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No. 71806-1

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

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

Respondents,

v.

CACH, LLC, a Colorado limited liability company,

Appellant.

BRIEF OF APPELLANT CACH, LLC

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TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	3
A. It is Undisputed that Consumers are Subject to Valid and Enforceable Credit Card Agreements with FIA Card Services.....	3
B. It is Undisputed that FIA Assigned All of its Rights Under the Credit Card Agreements to CACH.	3
C. It is Undisputed that the Credit Card Agreements Contain Express, Enforceable Arbitration Provisions.....	4
D. Consumers' Complaint Alleges Causes of Action that Arise Under Their Credit Card Agreements, Which are Governed by Valid Arbitration Provisions.....	4
E. Consumers Did Not Raise These Claims in the Original Lawsuits.....	5
F. The Trial Court Denied CACH's Motion to Compel Arbitration.....	5
IV. ARGUMENT	6
A. Standard of Review.....	6
B. It is Uncontested that CACH is the Assignee of the Cardholder Agreements and Has the Right to Invoke the Valid Arbitration Agreements Contained Therein.	6
C. There is a Strong Judicial Presumption Favoring Arbitration and Against Finding Waiver.	7
D. The Trial Court Erred in Finding that CACH Waived Its Right to Arbitrate the Claims at Issue.	9
1. CACH Has Not Engaged in Any Conduct Inconsistent with Its Right to Compel Arbitration.....	9
2. Waiver is Determined on a Claim-by-Claim Basis.....	11

3.	The Claims at Issue in this Putative Class Action Are <u>Not</u> the Same as Those in the Underlying Collection Matters.	12
4.	Consumers Cannot Demonstrate Any Prejudice.	15
5.	The Text of the Arbitration Agreements Confirms that No Waiver Has Occurred.....	17
E.	Since the Trial Court Found that CACH Waived its Right to Compel Arbitration, It Erred by Not Holding that the Claims Were Barred Under the Doctrines of <i>Res Judicata</i> and Judicial Estoppel.....	18
1.	Consumers Cannot Escape <i>Res Judicata</i>	18
2.	Judicial Estoppel Prevents Consumers from Contending the Claims are the Same for the Purposes of Waiver, but Distinct in Order to Survive a <i>Res Judicata</i> Challenge.....	19
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Albano v. Norwest Fin. Hawaii, Inc.</i> , 244 F.3d 1061 (9th Cir. 2001)	9
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995).....	7
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011).....	7
<i>Bartley-Williams v. Kendall</i> , 134 Wn. App. 95, 138 P.3d 1103 (2006)	20
<i>Britton v. Co-op Banking Grp.</i> , 916 F.2d 1405 (9th Cir. 1990)	6, 16
<i>Cage v. CACH</i> , C13-01741RSL, 2014 WL 2170431 (W.D. Wa. May 22, 2014)...	14, 15
<i>Creative Telecommunications, Inc. v. Breeden</i> , 120 F.Supp.2d 1225 (D. Haw. 1999)	8, 9
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213, 105 S.Ct. 1238 (1985).....	11
<i>Ensley v. Pitcher</i> , 152 Wn. App. 891, 222 P.3d 99 (2009)	6
<i>Fields v. Howe</i> , 2002 WL 418011 (S.D. Ind. Mar. 14, 2002).....	14, 15
<i>Fisher v. A.G. Becker Paribas Inc.</i> , 791 F.2d 691 (9th Cir. 1986)	8, 9
<i>Herko v. Metro. Life Ins. Co.</i> , 978 F.Supp. 141 (W.D.N.Y. 1997)	16

	<u>Page(s)</u>
<i>Hodson v. Javitch, Block & Rathbone,</i> LLP, 531 F.Supp.2d 827 (N.D. Ohio 2008).....	14
<i>In re Advanta Bank Corp.,</i> 2008 WL 615921 (Tex. App. Mar. 6, 2008).....	14
<i>Kinsey v. Bradley,</i> 53 Wn. App. 167, 765 P.2d. 1329 (1989).....	9
<i>Lake Wash. School Dist. No. 414 v. Mobile Modules Nw., Inc.,</i> 28 Wn.App. 59, 621 P.2d 791 (1980).....	8
<i>Maxum Founds., Inc. v. Salus Corp.,</i> 779 F.2d 974 (4th Cir. 1985)	10
<i>Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,</i> 460 U.S. 1, 103 S.Ct. 927 (1983).....	7, 8
<i>Otis Hous. Ass'n, Inc. v. Ha,</i> 165 Wn.2d 582, 201 P.3d 309 (2009).....	12
<i>Parfi Holding AB v. Mirror Image Internet, Inc.,</i> 842 A.2d 1245 (Del. Ch. 2004).....	11
<i>Pederson v. Potter,</i> 103 Wn. App. 62, 11 P.3d 833 (2000).....	19
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.,</i> 388 U.S. 395 (1967).....	7
<i>Quality Improvement Consultants, Inc. v. Williams,</i> 129 F. App'x 719 (3d Cir. 2005)	11
<i>Quevedo v. Macy's, Inc.,</i> 798 F.Supp.2d 1122 (C.D. Cal. 2011)	16
<i>Riensch v. Cingular Wireless LLC,</i> 2013 WL 951012 (W.D. Wa. Mar. 12, 2013).....	11
<i>Satomi Owners Ass'n v. Satomi, LLC,</i> 167 Wn.2d 781, 225 P.3d 213 (2009).....	6

	<u>Page(s)</u>
<i>Sauer–Getriebe KG v. White Hydraulics, Inc.</i> , 715 F.2d 348 (7th Cir. 1983)	9
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	19
<i>Schwartz v. CACH, LLC</i> , 13-12644-FDS, 2014 WL 298107 (D. Mass. Jan. 27, 2014)	14
<i>Southland Corp. v. Keating</i> 465 U.S. 1, 12, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).....	9
<i>Steele v. Lundgren</i> , 85 Wn. App. 845, 935 P.2d 671 (1997).....	8
<i>Subway Equip. Leasing Corp. v. Forte</i> , 169 F.3d 324 (5th Cir. 1999)	11
<i>United Computer Sys., Inc. v. AT&T Corp.</i> , 298 F.3d 756 (9th Cir. 2002)	15, 17
<i>Verbeek Properties, LLC v. GreenCo Envtl., Inc.</i> , 159 Wn. App. 82, 246 P.3d 205 (2010).....	12

STATUTES

Federal Arbitration Act (9 U.S.C. § 2 <i>et seq.</i>)	7, 8, 9, 11
Washington Collection Agency Act (RCW 19.16 <i>et seq.</i>)	passim
Washington Consumer Protection Act (RCW 19.86 <i>et seq.</i>).....	passim

I. INTRODUCTION

This dispute surrounds the accounts of Jennifer Wiese (“Ms. Wiese”) and Candy Bradison (“Ms. Bradison”) (collectively, “Consumers”). CACH, LLC (“CACH”) filed collection actions in superior court, asserting that Consumers breached their contracts and owed the unpaid balance of their accounts. The trial court entered judgments in favor of CACH. Those judgments remain in full force and effect today. Now, more than two years later, Consumers filed this separate class action, asserting consumer protection claims that were neither raised nor addressed in the previous collection matters.

The accounts in question are subject to arbitration agreements, which Consumers do not contest are valid and enforceable. However, when CACH invoked its right to arbitrate the claims presented by the present action, Consumers objected—they argue that CACH waived its right to compel arbitration of the Consumer Protection Act, Washington Collection Agency Act, and civil conspiracy claims raised in this putative class action by filing the previous breach of contract suits in superior court.

Consumers’ position runs contrary to well established waiver principles. The caselaw is abundantly clear that waiver is determined on a claim-by-claim basis. The putative class action claims presented in this

case were neither raised nor addressed in the separately filed, previously adjudicated collection matters. CACH cannot intentionally relinquish a known right—here, a right to compel arbitration of the claims currently at issue—when it did not exist years ago.

Alternatively, *even if* the Court accepts Consumers’ premise and links the putative class action and prior collection cases together as “one claim,” *then* Consumers are unequivocally barred from pursuing this case under *res judicata* and judicial estoppel.

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

II. ASSIGNMENTS OF ERROR

1. The trial court erred by holding that CACH waived its right to compel arbitration of the consumer protection claims presented in the present class action by previously filing suit in superior court to collect the balance of the underlying accounts.

2. The trial court erred by finding that the claims in the two actions were the same to evaluate Consumers’ waiver arguments, but distinct in order to survive a challenge under the doctrine of *res judicata*.

Both of these issues are questions of law and are therefore reviewed *de novo* by this Court.

III. STATEMENT OF THE CASE

A. It is Undisputed that Consumers are Subject to Valid and Enforceable Credit Card Agreements with FIA Card Services.

Consumers both had credit card accounts with FIA Card Services, N.A. (“FIA”). CP at 50-51. These accounts are governed by credit card agreements, which were mailed to Consumers in the ordinary course of business. CP at 51-52.

Consumers failed to pay the balances due under their accounts as required. CP at 52. Ms. Wiese made her last payment on October 22, 2009 and Ms. Bradison made her last payment on April 14, 2008. CP at 52. The accounts became delinquent 30 days after those final payments were made. CP at 52.

B. It is Undisputed that FIA Assigned All of its Rights Under the Credit Card Agreements to CACH.

After Consumers defaulted on their credit cards, FIA charged-off the accounts and assigned its rights under the credit card agreements to CACH. CP at 52. The bills of sale by which CACH acquired Consumers’ accounts state that FIA “absolutely sells, transfers, assigns, sets-over, quitclaims and conveys to CACH . . . without recourse” all of FIA’s “right, title and interest in and to” the accounts. CP at 105, 111. As a result of this transaction, CACH assumed all of the rights previously afforded to FIA under the agreements. CP at 105, 111.

C. It is Undisputed that the Credit Card Agreements Contain Express, Enforceable Arbitration Provisions.

Consumers' credit card agreements contain identical arbitration provisions that entitle the parties to arbitration of "[a]ny claim or dispute . . . arising from or relating in any way to this Agreement . . . (whether under a statute, in contract, tort, or otherwise . . .)." CP at 95, 102 (emphasis added). These provisions are not hidden in small print; rather, they are summarized in bold, capital letters:

YOU UNDERSTAND AND AGREE THAT IF EITHER YOU OR WE ELECT TO ARBITRATE A CLAIM, THIS ARBITRATION SECTION PRECLUDES YOU AND US FROM HAVING A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH COURT, OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS.

CP at 97, 102.

D. Consumers' Complaint Alleges Causes of Action that Arise Under Their Credit Card Agreements, Which are Governed by Valid Arbitration Provisions.

In their complaint, Consumers allege only a few scant facts. First, they refer to CACH as a "debt buyer," noting that CACH bought Ms. Wiese's and Ms. Bradison's credit card accounts. CP at 4. Second, they allege that CACH, through its attorneys, attempted to collect the balances due under those accounts. CP at 7-8. Finally, they state that CACH did not register as a collection agency under Washington Law. CP at 7-8. Consumers assert that these facts create liability under the

Washington Consumer Protection Act (RCW 19.86 *et seq.*), the Washington Collection Agency Act (RCW 19.16 *et seq.*), and for civil conspiracy. CP at 17-19. All of these claims relate to the credit card agreements and are therefore governed by the arbitration provisions detailed above.

E. Consumers Did Not Raise These Claims in the Original Lawsuits.

The collection actions against Ms. Wiese and Ms. Bradison were filed under docket numbers 11-2-02816-0-KNT and 10-2-08310-9, respectively. CP at 53. Both actions resulted in default judgments. CP at 116-17, 119-20. Neither Ms. Wiese nor Ms. Bradison raised any substantive defenses or counterclaims in response to CACH's actions for breaches of contract.

