (Pl.Supp.(Dkt.# 83) at 5-6.)

II. ANALYSIS

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”9 U.S.C. § 2. The purpose of the FAA is to “reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts.”*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); see *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978, 981, 169 L.Ed.2d 917 (2008). To that end, the FAA divests the district court of its discretion and requires it to resolve any doubts in favor of compelling arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

B. Unavailability of Chosen Arbitrator

The court must first determine whether the unavailability of NAF as arbitrator dooms the arbitration clause in its entirety, including the class action waiver. Under the FAA, the answer to this question turns on whether the selection of NAF as arbitrator is integral to the Agreement. *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir.2006). In general, the FAA provides that where the chosen arbitrator is unavailable, the court may appoint a substitute arbitrator. Section 5 of the FAA provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

*4 9 U.S.C. § 5. The parties agree that § 5 of the FAA and the Ninth Circuit's decision in *Reddam* provide the appropriate

lens through which to view the problem raised by the recent unavailability of NAF.

To determine whether to appoint a substitute arbitrator, the court must ask whether the choice of the specific arbitrator is integral to the arbitration agreement. In essence, “[w]hen a court asks whether a choice of forum is integral, it asks whether the whole arbitration agreement becomes unenforceable if the chosen arbitrator cannot or will not act.”*Reddam*, 457 F.3d at 1060. “Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an ‘ancillary logistical concern’ will the failure of the chosen forum preclude arbitration.”*Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir.2000).

The Ninth Circuit has had few opportunities to address the language of particular arbitration clauses. In *Reddam*, however, the Ninth Circuit set forth guidelines for the district courts to apply in evaluating arbitration clauses. 457 F.3d at 1059-61. Where the arbitration clause selects merely the rules of a specific arbitral forum, as opposed to the forum itself, and another arbitral forum could apply those rules, the unavailability of the implicitly intended arbitral forum will not require the court to condemn the arbitration clause. *Id.* At a minimum, for the selection of an arbitrator to be deemed integral, the arbitration clause must include an “express statement” designating a specific arbitrator. *Id.* at 1060. The *Reddam* court noted that the Ninth Circuit had not treated the selection of a specific litigation forum as exclusive of all other fora, “unless the parties have expressly stated that it was,” citing *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir.1984) (agreement provided that “disputes ... shall be litigated only in the Superior Court for Los Angeles, California (and in no other)”), as an example. *Reddam*, 457 F.3d at 1061.

Here, the court concludes that the parties' selection of NAF as arbitrator is integral to the arbitration clause. The arbitration clause provides that disputes “SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect” (Pape Decl., Ex. A ¶ 13 & Ex. B ¶ 13.) This language clearly and unequivocally selects NAF as the arbitrator, specifies that NAF will apply its own rules in the arbitration, and does not provide for an alternative arbitral forum. Unlike *Reddam*, the selection of NAF is not merely an implicit choice, but rather an express one. Furthermore, the arbitration clause states that binding arbitration administered

by NAF under its rules is the exclusive and final method for resolving disputes. The court is not persuaded by Dell's arguments that the term "exclusively" modifies only "binding arbitration" or that the language is either ambiguous or nonsensical. All of these considerations emphasize the key role of NAF and lead the court to find its selection integral to the arbitration clause.

*5 The Appellate Court of Illinois reached a similar conclusion in *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 335 Ill.Dec. 253, 918 N.E.2d 598 (2009). In that case, the Illinois court concluded that the selection of NAF was integral to the arbitration clause at issue and thus held that § 5 of the FAA could not be used to appoint a substitute arbitrator. *Carr*, slip op. at 6-8. The arbitration clause at issue in *Carr* provided, *inter alia*, that disputes "will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules" *Id.* at 6. The court interpreted this language as specifically designating NAF "as the exclusive arbitration forum," and emphasized the substantive effects of such a designation:

The NAF has a very specific set of rules and procedures that has implication for every aspect of the arbitration process. "[T]he designation of a [specific arbitral] forum such as the [NAF] 'has wide-ranging substantive implication that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.'"

Id. at 7-8 (quoting *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435 (S.C.2009) (quoting *Singleton v. Grade A Market, Inc.*, 607 F.Supp.2d 333, 340 (D.Conn.2009))). With these considerations in mind, the Illinois court held that "the selection of the NAF is neither logistical nor ancillary and is thus an integral part of the agreement to arbitrate" *Id.* at 8. The court finds the analysis of *Carr* persuasive. There is no meaningful difference between the arbitration clause in *Carr* and the one at issue here, and the court agrees that the parties' selection of NAF and its rules brings with it substantive implications that are neither merely logistical nor ancillary.