F. The Trial Court Denied CACH's Motion to Compel Arbitration.

CACH's counsel requested that Consumers arbitrate their claims per the terms of the cardholder agreements. CP at 124-26. Consumers rejected CACH's demand for arbitration, forcing CACH to file its Motion to Compel Arbitration and Dismiss. CP at 39-49.

Consumers opposed the motion, arguing that CACH waived its right to seek arbitration by previously commencing the collection lawsuits against them in state court. CP at 175-85. The trial court accepted this

argument, finding that CACH waived its right to compel arbitration by filing the prior collection lawsuits, and denied CACH's Motion. CP at 239-42. Without citation, the Court also ruled that while the claims were the same for the purposes of waiver, they were somehow different for *res judicata*. The present action is CACH's appeal of that decision.

IV. ARGUMENT

A. Standard of Review.

A trial court's decision on the arbitrability of a matter is reviewed *de novo* by this Court. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1409 (9th Cir. 1990); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). Whether *res judicata* bars an action is also a question of law, and is therefore reviewed *de novo* as well. *See Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009).

B. **It is Uncontested that CACH is the Assignee of the Cardholder Agreements and Has the Right to Invoke the Valid Arbitration Agreements Contained Therein.**

Consumers did not contest that the cardholder agreements contain valid arbitration provisions. *See* CP at 39-49. Consumers also did not contest that CACH is the assignee of the agreements. *See* CP at 39-49. CACH therefore has the right to invoke the arbitration provisions. CP at 97, 102. ("For the purposes of this Arbitration and Litigation Section, 'we' and 'us' means FIA Card Services, N.A., its . . . assigns, and any

purchaser of your account”). The primary issue before the Court is whether CACH waived its right to enforce the arbitration agreements in this instance.

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

The Federal Arbitration Act (“FAA”) and the courts heavily favor arbitration as a matter of public policy. The FAA is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). The body of caselaw surrounding the FAA dictates that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *AT&T Mobility LLC v. Concepcion*, __U.S.__, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011) (recognizing that Congress enacted the FAA “in response to widespread judicial hostility to arbitration agreements” to reflect “a liberal federal policy favoring arbitration”)

(internal citations and quotations omitted).¹ When there is any ambiguity about the scope of an arbitration provision, disputes should always be resolved in favor of arbitration. *See Moses*, 460 U.S. at 25-26 (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

Waiver of arbitration rights is also strongly disfavored—to waive the right to compel arbitration, a party must engage in “conduct inconsistent with **any other intention** but to forego a known right.” *See Lake Wash. School Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980) (emphasis added); *see also Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). The party contending that waiver has occurred “has a heavy burden of proof.” *Steele v. Lundgren*, 85 Wn. App. 845, 852, 935 P.2d 671 (1997); *Creative Telecommunications, Inc. v. Breeden*, 120 F. Supp. 2d 1225, 1232 (D. Haw. 1999). Consumers failed to overcome this strong presumption.

¹ Under the FAA, “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . .” 9 U.S.C. § 2.

D. The Trial Court Erred in Finding that CACH Waived Its Right to Arbitrate the Claims at Issue.

Since the cardholder agreements between the parties involved interstate commerce, the arbitrability of the present dispute is governed by the FAA. *See Kinsey v. Bradley*, 53 Wn. App. 167, 169, 765 P.2d. 1329 (1989) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). This Court must therefore apply the three-factor test set forth by the Ninth Circuit in *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (1986), to determine if CACH waived its right to compel arbitration. The burden of proving waiver is placed on Consumers, who 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.” *Id.* Consumers cannot establish the second or third prongs of the *Fisher* test. Thus, CACH did not waive its right to compel arbitration.

1. CACH Has Not Engaged in Any Conduct Inconsistent with Its Right to Compel Arbitration.

Consumers’ waiver argument solely focuses on CACH’s decision to bring the underlying collection actions in superior court. Such conduct, standing alone, is not sufficiently inconsistent with the right to compel arbitration to constitute waiver. *See Breedon*, 120 F. Supp. 2d at 1232; *Sauer–Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir.

1983) (holding that filing suit in state court did not waive right to later compel the claims filed into arbitration); *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981-83 (4th Cir. 1985) (finding no waiver where defendant filed third-party complaint and engaged in discovery).

Moreover, CACH's conduct in bringing the collection suits should have no bearing on its right to invoke the valid arbitration agreements in this instance. In order to demonstrate waiver, Consumers must show that CACH acted inconsistently with its right to invoke the arbitration agreements with respect to the specific claims at issue. Since the claims presented in this litigation were neither raised nor considered in the underlying collection matters, CACH's conduct in those suits is irrelevant to the waiver question before this Court.²

CACH has not acted inconsistently with its right to compel arbitration in this instance. CACH made a demand that the claims be moved to arbitration before doing anything substantive. CP at 121. This demand was rebuffed by Consumers' counsel. CP at 121. CACH's Answer then invoked the arbitration agreements. CP at 25. CACH did not waive its right to compel arbitration of Consumers' claims.

² This issue is addressed in more detail below in subsection (D)(2).

2. Waiver is Determined on a Claim-by-Claim Basis.

A party only invokes the judicial process—waiving its right to arbitrate—when it litigates a **specific claim** that it subsequently seeks to arbitrate.³ See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); *Riensch v. Cingular Wireless LLC*, Nos. C06-1325 TSZ, C09-106 TSZ, 2013 WL 951012, at *5 (W.D. Wash. Mar. 12, 2013) (“A party’s acts are inconsistent with the right to compel arbitration where the party makes a conscious decision to continue to seek judicial judgment **on the merits of the arbitrable claims.**”) (emphasis added) (internal quotations omitted); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999) (“We hold today that a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate.”). This claim-based approach to the FAA was confirmed by the U.S. Supreme Court in order to promote federal policy favoring arbitration. See *Byrd*, 470 U.S. at 217. In reaching this decision, the Supreme Court held that the enforcement of valid arbitration agreements should be absolute, even when some claims

³ The arbitration agreements contain choice of law provisions that invoke Delaware law. Though federal law applies in this instance, see *Bradley*, 53 Wn. App. 167, the result would be the same under Delaware law. See *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1262 (Del. Ch. 2004) (holding that the party had not waived its right to seek arbitration of contractual claims by actively litigating fiduciary duty claims); *Quality Improvement Consultants, Inc. v. Williams*, 129 F. App’x 719, 722 (3d Cir. 2005) (“[W]avier of arbitration with respect to some claims need not constitute waiver of the right to arbitrate all claims that might arise between the parties.”).

deriving from the same nucleus of fact are litigated while others are arbitrated, resulting in the “inefficient maintenance of separate proceedings in different forums.”⁴ *Id.*

3. The Claims at Issue in this Putative Class Action Are Not the Same as Those in the Underlying Collection Matters.

Consumers’ claims have never been litigated and the alleged basis for CACH’s waiver occurred in an entirely separate lawsuit. In the collection matters, two legal questions were considered: (1) whether Consumers breached the credit card agreements and therefore owed the unpaid balance of their respective accounts; and (2) whether CACH was the valid assignee of the agreements, entitling CACH to exercise FIA’s rights. Conversely, the present action involves three different claims: (1) alleged violation of the Consumer Protection Act (RCW 19.86 *et seq.*); (2) alleged violation of the Washington Collection Agency Act (RCW 19.16 *et seq.*); and (3) civil conspiracy. None of these claims were raised in the underlying collection actions.

⁴ Washington law has adopted the same approach. *See Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 91-92, 246 P.3d 205 (2010) (rejecting that the claims at issue were waived because “**the trial court did not, was not asked to, and was not authorized to find facts or make conclusions of law pertaining to the breach of contract and related claims Verbeek now seeks to arbitrate**”) (emphasis added); *Otis Hous. Ass’n, Inc. v. Ha*, 165 Wn.2d 582, 588, 201 P.3d 309 (2009) (noting that a party who has litigated a particular claim “may not later seek to relitigate the **same issue** in a different forum”) (emphasis added).

By any standard, the claims in these separate lawsuits are not the same. They are different causes of action, require different elements of proof, and involve different *prima facie* cases. The findings of fact and conclusions of law from the prior collection matters—namely, whether Consumers owed CACH the balance of their accounts—are quite distinct from those at issue here, which involve CACH’s allegedly improper conduct in seeking to collect on the accounts.

In the underlying breach of contract lawsuits, neither Ms. Bradison nor Ms. Wiese ever alleged that CACH had violated the Washington Consumer Protection Act or the Washington Collection Agency Act, that CACH was involved in a civil conspiracy, or that the Court should enter declaratory or injunctive relief. It is nonsensical to suggest that CACH could have knowingly relinquished its right to compel arbitration of these claims when they were never raised or considered in the previous suits. In fact, the present action primarily surrounds CACH’s conduct in bringing the underlying collection matters. The basis for Consumers’ claims did not even arise until the underlying judgments were finalized. Waiver cannot occur under such circumstances.

Appellants’ position is well supported by the numerous jurisdictions that have addressed the precise waiver argument before this Court, each of which has found that a debt collector does not waive its

right to compel arbitration in a subsequent consumer protection lawsuit simply by obtaining a judgment in state court. *See Cage v. CACH*, C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wash. May 22, 2014) (“Bringing a lawsuit for debt collection may result in defendants’ waiver of arbitration for that case, but it does not bar plaintiffs from compelling arbitration in that action or bar defendants from invoking arbitration in all future separate causes of action that plaintiffs assert against them.”); *Schwartz v. CACH, LLC*, No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014) (holding that “CACH’s decision not to invoke arbitration in the earlier state-court collection actions is not relevant” for determining waiver in a later-filed consumer protection action); *Hodson v. Javitch, Block & Rathbone, LLP*, 531 F. Supp. 2d 827, 831 (N.D. Ohio 2008); *In re Advanta Bank Corp.*, Nos. 11-07-00276-CV, 11-07-00315-CV, 2008 WL 615921, at *2 (Tex. App. Mar. 6, 2008); *Fields v. Howe*, No. IP-01-1036-C-B/S, 2002 WL 418011, at *8 (S.D. Ind. Mar. 14, 2002). Each case involved overlapping inquiries and common factual backgrounds, yet these similarities did not resolve the question before the respective courts. Instead, the central point of the analysis must be whether the claims raised in the subsequent suit are the same as the

claims in the collection matters. *See Cage*, 2014 WL 2170431, at *1. As one particularly on-point decision noted:

The fact that the present action arose because of Discover's allegedly improper conduct in the course of that state court proceeding does not render this cause one and the same as Discover's state court case. The state court case is a collection action – a case initiated by Discover; the federal court case is an action for alleged violation of federal and state laws – a case initiated by Fields.

Fields, 2002 WL 418011, at *8.

Consumers have never identified a single authority in any jurisdiction to support their position that filing a collection lawsuit waives a party's right to invoke an arbitration clause in a separate lawsuit involving statutory consumer protection claims.