Finally, the court is mindful that the arbitration clause not only selects NAF as arbitrator, but designates NAF's code of procedure as the applicable rules. This both underscores NAF's importance to the arbitration clause and raises concerns regarding whether any NAF rules remain "in effect" that could be applied by a substitute arbitrator. Dell notes

that while NAF stopped accepting new consumer arbitrations after July 24, 2009, it continues to arbitrate previously-filed matters under its rules. (Def. Supp. at 6.) Dell argues that, as a consequence, NAF rules are in effect and may be applied by a substitute arbitrator. (*Id.*) The court disagrees. While NAF may continue to apply certain rules to previously-filed consumer arbitrations, it does not follow that these rules remain "in effect" for arbitrations filed after July 24, 2009. Rather, because NAF does not arbitrate consumer disputes filed after July 24, 2009, there are simply no NAF rules currently in effect for such arbitrations. Therefore, even were the court to appoint a substitute arbitrator, the court is not persuaded that there would be applicable NAF rules "in effect" for the substitute arbitrator to apply.

*6 In sum, the court concludes that the selection of NAF is integral to the arbitration clause. The unavailability of NAF as arbitrator presents compounding problems that threaten to eviscerate the core of the parties' agreement. To appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause. In addition, this type of substitution would pose additional problems on the facts of this case because putative class members would have no knowledge that potential claims would be arbitrated by a substitute arbitrator. Like the Appellate Court of Illinois in *Carr*, the court finds that the selection of NAF is neither logistical nor ancillary to the arbitration clause. The court therefore declines to appoint a substitute arbitrator pursuant to § 5 of the FAA.

The court next must determine whether the class action waiver survives the failure of the arbitration clause. By its plain language, the class action waiver applies only in the context of arbitration. Although the language differs between the two versions of the Agreement, both directly link the class action waiver to arbitration and to the arbitration clause. Further, neither version of the Agreement includes a severability provision. The parties have previously agreed that if the court found the class action waiver unenforceable, the court should not enforce arbitration. By a similar token, the court concludes that the class action waiver cannot be severed from or lifted out of the arbitration clause because it is inextricably tied to arbitration. Therefore, because the class action waiver is not severable, the court concludes that the class action waiver, like the arbitration clause, is not enforceable.³

Having concluded that the arbitration clause and the class action waiver are unenforceable, the court grants Plaintiffs' supplemental Rule 60(b) motion and vacates the order

compelling arbitration because arbitration is no longer possible.

42) and the order denying Plaintiffs' original Rule 60(b) motion (Dkt.# 57). Dell shall file its answer to Plaintiffs' first amended complaint (Dkt.# 10) within 30 days of the date of entry of this order.

III. CONCLUSION

For the foregoing reasons, the court GRANTS Plaintiffs' supplemental Rule 60(b) motion (Dkt.# 71). Plaintiffs are hereby relieved from the order compelling arbitration (Dkt.#

All Citations

Not Reported in F.Supp.2d, 2009 WL 3485933

Footnotes

- 1 Dell provided two versions of the Agreement. (See Pape Decl., Exs. A & B.) The parties agree that Exhibit A is the version of the Agreement that governs Ms. Carideo's purchase while Exhibit B is the version of the Agreement that governs Ms. Candler's purchase. (Pape Decl. ¶ 4; Pls. Resp. to Mot. to Compel Arb. (Dkt.# 30) at 3.) The two versions of the Agreement are substantively similar, but include some different terms. Unless otherwise noted, the court refers to the Agreement as it appears in Exhibit A to Ms. Pape's declaration.
- 2 Paragraph 13 of the Agreement applicable to Ms. Carideo, titled "Binding Arbitration," provides:
ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT, AND EQUITABLE CLAIMS) AGAINST DELL, its agents, employees, successors, assigns, or affiliates (collectively for purposes of this paragraph ("Dell"), arising from or relating to this Agreement, its interpretation, or the breach, termination, or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell's advertising, or any related purchase, SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect (available via the Internet at www.arb-forum.com or via telephone at 1-800-474-2371). The arbitration will be limited solely to the dispute or controversy between Customer and Dell. Any award of the arbitrator(s) shall be final and binding on each of the parties and may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and claims may be filed with the NAF or at P.O. Box 50191, Minneapolis, MN 55405.
(Pape Decl., Ex. A ¶ 13.) Paragraph 13 of the Agreement applicable to Ms. Candler, titled "Binding Arbitration" provides:
ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS) BETWEEN CUSTOMER AND DELL, its agents, employees, principals, successors, assigns, affiliates (collectively for purposes of this paragraph, "Dell") arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell's advertising, or any related purchase, SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect (available via the Internet at <http://www.arb-forum.com>, or via telephone at 1-800-474-2371). The arbitration will be limited solely to the dispute or controversy between customer and Dell. NEITHER CUSTOMER NOR DELL SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS BY OR AGAINST OTHER CUSTOMERS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR CLASS ACTION OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. This transaction involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act 9 U.S.C. sec. 1-16(FAA). Any award of the arbitrator(s) shall be final and binding on each of the parties, and may be entered as a judgment in any court of competent jurisdiction. Dell will be responsible for paying any arbitration filing fees and fees required to obtain a hearing to the extent such fees exceed the amount of the filing fee for initiating a claim in the court of general jurisdiction in the state in which you reside. Each party shall pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim that affords the prevailing party attorneys' fees or if there is a written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party, under the standards for fee shifting provided by law. Information may be obtained and claims may be filed with the NAF at P.O. Box 50191, Minneapolis, MN 55405.

(Pape Decl., Ex. B ¶ 13.)

- 3 The court recognizes that this order does not address *McKee* or Plaintiffs' primary argument that the class action waiver is substantively unconscionable under Washington law. Although the court has considered *McKee* and other case law in depth, the court declines to address the issue of unconscionability where the matter is appropriately resolved on a threshold issue.

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393 Fed.Appx. 174

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.

Cheryl RANZY, Plaintiff–Appellee,

v.

Edmundo TIJERINA; Cynthia Salinas; Extra Cash of Texas, Inc., Defendants–Appellants.

No. 10–20251 | Summary
Calendar. | Aug. 25, 2010.

Synopsis

Background: Consumer brought action against payday loan company. Company moved to compel arbitration. The United States District Court for the Southern District of Texas denied motion. Company appealed.

Holding: The Court of Appeals held that district court's decision not to compel arbitration in a substitute forum was proper.

Affirmed.

Attorneys and Law Firms

*174 Matthew Brian Probus, Wauson & Probus, Sugar Land, TX, for Plaintiff–Appellee.

*175 Kim Kathryn Ogg, Randall Scott Poerschke, Jr., Esq., Ogg Law Firm, Houston, TX, for Defendants–Appellants.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:09–CV–3334.

Before KING, BENAVIDES, and ELROD, Circuit Judges.

Opinion

PER CURIAM: *

This appeal concerns whether the district court properly denied Defendants' motion to compel arbitration. We find that it did and we AFFIRM.

The arbitration provision at issue requires the parties to arbitrate all disputes before the National Arbitration Forum (NAF). Specifically, it states,

You and we agree that any and all claims, disputes, or controversies ... *shall* be resolved by binding individual (and not class) arbitration by and under the Code of Procedure of the National Arbitration Forum.... This agreement to arbitrate all disputes *shall* apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims *shall* be filed at any NAF office, [or by contacting the NAF via the internet, phone, or mail].

(emphasis added). At the time of the dispute, however, the NAF had ceased to handle the type of consumer claims that Ranzy had brought against Defendants. In other words, the contractually designated arbitration forum was no longer available.

The district court, Judge Miller, in a very well-reasoned decision, identified that the dispositive inquiry was whether the parties' designation of the NAF as the sole arbitration forum was an integral part of the arbitration agreement. The court found that it was because the “mandatory, not permissive” plain language of the arbitration provision “evinces a specific intent of the parties to arbitrate before the NAF.”

This court reviews the district court's denial of a motion to compel arbitration *de novo*. *In re Mirant Corp.*, 613 F.3d 584, 588–89 (5th Cir.2010) (citation omitted). Defendants acknowledge that the NAF is no longer an available forum,¹ but they contend that, under Section 5 of the Federal Arbitration Act (FAA), 9 U.S.C. § 5, the district court should have appointed a substitute arbitration forum. Section 5 states,

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; *176 and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. (emphasis added).

Section 5 does not, however, permit a district court to circumvent the parties' designation of an exclusive arbitration forum when the choice of that forum "is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern." *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir.2000) (citation and internal quotation marks omitted); see also *In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 561 (2d Cir.1995) (citing *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 333-34 (5th Cir.), cert. denied, 484 U.S. 943, 108 S.Ct. 329, 98 L.Ed.2d 356 (1987)). In order to determine whether the designation of the NAF as the sole arbitration forum is an integral part of the arbitration agreement, "the court must employ the rules of contract construction to determine the intent of the parties." *Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir.2000) (citation omitted). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Id.* (citation omitted).