4. Consumers Cannot Demonstrate Any Prejudice.

Even if CACH acted in a manner inconsistent with its right to compel the claims at issue into arbitration (it did not), Consumers cannot establish waiver because there has been no prejudice in this instance. Prejudice can only be demonstrated if a party's failure to invoke an arbitration provision results in significant costs to the opposing party. *See United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 765 (9th Cir. 2002) (rejecting waiver argument for failure to establish prejudice, despite the fact that the parties "incurred substantial costs in litigating this matter in state and federal court" because the case "never got past the pleading

stage”; if the “defendants permitted the case to proceed to discovery and to a trial, an argument of prejudice . . . would be much more compelling”); *Herko v. Metro. Life Ins. Co.*, 978 F. Supp. 141, 148 (W.D.N.Y. 1997) (holding that no waiver occurred because “neither side has engaged in the level of protracted litigation with the potential for substantial amounts of wasted legal costs that would necessitate finding that Defendants had waived their right to arbitration of Herko’s claims”). Statements of prejudice cannot be conclusory. *See Britton*, 916 F.2d at 1413. Rather, “prejudice typically is found only where the petitioning party’s conduct has substantially undermined the important public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution or substantially impaired the other side’s ability to take advantage of the benefits and efficiencies of arbitration.” *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1132 (C.D. Cal. 2011) (internal quotations omitted).

No significant cost or delay has been incurred in this case. CACH made a demand that the claims be moved to arbitration from the outset—it invoked this right before filing any pleadings. CP at 121. When Consumers’ objected to arbitration, CACH immediately filed its Motion to Compel Arbitration. CP at 121. The parties have not engaged in any discovery.

While the underlying collection actions should not be considered in evaluating prejudice, they would do little to support Consumers' argument. The collection suits against Consumers both resulted in default judgments. CP at 116-17, 119-20. Consumers did not even appear, let alone incur expenses significant enough to overcome the heavy presumption against finding waiver of the right to compel arbitration. *See United Computer Sys.*, 298 F.3d at 765.

5. The Text of the Arbitration Agreements Confirms that No Waiver Has Occurred.

The language of the arbitration agreements confirms that waiver only occurs when the claims have previously been litigated. The arbitration provisions in both cardholder agreements state:

Any **claim** or dispute ("**Claim**") by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), shall, upon election by either you or us, be resolved by binding arbitration. The arbitrator shall resolve any **Claims**, including the applicability of this Arbitration and Litigation Section or the validity of the entire Agreement or any prior Agreement, except for any **Claim** challenging the validity of the Class Action Waiver, which shall be decided by a court.

CP at 95, 102 (emphasis added).

The agreements also note that "Arbitration may be selected at any time unless a judgment has been rendered or the other party would suffer

substantial prejudice by the delay in demanding arbitration.” CP at 95, 102. Consumers interpret this provision to mean that any judgment rendered on any issue relating to the contract waives all future rights to invoke arbitration. CP at 227. This argument ignores the claim-specific context in which the judgment exception is placed.

Under the arbitration agreements, a party cannot compel arbitration of a claim once a judgment has been rendered on that particular claim. In this case, judgments have been rendered on the breach of contract claims filed by CACH in the underlying collection matters. No judgment has been rendered on the Consumer Protection Act, Washington Collection Agency Act, and civil conspiracy claims Consumers raised in this separate class action. These claims were neither raised nor considered in reaching the judgment Consumers rely upon to support their waiver argument. The text of the arbitration agreements does not establish that CACH waived its right to compel arbitration in this instance.

E. Since the Trial Court Found that CACH Waived its Right to Compel Arbitration, It Erred by Not Holding that the Claims Were Barred Under the Doctrines of *Res Judicata* and Judicial Estoppel.

1. Consumers Cannot Escape *Res Judicata*.

If the Court holds that the claims involved in the collection matters and the present putative class action are the same, the claims should be barred by the doctrines of *res judicata* and judicial estoppel.

Res judicata—also known as claim preclusion—prohibits the re-litigation of a claim or cause of action. See *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). *Res judicata* applies when a claim has been resolved in a final judgment on the merits. See *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986).

As argued above, the claims at issue in the present action are distinct from those involved in the underlying collection matters. However, *if* the Court determines the claims are the same (and that CACH has therefore waived its right to compel arbitration), *then* this litigation is barred under the doctrine of *res judicata*. The underlying actions were litigated to final judgment. See *Albano v. Norwest Fin. Hawaii, Inc.*, 244 F.3d 1061, 1064 (9th Cir. 2001) (noting that default judgments are final judgments). Consumers are therefore barred from re-litigating those claims through the present suit.

2. Judicial Estoppel Prevents Consumers from Contending the Claims are the Same for the Purposes of Waiver, but Distinct in Order to Survive a *Res Judicata* Challenge.

Judicial estoppel is an “equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

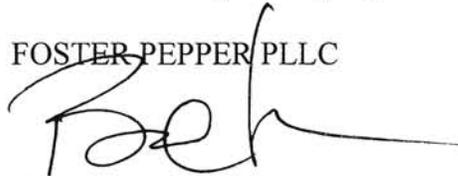
Consumers' arguments present exactly the type of situation contemplated and barred under the doctrine of judicial estoppel. Consumers argue that the claims in the collection matters and the present class action are the same; they do so to avoid being compelled into arbitration, as required under the cardholder agreements. If the Court accepts Consumers' contention, they should be judicially estopped from later arguing that the claims are distinct. Consumers are in an inescapable bind: either (1) the claims are not the same, granting CACH the right to compel arbitration (as established above); or (2) the claims are the same and Consumers' class action is barred under the doctrine of *res judicata*.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 18th day of August, 2014.

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CERTIFICATE OF SERVICE

I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen, and I am competent to be a witness herein. On August 18, 2014, I caused the foregoing document to be served on the following counsel via hand-delivery:

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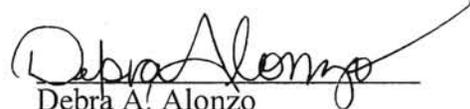
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington on August 18, 2014.


Debra A. Alonzo
Legal Assistant

2014 WL 298107

Only the Westlaw citation is currently available.
United States District Court,
D. Massachusetts.

Lawrence P. SCHWARTZ, individually
and on behalf of a class, Plaintiff,

v.

CACH, LLC; Square Two Financial Corp.; and
J.A. Cambece Law Offices, P.C., Defendants.

Civil Action No. 13-12644-FDS. | Jan. 27, 2014.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO COMPEL ARBITRATION

SAYLOR, District Judge.

*1 This action arises from an allegedly unlawful attempt to collect a debt. Plaintiff Lawrence P. Schwartz alleges that CACH, LLC wrongfully attempted to collect alleged creditcard debts from him and other Massachusetts residents by suing them in Massachusetts state courts. Square Two Financial Corp. owns, controls, and manages CACH. J.A. Cambece Law Offices, P.C. has represented CACH and Square Two in the state-court proceedings. The complaint alleges breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and violation of Mass. Gen. Laws ch. 93A, §§ 2, 9. It also seeks a declaratory judgment under Mass. Gen. Laws ch. 231A that defendants, among other things, violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*

Defendants CACH and Cambece have moved to compel arbitration and to stay or dismiss the litigation.¹ For the reasons set forth below, the motions to compel arbitration will be granted.

¹ Defendant Square Two has not sought to compel arbitration, but has been granted an extension of time to answer or otherwise respond to the complaint until ten days after this Court decides the motion to remand or motions to compel arbitration, whichever is later. (Dkt. No. 11).

I. Background

Lawrence Schwartz is a resident of Newton, Massachusetts. (Compl. ¶ 2). CACH, LLC is a limited liability company with offices in Colorado. (Compl. ¶ 3). Square Two is incorporated in Delaware and maintains offices in Colorado. (Compl. ¶ 4). J.A. Cambece Law Offices, P.C. is a professional corporation with offices in Massachusetts. (Compl. ¶ 5).

On July 23, 2007, Schwartz opened a credit card account with FIA Card Services, N.A. (CACH Memo., Huber Aff. ¶ 1). According to defendants, that account was governed by a credit card agreement. (Huber Aff. ¶ 4; Huber Aff., Ex. A). After Schwartz used the credit card and made payments through January 3, 2011, the account became delinquent. On September 27, 2011, FIA assigned the account to CACH, which hired Cambece to bring an action against Schwartz. (Huber Aff. ¶¶ 5-6; Huber Aff., Exs. C, D).

On October 4, 2011, attorneys at Cambece sent Schwartz a collection letter on behalf of CACH. (Compl. ¶ 7). That same day, they filed a lawsuit against him in Middlesex Superior Court. (*Id.*; Huber Aff. ¶ 7). However, CACH was not licensed by the Massachusetts Commissioner of Banks to act as a debt collector and had not registered with the Secretary of State to do business here. (Compl. ¶ 9). Section 54 of the Limited Liability Company Act, Mass. Gen. Laws ch. 156C, provides that “no action shall be maintained or recovery had” by a foreign unregistered LLC “in any of the courts of the commonwealth as long as such failure continues.” The complaint alleges that CACH has initiated and filed thousands of similar lawsuits in Massachusetts. (Compl. ¶ 8).

On September 30, 2013, Schwartz filed a putative class action in Middlesex Superior Court seeking a declaratory judgment and alleging breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and violation of Mass. Gen. Laws ch. 93A, §§ 2, 9. Defendants removed the action to this Court, asserting federal-question and supplemental jurisdiction.

*2 Defendants CACH and Cambece have moved to compel arbitration and to dismiss or stay the action. They contend that the credit card agreement constitutes a valid and enforceable contract.² Plaintiff, in turn, asserts that defendants waived their right to arbitrate by filing the collection actions in state court and because he suffered prejudice by their delay in seeking arbitration.

² Plaintiff has moved to strike the affidavit of Peter Huber, an agent and custodian of records for CACH, on the ground that he is not competent to testify under the Federal Rules of Evidence. However, the sole case that plaintiff cites is from the Missouri Supreme Court and based on Missouri rules of evidence. *CACH, LLC, v. Askew*, 358 S.W.3d 58 (2012). Under Fed.R.Evid. 803, which applies here, Huber appears competent to testify about CACH's business records and FIA's record-keeping methods based on his asserted custodial responsibilities and personal knowledge. See *United States v. Doe*, 960 F.2d 221, 223 (1st Cir.1992) (holding that a custodian can testify about another business's records if they were relied upon by his business and integrated into the records of his business). (See also CACH Opp. Mot. Strike, Ex. A, Supp. Huber Aff.). Accordingly, the motion to strike will be denied.

II. Legal Standard

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., governs the enforcement of written arbitration agreements. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (holding that the FAA extends to employment cases for employees other than those engaged in transportation). It was enacted in order to reverse longstanding judicial hostility to arbitration agreements and to “place such agreements upon the same footing as other contracts.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (citation and internal quotation omitted); accord *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1745–1746, 179 L.Ed.2d 742 (2011). When “construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (citation omitted). The act promotes “a liberal federal policy favoring arbitration agreements [and] any doubts concerning the scope of arbitrable issues should be resolved 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).

“A party who is seeking to compel arbitration must demonstrate ‘that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope.’” *SotoFonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 474 (1st Cir.2011). “When an enforceable arbitration agreement exists between the parties, a court may enforce that agreement by staying existing litigation pending arbitration of the parties, 9 U.S.C. § 3, or compelling the parties to arbitrate, 9 U.S.C. § 4.” *DeLuca v. Bear Stearns & Co.*, 175 F.Supp.2d 102, 106–07 (D.Mass.2001).

III. Analysis

Plaintiff does not contest that the agreement to arbitrate is valid; that defendants are entitled to invoke the arbitration clause; that he is bound by the clause; or that his claims come within the clause's scope. His sole contention is that defendants waived their right to compel arbitration.³

³ Plaintiff does not contest that if defendants did not waive their right and the claim is subject to arbitration, then he must arbitrate individually rather than on behalf of a class. The agreement states that plaintiff does “not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim submitted to arbitration.... The parties acknowledge and agree that under no circumstances will a class action be arbitrated.” (Huber Aff., Ex. A at 41). Because a court “can only compel class arbitration if there is a “contractual basis for concluding that [the parties] agreed to do so,” *Stolt-Nielsen*, 130 S.Ct. at 1775, and no such basis exists here, the Court will not compel class arbitration. See *Karp v. CIGNA Healthcare, Inc.*, 882 F.Supp.2d 199, 207–215 (D.Mass.2012).

“In considering whether a party has waived its arbitration right, courts are consistently mindful of the strong federal policy favoring arbitration.” *Creative Solutions Grp., Inc. v. Pentzer Corp.*, 252 F.3d 28, 32 (1st Cir.2001). “Waiver is not to be lightly inferred, and mere delay in seeking [arbitration] without some resultant prejudice to a party cannot carry the day.” *Id.* (quoting *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 293 (1st Cir.1986)). To determine whether there was prejudice, courts look to a number of factors, including (1) the length of delay in seeking a stay; (2) the extent to which the party participated in litigation; (3) whether it took a position inconsistent with its arbitration right; (4) how much activity in the litigation has occurred; and (5) whether discovery or other important intervening events

have occurred. *Creative Solutions Group, Inc. v. Pentzer Corp.*, 252 F.3d 28, 32–33 (1st Cir.2001).

*3 Here, plaintiff contends that defendants explicitly waived their right to arbitration by filing two certifications in the state court actions. (Pl.Opp., Ex. 1). However, the certifications merely state that the attorneys discussed dispute-resolution services with their clients in accordance with the rules of the Supreme Judicial Court. They do not constitute a waiver of any rights.

As for implied waiver, defendants' delay in seeking arbitration was minimal. Plaintiff filed his complaint in state court on September 26, 2013. After removing the matter to federal court, CACH and Campece moved to compel arbitration on November 11 and December 12, 2013, respectively. A delay of less than one-and-a-half or two-and-a-half months is hardly excessive. See *Fluehmann v. Associates Fin. Servs.*, 2002 WL 500564 (D.Mass. Mar.29, 2002) (finding no waiver due to party's three-month delay in invoking arbitration clause); see also *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir.2003) (finding undue delay where discovery had closed, trial date was six weeks away, and opposing party was prejudiced by wasted trial preparation). Furthermore, no discovery and little litigation had occurred within that period. Plaintiff, therefore, appears to have suffered little, if any, prejudice.

CACH's decision not to invoke arbitration in the earlier state-court collection actions is not relevant. The contract here provides that either party can elect arbitration as to "any

claim." (Huber Aff., Ex. A at 39). It does not require that the parties either litigate all claims or arbitrate all claims. The collection actions, which CACH brought against plaintiff, are distinct from the claims brought by plaintiff here. CACH did not, therefore, waive its right to arbitrate the present dispute. See *Hodson v. Javitch, Block & Rathbone, LLP*, 531 F.Supp.2d 827, 831 (N.D. Ohio 2008) (holding that prior state court collections action did not constitute waiver of right to arbitrate in later federal court action); see also *Doctor's Associates v. Distajo*, 107 F.3d 126, 134 (2d Cir.1997), cert. denied, 522 U.S. 948 (1997) (finding that prejudice "refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate *that same issue*") (emphasis added).

Because plaintiff suffered neither delay nor prejudice, the Court finds that defendants did not waive their right to invoke the arbitration clause. Accordingly, the motions to compel arbitration will be granted.

IV. Conclusion

For the foregoing reasons, plaintiff's motion to strike is DENIED, and defendants' motions to compel arbitration are GRANTED. The matter is referred to arbitration in accordance with the agreement between the parties. The litigation is hereby stayed pending arbitration.

So Ordered.

2014 WL 2170431

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

Denise Marie CAGE, et al., Plaintiffs,
v.
CACH, LLC, et al., Defendants.

No. C13-01741RSL. | Signed May 22, 2014.

Attorneys and Law Firms

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Bradley Lloyd Fisher, Brendan Thomas Mangan, Davis Wright Tremaine, Bert W. Markovich, Claire L. Been, Schwabe Williamson & Wyatt, Seattle, WA, for Defendants.

Opinion

ORDER COMPELLING ARBITRATION

ROBERT S. LASNIK, District Judge.

*1 This matter comes before the Court on “Defendants CACH, LLC, Squaretwo Financial Corporation and Squaretwo Financial Commercial Funding Corporation's Motion to Compel Arbitration.” Dkt. # 40. Defendants seek to enforce the arbitration provisions in credit card agreements with plaintiffs. Plaintiffs do not dispute that their claims are within the scope of the relevant arbitration clauses. They instead oppose arbitration on two grounds: (1) that defendants waived the arbitration provisions by initiating lawsuits to collect debts against plaintiffs and participating in this action and (2) that defendants have not adequately demonstrated through admissible evidence that the arbitration clauses bind these plaintiffs and defendants. Having reviewed the parties' memoranda, declarations, and exhibits, the Court finds as follows:

Plaintiff Denise Cage's credit card account with Bank of America (FIA Card Services) includes a provision that states:

“Any claim or dispute (‘Claim’) by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement ... shall, upon election by either you or us, be resolved by binding arbitration.” Decl. of Christie Coston (Dkt.# 41-2), Ex. 4 at 52. “We” and “us” is defined to include the successors, assigns, purchasers, and their agents. *Id.* at 54. Plaintiff Ryan King's credit card agreement with Citibank states: “All Claims relating to your account ... are subject to arbitration...” Decl. of Christie Coston (Dkt.# 41-4), Ex. 8 at 48. Regarding whose claims are subject to arbitration, the agreement states: “Not only ours and yours, but also Claims made by or against anyone connected with us or you.. such as ... [a] successor ... [or][an] assignee....” *Id.*

Pursuant to the Federal Arbitration Act, a written agreement to arbitrate a dispute “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. Although the right to arbitration can be waived, “waiver of the right to arbitration is disfavored because it is a contractual right.” *United States v. Park Place Assocs.*, 563 F.3d 907, 921 (9th Cir.2009) (internal quotations and citations omitted). The party seeking to prove a waiver of arbitration “bears a heavy burden of proof” and 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.” *Id.* (internal quotations and citations omitted).

Plaintiffs argue that defendants have taken two sets of actions that are inconsistent with their right to arbitrate. First, plaintiffs assert that defendants acted inconsistently with their right to arbitrate by filing debt collection lawsuits against plaintiffs, therefore electing “to litigate instead of arbitrate.” Response (Dkt.# 53) at 9-10. However, plaintiffs misquote the law and rely on authority that is not applicable in this case. See Response (Dkt.# 53) at 9. Although the decision to file a suit, participate in litigation, and later seek to compel arbitration may constitute a waiver, this case does not involve the party that initiated the lawsuit later seeking to compel arbitration in the same matter.¹ Rather, plaintiffs initiated this separate lawsuit against defendants, and defendants responded by invoking the arbitration agreements. Nor do defendants' earlier debt collection suits against plaintiffs suggest that they initiated litigation that they now seek to abandon in favor of arbitration. Defendants' previous collection actions are separate from the suit plaintiffs now bring against defendants. Bringing a lawsuit for debt

collection may result in defendants' waiver of arbitration for that case, but it does not bar plaintiffs from compelling arbitration in that action or bar defendants from invoking arbitration in all future separate causes of action that plaintiffs assert against them. *See Schwartz v. CACH, LLC*, 2014 WL 298107, at *3 (D.Mass.2014) (finding "CACH's decision not to invoke arbitration in the earlier state-court collection actions is not relevant" to determining whether defendants waived the right to arbitrate in plaintiffs' subsequent consumer protection suit).

¹ *Cf. Louisiana Stadium & Exposition Dist. v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 626 F.3d 156 (2d Cir.2010) (plaintiff filed a lawsuit, litigated it at length, and then sought to compel arbitration); *Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir.2009) (plaintiff attempted to compel arbitration after the lawsuit she had filed in state court was removed to federal court); *Riverside Publishing Co. v. Mercer Publishing LLC*, 829 F.Supp.2d 1017, 1020–21 (W.D.Wash.2011) (citing *United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 765 (9th Cir.2002)) (plaintiff's initiation of a lawsuit requesting an injunction, actual damages, and a jury trial without mention of arbitration satisfied the first two prongs of a waiver of arbitration on those issues).

*2 Second, plaintiffs point out that defendants "have engaged in discovery and motions practice in this case," which plaintiffs assert constitutes a waiver. However, defendants' participation in this litigation is not inconsistent with the right to arbitrate. The only "motions practice" that defendants have engaged in before moving to compel arbitration involves an unopposed motion for an extension of time, see Dkt. # 10, and answering or responding to plaintiffs, see Dkts. # 11, 14, 25, 32. Although defendants did respond to discovery requests, their communications explicitly reserved the right to arbitrate and notified plaintiffs of their intent to compel arbitration if plaintiffs did not dismiss their claims. *See Decl. of Brad Fisher* (Dkt.# 60), Ex. A. Defendant Kirkland Law Group did cooperate with discovery and participate in the plaintiffs' Fed.R.Civ.P. 30(b) (6) deposition, but only with an express denial of a waiver of arbitration and notification of their request to join the motion to compel arbitration. *See Decl. of Claire Been* (Dkt.# 62), Ex. A at 5–6. Because defendants' acts that plaintiffs claim are inconsistent with the right to arbitrate were taken with defendants' express reservation and communication of such rights, defendants did not waive their right to enforce the arbitration agreement.

Plaintiffs also challenge the arbitration agreement by asserting that defendants cannot demonstrate through admissible evidence that plaintiffs' credit card accounts were assigned to defendants. Defendants offer multiple exhibits supported by the declaration of Christie Coston, a records custodian of defendant CACH, to prove the assignment of plaintiff Cage's account from FIA Card Services, N.A. directly to CACH and plaintiff King's account from Citibank South Dakota, N.A. directly to CACH. *See Decl. of Christie Coston* (Dkt. # 41). Plaintiffs claim the declaration is hearsay and the business records lack sufficient indicia of trustworthiness to qualify for the business records exception to the rule against hearsay.

Under the business records hearsay exception, a business's records custodian or other qualified witness may authenticate documents from transactions in which the business was involved, even if that witness did not personally witness the transaction. *See Fed.R.Evid. 803(6)*. Where business records involve a chain of multiple assignments, each transaction requires supporting testimony from a qualified witness with knowledge of the assignee's record keeping procedures in order to qualify for the hearsay exception. *See Webb v. Midland Credit Mgmt., Inc.*, No. 11–C–5111, 2012 WL 2022013 (N.D.Ill. May 31, 2012) (cardmember agreement was transferred four times; records custodian for final assignee could authenticate final assignment, but could not lay the foundation for the previous three assignments). Here, in contrast, FIA and Citibank assigned the respective plaintiffs' accounts directly to CACH without any intervening transactions. *See Decl. of Coston* (Dkt.# 41), Ex. 2 (agreement conveying ownership of plaintiff Cage's account from FIA to CACH), Ex. 6 (agreement conveying ownership of plaintiff King's account from Citibank South Dakota, N.A. to CACH).

*3 The Court finds that the exhibits showing the assignment of plaintiffs' accounts to defendants qualify as business records because Coston's declaration provides an adequate foundation for the records. Coston asserts that she is an agent of CACH and was appointed as a records custodian by the manager. She is familiar with the CACH's recordkeeping systems, has reviewed CACH's business records relating to these transactions, and asserts that the records represented in Exhibits 2–9 were created from information transmitted by a person with knowledge near the time of the event and kept in defendant CACH's regular course of business. *Decl. of Coston* (Dkt.# 41), at 2. Plaintiffs provide no specific reason to doubt the trustworthiness or reliability of the records other than the fact that they were adopted from another business.