Here, the arbitration agreement plainly states that Ranzy "shall" submit all claims to the NAF for arbitration and that the procedural rules of the NAF "shall" govern the arbitration. Put differently, the parties explicitly agreed that the NAF shall be the exclusive forum for arbitrating disputes. In *National Iranian*, we explained that, where the parties' agreement specifies that the laws and procedures of a particular forum shall govern any arbitration between them, that forum-selection clause is an "important" part of the arbitration agreement. 817 F.2d at 334 ("Not only did NIOC choose Tehran as the site of any arbitration, but the contract also provides that Iranian law governs the interpretation and rendition of any arbitral awards.... The language of the contract thus makes self-evident the importance of Iranian law and Iranian institutions to NIOC."). Thus, a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable. See *id.* at 333-35. Applying this rule, the Second Circuit, in *In re Salomon*, held that the district court properly declined to appoint a substitute arbitrator under § 5 and then compel arbitration because (1) the parties had contractually agreed that only the New York Stock Exchange could arbitrate any disputes between them and (2) that forum became unavailable. See 68 F.3d at 561. We agree with the Second Circuit's application of *National Iranian*, and we also find this case to be indistinguishable from *In re Salomon*. Therefore, we hold that the district court properly denied the motion to compel arbitration.

AFFIRMED.

All Citations

393 Fed.Appx. 174, 2010 WL 3377235

Footnotes

- * Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.
- 1 In July 2009, the NAF ceased consumer arbitrations under a settlement with the State of Minnesota. That settlement resolved a lawsuit filed by Minnesota against the NAF, alleging unlawful conduct arising from collusion with its clients.

258 Fed.Appx. 466

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7) United States Court of Appeals, Third Circuit.

SOUTH BROWARD HOSPITAL DISTRICT, doing business as Memorial Hospital West, doing business as Memorial Hospital Pembroke, doing business as Memorial Regional Hospital; Childrens Hospital Los Angeles; Northbay Healthcare Group, doing business as Northbay Medical Center, doing business as Vaca Valley Hospital; Partners Healthcare Systems, Inc., doing business as Partners Healthcare, doing business as Massachusetts General Hospital, doing business as Massachusetts General Physician's Organization, doing business as Brigham and Women's Hospital, doing business as Spaulding Rehabilitation Hospital; doing business as Newton-Wellesley Hospital, doing business as North Shore Medical Center, Inc., doing business as The Salem Hospital, doing business as Union Hospital; Riverside Healthcare Systems, L.P., doing business as Riverside Community Hospital; West Hills Hospital, individually and on behalf of all those similarly situated doing business as West Hills Hospital & Medical Center
v.

MEDQUIST INC.; Ronald Scarpone; John Suender; Brian Kearns; Michael Clark; Medquist Transcriptions, Ltd., Medquist Inc. and Medquist Transcriptions, Ltd., Appellants.

No. 07-2076. | Submitted
Under Third Circuit LAR 34.1(a) Dec.
13, 2007. | Filed: Dec. 18, 2007.

Synopsis

Background: Putative class of customers brought action against affiliated medical transcription companies, and certain senior executive officers, asserting claims of fraud,

negligent misrepresentation, negligent supervision, unfair business practices, a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), and other tort claims. The United States District Court for the District of New Jersey, Jerome B. Simandle, J., 516 F.Supp.2d 370, denied defendants' motion to compel arbitration. Defendants appealed.

Holding: The Court of Appeals, Ambro, Circuit Judge, held that medical transcription company waived right to compel arbitration.

Affirmed.

*467 Appeal from the United States District Court for the District of New Jersey (D.C. Civil Action No. 05-cv-2206), District Judge: Honorable Jerome B. Simandle.

Attorneys and Law Firms

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Laura M. Klaus, Robert P. Charrow, Greenberg Traurig, Washington, DC, for Appellees.

Olivier Salvagno, Greenbaum, Rowe, Smith, Ravin, Davis & Himmel, Iselin, NJ, Marc J. Gross, Greenbaum, Rowe, Smith & Davis, Roseland, NJ, Gail J. Standish, Peter E. Perkowski, Neal R. Marder, Stephen R. Smerek, Winston & Strawn, Los Angeles, CA, for Appellants.