Although some of the records were originally created by businesses other than CACH, “records a business receives from others are admissible under Federal Rule of Evidence 803(6) when those records are kept in the regular course of business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records.” *MRT Construction Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir.1998) (citing *United States v. Childs*, 5 F.3d at 1333–34, 1334 n. 3 (9th Cir.1993)). Coston confirms that the documents originally created by other businesses “have been incorporated into the business records of CACH, and are relied upon by CACH in conducting its business.” Decl. of Coston (Dkt.# 41), at 2. In addition, CACH’s decision to file debt collection actions against plaintiffs for the outstanding balance on these accounts indicates that defendants trusted and relied upon the accuracy of the records that it incorporated into its own course of business upon assignment of the accounts.

Finally, plaintiffs summarily assert that the arbitration provision does not bind plaintiffs because defendants have failed to submit authenticated credit card agreements containing the arbitration provisions. Response (Dkt.# 53) at 13. However, as the Court has discussed, defendants have sufficiently authenticated the business records that defendant CACH incorporated into its own records through the assignment of plaintiffs’ accounts. These records include the credit card agreements that plaintiffs entered into with

FIA and Citibank South Dakota, N.A., respectively. Decl. of Coston (Dkt.# 41), at 3, 5. Although plaintiffs have not signed the credit card agreements, their signatures are not necessary to bind plaintiffs to the agreements. Use of a credit card and the failure to invoke an opt out provision is sufficient to bind plaintiffs to those agreements. *Stinger v. Chase Bank, USA, NA*, 265 F.App’x 224, 227 (5th Cir.2008) (“By using the cards, [plaintiff] demonstrated an intent to be bound by the terms of the [cardmember agreements] and thus agreed to the arbitration provisions in the [cardmember agreements]”); see also *Guerrero v. Equifax Credit Info. Servs., Inc.*, CV 11–6555 PSG PLAX, 2012 WL 7683512 (C.D.Cal. Feb.24, 2012) (plaintiff’s use of the credit card and decision not to opt out after the terms changed to add a binding arbitration provision bound plaintiff to a valid arbitration provision). Plaintiffs do not dispute defendants’ claims that plaintiffs were issued and used the credit cards. Therefore, defendants may invoke the arbitration provisions in the credit card agreements with plaintiffs.

*4 For all of the foregoing reasons, the motion to compel arbitration is GRANTED. Plaintiff’s claims are hereby DISMISSED. The pending “Motion for Class Certification” (Dkt.# 44) and “Motion to Stay Motion for Class Certification” (Dkt.# 50) are DENIED as moot. The Clerk of Court is directed to enter judgment in the above-captioned matter.

2002 WL 418011

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.

Marilyn J. FIELDS, Plaintiff,
v.

Howard HOWE and Greenwood Trust Company/
Discover Financial Services, Inc., Defendant.

No. IP-01-1036-C-B/S. | March 14, 2002.

Attorneys and Law Firms

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James H. Hamm III, Baker & Daniels, Todd J. Kaiser,
Ogletree Deakins Nash Smoak & Stewart PC, Indianapolis,
IN, for defendants.

Opinion

ENTRY AND ORDER

SARAH EVANS BARKER, Judge.

*1 This cause comes before the Court on Defendants' motions to compel arbitration and motions to dismiss. For the following reasons, the Court grants in part and denies in part the motions to compel, denies the motions to dismiss, and orders limited discovery on the issue of prohibitive arbitration costs.

Background

In 1987, defendant Greenwood Trust Company/Discover Financial Services, Inc. (Discover) issued a credit card to plaintiff Marilyn J. Fields (Fields). Compl. ¶ 1. By February 2001, Fields was in default on her Discover account. Compl. ¶ 12. In a February 14, 2001 letter to Fields, Discover requested that she pay the outstanding balance on her account—an amount totaling \$9,329.33. Compl. ¶¶ 13-15, Ex. A. On April 5, 2001, defendant Howard Howe (Howe), an attorney retained by Discover to collect Fields' debt, sent Fields a letter asking her to make arrangements to pay the credit card debt. Compl. ¶¶ 20-21. Fields' continued failure to pay prompted

Howe to file a complaint on behalf of Discover against Fields in Marion [County] Superior Court on May 15, 2001 seeking the balance due on her Discover account, interest, attorney fees and costs. Significant to the present case, Discover and Howe sought \$1,950 in attorney fees and costs, Compl. ¶¶ 39-42, Ex. C, and on June 8, 2001, along with his application for a default judgment against Fields, Howe submitted to the Marion Superior Court a verified affidavit in support of his request for attorney fees. Compl. ¶¶ 60-64.

Fields responded by filing the present action in federal court against Howe and Discover on July 16, 2001, alleging that the defendants violated state and federal law in their attempts to collect Fields' Discover debt. Fields lodges claims under the Fair Debt Collection Practices Act (FDCPA) and under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations (RICO). Her complaint, which seeks class certification, also includes claims of statutory deception, attorney deceit, common law breach of contract and abuse of the legal process. On September 25, 2001 and October 23, 2001, Discover and Howe, respectively, filed motions to compel arbitration and motions to dismiss. We turn now to a discussion of these motions.

Discussion

Federal policy favors the enforcement of private arbitration agreements. *Brown v. Surety Fin. Serv., Inc.*, 2000 WL 528631, *1 (N.D.Ill. March 24, 2000) (citing *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)). Under such policy, the Federal Arbitration Act (FAA) “authorizes a district court to compel arbitration of any issue covered by a valid and enforceable arbitration agreement.” *Id.* (citing 9 U.S.C. § 4). According to the Seventh Circuit, an agreement to arbitrate “must be enforced ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir.1997) (quoting 9 U.S.C. § 2).

*2 Fields launches several arguments in support of her position that arbitration in the case is inappropriate. She contends that under the terms of the original agreement between herself and Discover, Discover was authorized to change only existing terms; it could not add new terms, such as the arbitration provision that was added to her agreement in the latter half of 1999 (1999 arbitration provision). Second, Fields argues that Discover has failed to demonstrate that she received notice of Discover's March 1999 amendment

allowing Discover to add new terms to the Cardmember Agreement (1999 change of terms provision). Next, Fields contends that defendants have waived any right to arbitrate. Lastly, Fields asserts that discovery should proceed before we reach a decision on the arbitration issue because, she insists, arbitration could prove prohibitively costly and could result in a biased decision. We address Fields' contentions *seriatim*.

First, Fields opines that although the language of the original agreement she entered with Discover allowed Discover to change the terms in the agreement, it did not permit Discover to add new terms. Thus, Fields concludes, Discover was not at liberty to add the 1999 arbitration provision at the foundation of Discover's motion to compel. Discover responds that its amendment of the Cardmember Agreement to add the 1999 arbitration provision was proper and that the arbitration provision precludes Fields from maintaining the present court action against it.

The language in the Cardmember Agreement initiating the relationship between Fields and Discover provided, in relevant part:

CHANGE OF TERMS. We may change any term or part of this Agreement, including any finance charge rate, fee or method of computing any balance upon which the finance charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective.... If you do not agree to the change, you must notify us in writing within 30 days after the mailing of the notice of change at the address provided in the notice of change, in which case your Account will be closed and you must pay us the balance you owe us under the existing terms of the unchanged notice. Use of your Account after the effective date of the change will be deemed acceptance of the new terms as of such effective date, even if you previously notified us that you did not agree to the change.

Compl., Ex. C.

Beginning in December 1998 and continuing through January 1999, Discover mailed with its monthly billing statements to

its card members a notice of amendment. Matysik Decl. ¶ 6. The notice stipulated, in relevant part, that

[w]e are changing this section to permit us to change any term or part of the Agreement or to add any new term or part to the Agreement by sending you a written notice at least 15 days, instead of 30 days, before the change is to become effective. In addition, we are changing this section to require you to notify us in writing within 15 days, instead of 30 days, after the mailing of the notice of change that you do not agree to the change.

*3 Matysik Decl. ¶ 6 and Ex. B. In accordance with the notice, Discover amended its "Change of Terms" clause. The revised 1999 change of terms provision incorporated the reduction in time for notice and response and permitted Discover to add new terms, but otherwise was identical to the original Cardmember Agreement, providing that

[w]e may change any term or part of this Agreement, including any finance charge rate, fee or method of computing any balance upon which the finance charge rate is assessed, or add any new term or part to this Agreement by sending you a written notice at least 15 days before the change is to become effective. We may apply any such change to the outstanding balance of your Account on the effective date of the change and to new charges made after that date. If you do not agree to the change, you must notify us in writing within 15 days after the mailing of the notice of change at the address provided in the notice of change, in which case your Account will be closed and you must pay the balance that you owe us under the existing terms of the unchanged Agreement. Otherwise, you will have agreed to the changes in the notice. Use of your Account after the effective date of the change will be deemed acceptance of the new terms of such effective date, even if you previously notified us that you did not agree to the change.

Matysik Decl. ¶ 6 and Ex. A.

Discover later mailed another notice of amendment to its cardholders. Beginning in July 1999 and continuing through August 1999, Discover notified cardholders that it was adding an arbitration clause to the Cardmember Agreement—that is, the 1999 arbitration provision. The notice provided as follows:

**NOTICE OF AMENDMENT TO
DISCOVER CARDMEMBER AGREEMENT**

This notice informs you of changes to your current Discover Cardmember Agreement. Please note the effective date of the changes shown below and retain this notice for your records—**WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN U.S. BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE.**

Matysik Decl. ¶ 15 and Ex. C. Discover's newly added arbitration clause, set forth in the same mailing as the notice, provided as follows:

ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS:

ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

***4 IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE HEARING DISCOVERY RIGHTS AND POST HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER**

YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY....

Matysik Decl. ¶ 16 and Ex. C.

Fields appears to agree that if the 1999 arbitration provision is enforceable, she is precluded from maintaining this cause in federal court. Fields contends, however, the clause is unenforceable against her. In particular, she claims that her original Cardmember Agreement permitted a change in its terms, but it did not permit addition of new terms. Thus, she argues that the 1999 change of terms provision Discover issued in late 1998 through early 1999 was ineffective to pave the way for Discover's addition of the arbitration clause.

In accordance with the Cardmember Agreement, our consideration of this issue is framed by Delaware law. *See* Compl., Ex. C (wherein it is provided that “[t]his agreement will be governed by the laws of the State of Delaware and applicable federal laws.). Significantly, a Delaware statute authorizes amendments to credit card agreements. In 5 Delaware Code § 952(a), the state legislature stipulated that

[u]nless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending

the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever.... An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder.... Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

Id.

Fields states that the first two sentences of the above-quoted statutory language were not a part of § 952 until after an April 9, 1999 statutory amendment. She seems to argue that this portion of the statute was written only to govern a bank's contracts with new cardholders, not to govern contracts with existing ones. Because the initiation of her relationship with Discover pre-dated the April 9, 1999 amendment, Fields urges us to find that the statutory language is inapplicable to her.

*5 We find nothing in the statutory language that supports Fields' position. Fields does not explain why the legislature would permit banks to add terms not originally contemplated to the agreements of cardholders who initiated their relationship with Discover after April 1999 but would not permit banks to add such terms to the agreements of cardholders who initiated their relationship with Discover before April 1999. Moreover, although the pre-April 1999 version of § 952 did not include the first two sentences of the post-April 1999 version, it did contain the following sentence: "[A] bank may at any time and from time to time amend the terms of such agreement in any respect." See Annotations to 5 Delaware Code § 952(a). This broad language clearly permitted Discover to amend its Cardmember Agreements to include the right to add new terms. Because both the earlier and amended versions of § 952(a) permitted Discover to add new terms to its Cardmember Agreements, we must reject Fields' argument that the 1999 statutory amendment came too late to affect her agreement with Discover.

Fields also appears to argue that the statutory phrase "unless the agreement governing a revolving credit plan otherwise provides" exempts her Cardmember Agreement from the amended version of § 952(a). She asserts that because her "original Cardmember Agreement did not provide a way to change the manner for amending the "Change of Terms" ... any amendment, with notice to the consumer or otherwise, would be ineffective." Pl.'s Response at 13.

Again, we must reject Fields' contention. The statutory phrase on which she relies does not assist her. Specifically, the original Cardmember Agreement between Discover and Fields does not "otherwise provide,"-that is, it does not include language precluding Discover from adding new terms. Additionally, interpreting the statutory language in the manner Fields urges would lead to an untenable result. In particular, the statute stipulates that contract terms not originally contemplated or addressed by the parties may be added. Under Fields' interpretation, Discover would be able to add new terms if the original Cardmember Agreements did not make any mention of Discover retaining the right to change or add to the terms of the agreement, but if Discover included in the original agreement a provision retaining the right to change the terms of the agreement, then it would be prohibited from adding new terms because, according to Fields, the phrase "change of terms" cannot be read to include the phrase "add new terms." We find it inconceivable that the Delaware legislature would have enacted a statute that placed a bank that fails to make any provision for future amendment of its Cardmember Agreements in a better position than a bank anticipating the potential need for such amendments. Fields' argument is clearly without merit.

Next, Fields insists that even if we sanction Discover's addition of new terms in her Cardmember Agreement, still Discover's motion to compel should fail. According to Fields, Discover has not demonstrated that she received notice of the relevant amendments to the Cardmember Agreement; Fields argues that the declaration of Ashoke Dutt (Dutt), executive vice president of business development and international banking for Discover, is insufficient to prove notice. Fields claims that Dutt's declaration is inadequate because Dutt does not state that he actually mailed the notice; because Dutt did not work for Discover in 1999; because he did not provide the address to which Fields' notice allegedly was sent; and because he did not outline Discover's routine practices in sending notice.¹

1 The Dutt declaration addresses the issue of notice as it pertains to Discover's addition of the 1999 arbitration provision. Because the later-filed Matysik declaration, discussed *infra* in the text, addresses notice as it relates to the addition of both the arbitration and the change of terms provisions, our discussion here is applicable to both notices.

*6 In reply, Discover dismantles Fields' argument by two distinct means. First, Discover argues that the Dutt declaration is perfectly appropriate and adequate to demonstrate notice. Second, Discover submits the affidavit of Dan Matysik (Matysik), wherein Matysik overcomes Fields' perceived obstacles to notice.² Matysik states that he worked for Discover during the relevant time frame; he provides the address to which Fields' notice was sent; and he outlines Discover's routine practices for ensuring that cardholders receive notice of amendments to the Cardmember Agreement. And, although Matysik did not state that he personally mailed Fields' notice, Delaware case law tell us, as we discuss *infra*, that his averments are sufficient to establish that Discover forwarded the appropriate notice to Fields both for the 1999 change of terms provision and for the 1999 arbitration provision. Significantly, Matysik states that Fields submitted a payment to Discover in response to the mailings that contained the notices relevant to this action. Matysik Decl. ¶¶ 11, 21.

2 Because Discover offers the declaration of Matysik we need not consider its contentions that Dutt was a proper person to speak on behalf of Discover and that Dutt's declaration established all that is necessary for proving notice.

In *Edelist v. MBNA America Bank*, 2001 WL 946500 (Del.Super.Ct. Aug. 9, 2001), the court rejected plaintiff's allegation that he did not receive notice of a proposed amendment. "His claim is a mere assertion of counsel," the court reasoned. "That is contrasted with MBNA's affidavit from [Deborah] Fisher [, senior vice president of MBNA]." *Id.* at *7. The Delaware court concluded that Fisher's affidavit was sufficient to demonstrate that the plaintiff "(1) was sent and received notice of the amendment and (2) did not exercise the opt-out provision." *Id.* This reasoning is directly applicable to the case *sub judice*. Discover has submitted Matysik's declaration, which establishes that Fields was sent and received notice and that she did not exercise the opt-out provision. Fields has offered only her lawyer's arguments in an attempt to stave off arbitration and dismissal. Such unsupported assertions are inadequate to counter Discover's evidence. See also *Pick v. Discover Fin. Servs., Inc.*, 2001

WL 1180278, *4 (D.Del. Sept. 28, 2001) (holding that "defendant's mailing procedures and plaintiff's payment of his July 20, 1999 bill are sufficient evidence to satisfy defendant's burden of demonstrating adequate notice to plaintiff.").

In sum, we reject Fields' argument that Discover's evidence was insufficient to create a rebuttable presumption of delivery. Rather, we find that Discover created such a presumption and that Fields failed to rebut same. We turn now to consider Fields' allegations that Discover and Howe waived their right to arbitrate.

The arbitration provision in the governing Cardmember Agreement provides that

[i]n the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

*7 IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.

Matysik Decl., Ex. C.

According to Fields, Discover waived its right to seek arbitration when Discover initiated its collection action against her in state court. She argues that the conduct for which she now seeks recovery was committed by defendants in state court and that defendants "agreed, by their voluntary filing of the state Court action, to have the issue addressed

by a Court, as opposed to having the issues arbitrated."Pl.'s Resp. Br. at 16. Fields' contention cannot be sanctioned.

The language of the arbitration provision demonstrates that the claims Fields lodged in this Court are plainly subject to arbitration. Undoubtedly, the claims represent disputes relating to Fields' Discover account. Additionally, the tort and other claims Fields pursues in federal court are not the same claims Discover lodged in state court. The fact that the present action arose because of Discover's allegedly improper conduct in the course of that state court proceeding does not render this cause one and the same as Discover's state court case. The state court case is a collection action-a case initiated by Discover; the federal court case is an action for alleged violation of federal and state laws-a case initiated by Fields. Furthermore, even if the cases were one and the same, still the governing Cardmember Agreement would permit arbitration. The arbitration provision stipulates that any new claim later asserted in a lawsuit is subject to arbitration and "nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision."See *supra* at 13. Additionally, the arbitration provision stipulates that it "shall survive ... any legal proceedings by us to collect a debt owed by you...." Matysik Decl., Ex. C. This language clearly dooms Fields' waiver argument against Discover. We turn to discuss Fields' assertion that defendant Howe has waived the right to arbitration.

In Howe's brief in support of his motion to compel, he argues that, as Discover's attorney and agent, he is subject to the arbitration agreement between Discover and Fields. Fields apparently concedes that the arbitration provision covers Howe, as she does not challenge Howe's argument. Fields merely contends in a footnote that "Defendant Howard Howe waived his right to arbitrate this controversy."Pl.'s Resp. Br. at 1 n. 1. Fields cites a few cases in her footnote "argument," but she fails to explain in what way those cases support her waiver contention. Fields provides us only with the timing of events leading to Howe's motion to compel: Fields notes that Discover first filed its motion to compel arbitration; Howe thereafter filed his answer to Fields' complaint; and Howe later filed his motion to compel arbitration. Fields' meager argument is insufficient to demonstrate that Howe waived his right to arbitrate.

*8 In any event, Howe did not expressly waive his right to arbitrate and his actions do not amount to implicit waiver. To determine whether one implicitly has waived a right to arbitrate, a court considers whether "based on all

the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate." *Grumhaus*, 223 F.3d 648, 650-51 (7th Cir.2000) (citation omitted). Howe explains that his attorney initially was unsure about whether the arbitration agreement applied to Howe. Howe's Reply Br. at 5 (citing Ex.A, Kaiser Aff. ¶¶ 6-7). While still researching the issue, Howe's answer became due and Howe, rather than asking for an additional extension of time to file his answer, filed same, including the right to arbitrate as an affirmative defense. Howe's Reply Br. at 5. Eight days later Howe moved to compel arbitration. *Id.* These facts do not suggest that Howe acted inconsistently with his right to arbitrate. Therefore, Fields' unsupported allegations of waiver must fail.

Next, we turn to Fields' argument that she is entitled to discovery prior to the issuance of a decision on defendants' motions to compel and motions to dismiss. Fields insists that discovery may prove that arbitration of this matter would involve prohibitive costs and would result in a biased decision. In *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), the United States Supreme Court considered whether an agreement "to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide Randolph protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id.* at 89.

The Court found that

[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, "we lack ... information about how claimants fare under Green Tree's arbitration clause."

Id. at 90-91 (quoting *Randolph v. Green Tree Fin. Corp.-Ala.*, 178 F.3d 1149, 1158 (11th Cir.1999)).

The Court ruled that Randolph, as the party resisting arbitration, carried the burden of proving that arbitration would be prohibitively expensive. *Id.* at 92. Because Randolph lacked evidence in support of her argument, the Court concluded, her argument was too speculative to justify invalidation of the arbitration agreement. *Id.* at 91. Since *Green Tree*, the issue of the cost of arbitration has come before other courts. The court in *Phillips v. Associates Home*

Equity Services, Inc., 179 F.Supp.2d 840 (N.D.Ill.2001), discussing *Green Tree*, concluded that plaintiff Phillips had “come forward with evidence that the costs associated with arbitration would effectively preclude her from pursuing her TILA claims.”*Id.* at 846. The court denied defendants’ motion to compel, noting its willingness to reconsider its ruling if defendants agreed to bear the costs associated with arbitration. *Id.* at 847.

*9 In *Livingston v. Associates Finance, Inc.*, 2001 WL 709465 (N.D. Ill. June 25, 2001), the magistrate judge found that in *Green Tree* the Supreme Court “implicitly indicated that discovery would be the appropriate vehicle to make particularized findings regarding excessive costs.”*Id.* at *2. The *Livingston* court continued:

Furthermore, it seems axiomatic that, if the Supreme Court places a burden of proof on a party, then that party must be given an opportunity to pursue discovery related to the issue that it has the burden to prove. While Defendants argue that Plaintiffs have all the information related to costs that they need (i.e. the arbitration agreement itself and the AAA Commercial Rules), the Supreme Court noted in *Green Tree* that such generic information is not enough to satisfy the party’s burden of proof to prove excessive costs.

Id. The *Livingston* court recommended that plaintiffs be permitted to conduct discovery “to uncover information about the specific costs they are likely to entail.”*Id.* at 4. The costs included “not just the administrative fee, but ... all fees associated with arbitration, including (but not limited to) the arbitrator’s fees and expenses.”*Id.* at 2.

In the present case, the arbitration provision stipulates that

[a]t your written request, we will advance any arbitration filing, administrative and hearing fees which you would be required to pay to pursue a claim or dispute as a result of our electing to arbitrate that claim or dispute. The arbitrator will decide who will ultimately be responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing,

administrative, or hearing fees in an amount greater than what your and our combined court costs would have been if the claims had been resolved in a state court with jurisdiction.

Matysik Decl., Ex. C.