Before: SLOVITER and AMBRO, Circuit Judges, POLLAK, * District Judge.

OPINION

AMBRO, Circuit Judge.

Medquist Inc, a provider of transcription services to hospitals, appeals the District Court's denial of its motion to compel arbitration. As we agree with the District Court that Medquist waived its right to compel arbitration, we affirm.

Plaintiffs-appellees are a putative class of hospitals. They allege that Medquist manipulated its billing practices in a fraudulent manner that violated the Racketeer Influenced

and Corrupt Organizations Act, resulting in various tort claims. Their action, initially filed in the Central District of California, was transferred to the District of New Jersey. After motion practice before that Court and 16 months into the case, Medquist moved to compel arbitration.

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, establishes a policy in favor of arbitration that requires the liberal reading of arbitration agreements and the resolution of any doubts in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Waiver of the right to compel arbitration is not to be inferred lightly. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 233 (3d Cir.1997) (citing *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068 (3d Cir.1995)). Prejudice is the touchstone for evaluating an asserted waiver of the right to compel arbitration. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir.2007) (citing *Hoxworth v. Blinder, Robinson, & Co.*, 980 F.2d 912, 925 (3d Cir.1992)). In determining prejudice, we consider the following non-exclusive list of factors: (1) the timeliness or lack of a motion to arbitrate; (2) the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims; (3) whether the party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the District Court proceedings; (4) the extent of that party's non-merits motion practice; (5) its assent *468 to the District Court's pretrial orders; and (6) the extent to which the parties have engaged in discovery. *Id.* at 222 (citing *Hoxworth*, 980 F.2d at 926–27). Waiver normally will be found only “where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery.” *Faragalli*, 61 F.3d at 1068–69 (quoting *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir.1975)).

To repeat, the motion to compel arbitration before us came 16 months after the filing of suit. Even after subtracting the five months at the beginning of the case during which no plaintiffs had been named that were parties to contracts containing arbitration provisions,¹ the remaining 11–month period is as long as the period at issue in *Hoxworth*. See 980 F.2d at 925; see also *id.* at 926 (noting that “courts have not hesitated to hold that the right to arbitrate has been waived under circumstances similar to those here”). Although the District Court did not entertain motions for summary judgment, Medquist twice tested the sufficiency of

the pleadings with motions to dismiss. The fact that the parties did not engage in discovery normally precludes a finding of waiver, but here it is outweighed by Medquist's tactical decision to litigate extensively in federal court before seeking to compel arbitration.

As detailed by the District Court, Medquist litigated this case vigorously before expressing an intent to force arbitration. This is demonstrated by its motion to dismiss the second amended complaint in favor of arbitration (which was filed eleven months after the beginning of the case, or five months before the motion to compel arbitration). That motion did not indicate an intent to move to compel arbitration in the future. Instead, it argued that “[b]ecause plaintiffs have not indicated whether they will pursue arbitration, and there is no request to compel arbitration before the Court, a stay would serve no purpose and the action should be dismissed.” In other words, Medquist attempted to turn to its own advantage its decision not to move to compel arbitration. The hospitals may have delayed somewhat the litigation by their own conduct, but Medquist has not explained how the actions of the hospitals stopped it from moving to compel arbitration at an earlier date.

The District Court concluded correctly that Medquist made a tactical decision to forgo moving to compel arbitration pending litigation of the motions to dismiss. This decision exposed the hospitals to extensive litigation expense and allowed Medquist to pursue a total victory in federal court while presuming to reserve any motion to compel arbitration. Nothing in the cases cited by Medquist entitles it to expose the hospitals to such delay, expense, and prejudice and then move to compel arbitration. Medquist may have expressed its preference for arbitration, but that fact does not reduce the prejudice caused to the hospitals by its tactical decision not to move to compel arbitration. It moved to the arbitration alternative only when its preferred option proved unsuccessful. In this case, it was too late.

We thus affirm. In doing so, we do not reach the other issues raised by Medquist *469 in this appeal because they have not been considered by the District Court.

All Citations

258 Fed.Appx. 466, 2007 WL 4394391, RICO Bus.Disp.Guide 11,403

Footnotes

- * Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
- 1 However, plaintiffs incorrectly alleged in the initial complaint that they were parties to contracts containing arbitration provisions and that agreement to those provisions was fraudulently induced. This error was one basis for defendants' motion for Rule 11 sanctions against plaintiffs and their counsel. *See* Motion for Sanctions 17–22, Case No. C 05–2206 JBS (D.N.J., Nov. 8, 2005).

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