Discover contends that the language of this provision undermines Fields’ argument about prohibitive expense. In particular, Discover points to the section of the provision stating that “the costs of arbitration to Ms. Fields can not [sic] be greater than the parties’ combined costs of litigating Ms. Fields’ claims in court...” Discover’s Reply Br. at 13. Discover is correct that these provisions undermine Fields’ contentions about the prohibitive expense of arbitration given Discover’s contractual agreement to bear much if not all of the financial burden. Even so, Discover has failed to explain how it knows what the combined costs of litigating Fields’ claims in court would be or how it might arrive at such figure. And although the Cardmember Agreement stipulates that the rules either of JAMS/Endispute or of National Arbitration Forum (NAF) will govern arbitration, we neither have been provided with a copy of such rules nor have we been informed as to their content. We are convinced that Fields should be permitted an opportunity to conduct limited discovery into the specific costs she is likely to incur should her case be arbitrated. Appropriate discovery potentially costly in its own right, we are moved to say, includes information regarding the arbitration costs associated with similar claims Discover previously has arbitrated. Following this discovery, the court will be able to make an informed decision on whether the costs associated with arbitration would be prohibitive.

*10 The final issue for our consideration is the potential for bias in an arbitral forum. According to plaintiff, NAF may have a bias in favor of financial services companies, and she wishes to conduct discovery in order to flush out any such problem. However, as Discover points out, the arbitration agreement gives the party filing the arbitration claim the option of selecting as the arbitrator either JAMS/Endispute or NAF. Because Fields has lodged the claims in the present action, it is she who will select the arbitrator. Although Fields has challenged the neutrality of NAF, she has not included JAMS/Endispute in her allegations of bias. Thus, JAMS/Endispute remains a viable, unbiased arbitrator who can conduct the arbitration for Fields and Discover should arbitration of this matter ultimately be sanctioned.

Consequently, we deny Fields' request to conduct discovery into NAF's alleged bias.

In sum, we find that Discover properly amended its Cardmember Agreement; that Fields had notice of Discover's amendments; that neither Discover nor Howe waived the right to arbitrate; and that Fields is not entitled to conduct discovery into NAF's alleged potential bias. We, however, also find that Fields is entitled to conduct limited discovery in order to determine the specific costs she likely will incur in arbitration. Thus, we grant in part and deny in part defendants' motions to compel, and for now at least we must deny their motions to dismiss. Following the conclusion of the discovery permitted herein, defendants may file renewed motions to compel and/or dismiss. Fields, then, may respond to such motions with

the benefit of relevant discovery. All further briefing on such motions is limited to the issue of prohibitive arbitration costs.

In order to move this case along, we hereby direct that Fields' discovery shall be undertaken and completed within sixty (60) days from the date of this order, that defendants shall file their renewed motions within thirty (30) days thereafter and in no event later than June 12, 2002, that responsive briefing by plaintiff shall be filed within twenty (20) days after the renewed motions(s), and a final reply within fifteen (15) days after plaintiff's response.

It so is ordered this __ day of March 2002.

2008 WL 615921

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Eastland.

In re ADVANTA BANK CORPORATION.
In re Phillips & Cohen Associates, Ltd.

Nos. 11-07-00276-CV, 11-07-
00315-CV. | March 6, 2008.

Synopsis

Background: Credit card issuer and debt collector brought original proceeding seeking writ of mandamus to compel trial court to grant their motions to compel arbitration in underlying deceptive trade action brought by credit card holder.

Holdings: The Court of Appeals, Jim R. Wright, C.J., held that:

[1] credit card issuer did not invoke the judicial process so as to waive its right to arbitrate, and

[2] credit card agreement between issuer and holder also conferred right to arbitrate upon debt collector.

Writs conditionally granted.

West Headnotes (2)

[1] **Alternative Dispute Resolution**

≡ Suing or participating in suit

Credit card issuer did not invoke the judicial process so as to waive its right to arbitrate card holder's deceptive trade practices action, pursuant to credit card agreement, even though issuer pursued debt collection claims against card holder in a separate state, absent showing of

actual prejudice resulting from the judgment that was entered in the issuer's debt collection case.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**

≡ Persons entitled to enforce

Credit card agreement between credit card issuer and card holder also conferred contractual rights, including right to arbitration, upon third parties such as debt collector, and therefore, debt collector was entitled to compel arbitration pursuant to the agreement, in trade practices action brought by issuer, even though it did not have a contract with card holder.

Cases that cite this headnote

Original Mandamus Proceeding.

Attorneys and Law Firms

Forrest McCray, Lance Hall, David C. Hall, Vernon Stutts, for Advanta Bank Corporation.

Keith Wier, Kandy E. Messenger, for Phillips & Cohen Associates, Ltd.

Panel consists: of WRIGHT, C.J., McCALL, J., and STRANGE, J.

Opinion

MEMORANDUM OPINION

JIM R. WRIGHT, Chief Justice.

*1 The trial court denied Advanta Bank Corporation's motion to compel arbitration.¹ It also denied a motion to compel arbitration filed by Phillips & Cohen Associates, Ltd. In their petitions for writ of mandamus, Advanta and Phillips & Cohen ask this court to order the trial court to grant their motions and compel arbitration. We conditionally grant the writs.

¹ We originally found an order by which the trial court denied the motion to compel filed by Phillips & Cohen. We could find no order whereby the trial court denied

a like motion filed by Advanta. Under the provisions of TEX.R.APP. P. 44.4, we abated this case and directed the trial court to enter an order either granting or denying Advanta's motion to compel arbitration. The trial court entered an order denying Advanta's motion. These appeals have been reinstated.

Background Facts

Charles Watlington owned Mustang Oil Change in Nolan County. Advanta issued a business credit card to Watlington. Watlington later sold Mustang Oil to Vernon Stutts. Watlington alleges that he closed the Advanta account when he sold to Stutts and that he paid the account in full. Nevertheless, Stutts continued to make charges to the credit card. Watlington later received a call from a representative of Advanta, and he learned that there was a balance of about \$12,000 owing on the account. Watlington says that he told the representative that he had paid the entire balance due on the account and had closed it. He also told the representative that he had not authorized any additional charges to the account. It is Watlington's position that Advanta, or those acting under and for it, including Phillips & Cohen, began to harass him and to threaten him regarding payment of the account.

On September 21, 2005, Watlington sued Advanta, Phillips & Cohen, and Stutts in Nolan County. Basically, Watlington alleged various causes of action against Advanta and Phillips & Cohen under the Deceptive Trade Practices Act² and under the Debt Collection Act.³ His suit also contained claims against Advanta, Phillips & Cohen, and Stutts for common-law fraud.

² TEX. BUS. & COM.CODE ANN. ch. 17 (Vernon 2002 & Supp.2007).

³ TEX. FIN.CODE ANN. ch. 392 (Vernon 2006).

In April 2006, in a state court in Utah, Advanta sued Watlington on the debt. In August 2006, Advanta recovered a default judgment against Watlington for \$16,651.09. Subsequently, both Advanta and Phillips & Cohen filed motions to compel arbitration of the claims made by Watlington in his Nolan County lawsuit. The trial court denied the motions.

Claims of Advanta

Mandamus relief is appropriate when a party is denied, wrongfully, the right to arbitrate under the Federal Arbitration Act.⁴ *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 575 (Tex.1999) (orig.proceeding). A writ of mandamus will issue to correct a clear abuse of discretion or when a court has violated a duty imposed by law or when the abuse cannot be remedied by an appeal. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex.1992).

⁴ 9 U.S.C. §§ 1-16.

[1] When a party seeks to compel arbitration, that party must establish that there is an arbitration agreement and that the claims asserted come within the scope of that agreement. *Oakwood Mobile Homes*, 987 S.W.2d at 573. Both DTPA claims and claims under the Texas Debt Collection Act are subject to the Federal Arbitration Act. *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562 (Tex.App.-Waco 2000, orig.proceeding). For purposes of this original proceeding, it is not disputed that the business credit card agreement between Advanta and Watlington contained an arbitration clause in accordance with the Federal Arbitration Act. Further, for purposes of this proceeding, there have been no claims that the matters alleged by Watlington in the Nolan County lawsuit against Advanta are not within the scope of the arbitration clause. The claim is that Advanta waived its right to arbitration.

*2 Although there are various ways in which a party can waive its right to arbitrate a claim, Watlington's only claim was that Advanta waived its right to insist upon the arbitration clause because it filed the Utah lawsuit and thereby substantially invoked the judicial process to Watlington's actual prejudice. The trial court agreed.

If a party seeking arbitration substantially has invoked the judicial process and if the party opposing arbitration suffers actual prejudice as a result, then the right to arbitrate has been waived. *Southwind Group, Inc. v. Landwehr*, 188 S.W.3d 730, 735 (Tex.App.-Eastland 2006, no pet.). Because public policy favors arbitration of claims, there is a strong presumption against the waiver of a right to arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex.1998) (orig.proceeding). It is Watlington's burden to establish the elements of his waiver claim, that being (1) that Advanta substantially invoked the judicial process and (2) that he

suffered actual prejudice as a result, *Southwind Group*, 188 S.W.3d at 735; the burden is a heavy one. *Terminix*, 988 S.W.2d at 705. We resolve any doubts in favor of arbitration. *Id.* at 705. Our review of the issue is a question of law and is de novo. *Southwind Group*, 188 S.W.3d at 735.

There are two different classes of claims involved in this appeal as far as Watlington and Advanta are concerned. First, there are the claims that Watlington filed in Nolan County, as plaintiff, against Advanta, as defendant. Secondly, there is the claim on the debt that Advanta filed against Watlington in Utah. The debt claim has never been a part of the Nolan County lawsuit, and the claims raised by Watlington in Nolan County have never been made a part of the Utah lawsuit. Advanta apparently decided not to arbitrate its claim for the debt against Watlington because it filed suit on that claim. And, apparently Watlington decided not to demand his right that the debt claim be submitted to arbitration because he did nothing in the lawsuit on that claim in Utah. On the other hand, Advanta is asserting a right to arbitrate the separate and distinct claims that Watlington made in the Nolan County lawsuit that he instigated.⁵

⁵ We do not address the effect, if any, of TEX.R. CIV. P. 97 because no issue has been raised under that rule.

The claims in Nolan County are different from the one in Utah. Some courts have correctly described “substantially involk[ing] the judicial process” as taking specific and deliberate steps, after a suit has been filed, that are inconsistent with the right to arbitrate. *See Sedillo v. Campbell*, 5 S.W.3d 824, 827 (Tex. App. -Houston [14th Dist.] 1999, no pet.). We think that it is clear that, if Advanta had not succeeded in its Utah lawsuit, then it could not have insisted on later arbitrating that same claim. Its actions would have been inconsistent with the right to arbitrate its debt claim, and it would have substantially invoked the judicial process. Furthermore, one who has tried, but failed, in its invocation of the judicial process should not be allowed then to try again in the arbitration process. The court in *Terminix* stated: “[T]his is not a case in which a party who has tried and failed to obtain a satisfactory result in court then turns to arbitration.” *Terminix*, 988 S.W.2d at 704; *see also Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 135 (Tex.App.-Houston [1st Dist.] 2003, no pet.); *In re Winter Park Const., Inc.*, 30 S.W.3d 576, 579 (Tex.App.-Texarkana 2000, no pet.). We hold that Advanta did not substantially invoke the judicial process as to the claims that Watlington filed in the Nolan County lawsuit.

*3 Furthermore, even if it can be said that Advanta did substantially invoke the judicial process as to the Nolan County claims when it filed suit on the debt claim in Utah, Watlington has not met the heavy burden of showing actual prejudice.

When courts determine the prejudice issue, the focus is on such matters as (1) whether the one seeking to arbitrate, after having substantially invoked the judicial process, has gained access to information not discoverable in the arbitration process and (2) whether the one seeking to establish waiver has incurred costs and fees as a result of the proponent's actions or delay. *Southwind Group*, 188 S.W.3d at 737. This burden generally involves the presentation of evidence. *Williams Indus.*, 110 S.W.3d at 135. There was no evidentiary hearing held in this case. General statements about the costs related to the invocation of the judicial process are not sufficient to meet the heavy burden related to a showing of actual prejudice. *Pennzoil Co. v. Arnold Oil Co.*, 30 S.W.3d 494, 499–500 (Tex.App.-San Antonio 2000, no pet.).

The only prejudice that Watlington asserts is that a court in Utah entered a judgment against him in the amount of the debt plus costs and attorney's fees. There is no showing that he would not have had to pay these amounts in an arbitration proceeding. Watlington failed to show the kind of actual prejudice required when a party is called upon to establish costs and fees incurred by him as a result of a proponent's actions or delay. *See Southwind Group*, 188 S.W.3d at 737 (opponents of arbitration did not present any evidence of the amount of any expenses in litigating their claims that they would not have incurred in arbitration); *Pennzoil Co.*, 30 S.W.3d at 499–500 (opponent of arbitration failed to show the time and expenses incurred as a result of the invocation of the judicial process); *Williams Indus.*, 110 S.W.3d at 140–41 (opponent failed to carry its burden of showing actual prejudice because it presented no evidence in support of expenses directly related to actions of proponent of arbitration). Watlington did not establish actual prejudice.

The contract in this case contained an agreement invoking the Federal Arbitration Act. No complaint is made regarding its scope. Watlington has failed to establish that Advanta waived its right to arbitrate the claims that Watlington made in the Nolan County lawsuit. Advanta is entitled to have those claims submitted in arbitration. We conditionally grant Advanta's petition for writ of mandamus. However, the writ will issue only if the trial court does not enter its order

compelling arbitration of Watlington's Nolan County claims against Advanta.

Claims of Phillips & Cohen

[2] Because Phillips & Cohen was not a party to the contract between Watlington and Advanta, Watlington maintains that Phillips & Cohen is not entitled to arbitrate the claims he made against it in Nolan County. Nonsignatories to a contract have been allowed to enforce arbitration clauses in limited situations. *In re Rolland*, 96 S.W.3d 339, 344 (Tex.App.-Austin 2001, no pet.). Watlington maintains that his claims against Phillips & Cohen are not the type that fall within those limited situations. He cites us to *Rolland*, which sets forth some of those exceptions. *See id.* For purposes of this opinion, we will agree that there is no showing that, while Advanta had engaged Phillips & Cohen to assist in collecting the debt, there was any assignment of the agreement from Advanta to Phillips & Cohen.

*4 While Watlington is correct that this case does not fall within many of the exceptions set forth in *Rolland*, we are reminded that arbitration is a contract matter. If the parties to a contract, by that contract, confer contractual rights upon a third party, that third party may invoke an arbitration provision in a contract. *Id.*

In this case, Advanta and Watlington signed an agreement that contained the following provisions:

35. ARBITRATION DISCLOSURE: By applying for credit with us or using your Account, you agree that if a dispute of any kind arises out of your application for credit or out of the existence or use of this Agreement or your Account, either you or we or any other party that may be involved can choose to have that dispute resolved by binding arbitration. If arbitration is chosen, it will be conducted pursuant to the Code of Procedure of the National Arbitration Forum.... IF ANY PARTY TO ANY SUCH DISPUTE CHOOSES ARBITRATION, NEITHER YOU NOR WE OR ANY OTHER PARTY WILL HAVE THE RIGHT TO LITIGATE OR APPEAR IN COURT BEFORE A JUDGE OR JURY, OR TO ENGAGE IN DISCOVERY EXCEPT AS PROVIDED IN THE ARBITRATION RULES....

36. ARBITRATION PROVISION: Any claim, dispute or controversy (whether stated in contract, tort, or otherwise) arising from or relating to the Account or this Agreement or the relationships that led up to or result from this Agreement, including, without limitation, any advertisements, promotions, and oral or written statements related to your Account, any application for credit and any prior agreements between you and us, and any claim concerning the applicability or validity of this Arbitration Provision or of this Agreement, no matter by or against whom the claim is made, whether by or against either you or us or (to the full extent permitted by law) by or against any employees, agents, representatives or assigns of either you or us or any involved third party (a "Claim"), shall, at the election of you or us or any such third party, be resolved by binding arbitration pursuant to this Arbitration Provision....

Arbitration can be elected at any time on any Claim, regardless of whether a lawsuit has been filed in court (unless that suit has resulted in a judgment), and a party who has asserted a Claim in a lawsuit in court may elect arbitration with respect to that Claim and/or to any Claim(s) subsequently asserted in that lawsuit by any party.

Because arbitration is a contract matter, a party can be forced to arbitrate a dispute if it has agreed to arbitrate it. *Id.* at 345. Here, Watlington agreed. The arbitration provision in the contract between Advanta and Watlington is broadly written. Unlike many circumstances in which the contract addresses only the arbitration rights of the parties to it, Watlington and Advanta agreed in this contract that the arbitration provisions of the agreement would apply to third parties such as Phillips & Cohen on claims such as those asserted by Watlington. Watlington's claims against Phillips & Cohen arise from his agreement with Advanta, and because Watlington agreed that such third-party disputes could be submitted to arbitration, Phillips & Cohen is entitled to have Watlington's claims against it submitted to arbitration. We conditionally grant Phillips & Cohen's petition for writ of mandamus. However, the writ will issue only if the trial court does not enter its order compelling arbitration of Watlington's Nolan County claims against Phillips & Cohen.

*5 Watlington's claims against Stutts remain pending on the docket of the trial court.

2013 WL 951012

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

Nathan RIENSCH, Plaintiff,

v.

CINGULAR WIRELESS LLC, et al., Defendants.

James Bowden, Plaintiff,

v.

AT & T Mobility, LLC f/k/a Cingular
Wireless LLC, et al., Defendants.

Nos. C06-1325 TSZ, C09-
106 TSZ. | March 12, 2013.

Attorneys and Law Firms

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Opinion

ORDER

THOMAS S. ZILLY, District Judge.

*1 THIS MATTER comes before the Court on Defendants' motions to compel arbitration in these companion cases, C06-1325TSZ, docket no. 193, and C09-106TSZ, docket no. 83. Having reviewed all papers filed in support of and in opposition to each motion, the Court enters the following order.

I. Background

Plaintiffs Nathan Riensch and Jared Bowden¹ (hereinafter referred to collectively as "Plaintiffs") are the named plaintiffs in two separate putative class action lawsuits in this Court against Defendants Cingular Wireless LLC, New Cingular Wireless Services Inc., d/b/a AT & T Wireless, New Cingular Wireless Services Purchasing Company LP, and New Cingular Wireless PCS LLC (hereinafter referred to collectively as "Cingular").² Plaintiffs allege that Cingular

breached its service contracts and was unjustly enriched by collecting the Washington State business and occupation tax ("B & O") as a surcharge from customers. Complaint, C06-1325TSZ, docket no. 1; Complaint, C09-106TSZ, docket no. 1. The long and tortuous history of the litigation in this Court is, for the most part, irrelevant to the issue before the Court today namely whether Plaintiffs claims must be submitted to arbitration pursuant to the agreements of the parties. A brief recitation of the relevant events follows.

¹ This lawsuit was originally filed by Jared Peck in 2006. *Peck v. Cingular Wireless LLC*, C06-343TSZ, Notice of Removal, docket no. 1. Bowden joined the lawsuit in December 2008. *Peck v. Cingular Wireless LLC*, C09-106TSZ, Notice of Removal, docket no. 1. Peck was later dismissed. *Id.*, docket no. 25.

² In Bowden's Second Amended Complaint, C09-106TSZ, docket no. 48, filed on June 3, 2009, Defendant Cingular Wireless LLC is replaced by AT & T Mobility, LLC, f/k/a CINGULAR WIRELESS LLC, d/b/a Cingular Wireless.

Plaintiffs each entered into a contract with Cingular Wireless for wireless phone service sometime in 2004. Each of their agreements with Cingular included an arbitration provision. Bennett Decl. at ¶¶ 5-6 & Ex. B, C06-1325TSZ, docket no. 6; Cummings Decl. at ¶ 7 & Ex. 5, C06-1325TSZ, docket no. 194; Dobbs Decl. at ¶ 6 & Ex. 2, C06-1325TSZ, docket no. 196; Bowden Dep. at Ex. 2 (Ex. 3 to Afzali Decl.), C09-106TSZ, docket no. 20. Cingular promptly moved to compel arbitration in both cases. Motion to Compel Arbitration, C06-1325TSZ, docket no. 5; Motion to Compel Arbitration, C06-343TSZ, docket no. 11. The Court denied the motions, concluding that the prohibition on class proceedings in the arbitration provision was substantively unconscionable under Washington law.³ Order at 22-23, C06-1325TSZ, docket no. 22; Minute Order, C06-343TSZ, docket no. 22.

³ The Court granted the motion to compel arbitration in part in Peck, concluding that the arbitration provision contained in Cingular's Calling Plan for Employees of Cingular Agents and National Retailers was enforceable as to Peck's claims that pre-dated January 6, 2006. See Minute Order, C06-343TSZ, docket no. 22. The Court denied the motion as to the arbitration provision contained in the Consumer Calling Plan, which applied to Peck's claims that post-dated January 6, 2006, the date Peck terminated his employment with Cingular and activated a consumer calling plan. *Id.* It is the arbitration

provision contained in the Consumer Calling Plan that is at issue in the present case.

The Plaintiffs separately litigated their claims in this Court for approximately four years, culminating in summary judgment dismissal of all Plaintiffs' remaining claims in October 2009. Order, C06-1325TSZ, docket no. 165; Order, C09-106TSZ, docket no. 56. The Plaintiffs then each appealed to the Ninth Circuit, where the cases were eventually consolidated for purposes of appeal only. *Peck v. Cingular Wireless*, No. 09-36113, docket no. 66.

In January 2011, the Ninth Circuit certified to the Washington Supreme Court the question of whether RCW Section 82.04.500 allows a seller to recoup its B & O tax by collecting a surcharge from customers in addition to the monthly service fee. *Id.*, docket no. 34. The Washington Supreme Court held oral argument on October 20, 2011, and on April 28, 2012, the Court issued its decision, holding that Cingular had violated the Washington B & O tax statute by adding the cost of its tax to customers' bills. *Peck v. AT & T Mobility*, 174 Wn.2d 333, 275 P.2d 304 (2012). After the Washington Supreme Court issued its decision, the Ninth Circuit accepted additional briefing on the effect of the Washington Supreme Court decision and the issue of whether the Washington statute was preempted by the Federal Arbitration Act ("FAA"). *Peck v. Cingular Wireless*, No. 09-36113, docket no. 66. On October 24, 2012, the Ninth Circuit issued a memorandum opinion concluding that RCW 82.04.500 prohibits Cingular from charging its customers the B & O tax as a surcharge, that the Washington statute is not preempted by the FAA, and that Plaintiffs are entitled to recover under Washington's Consumer Protection Act. *Riensch v. Cingular Wireless*, 2012 WL 5352971 (9th Cir.2012). The Ninth Circuit then remanded the cases to this Court for further proceedings.

*2 A mandate issued from the Ninth Circuit on November 16, 2012, Mandate of USCA, C06-1325TSZ, docket no. 186, and Cingular filed a renewed motion to compel arbitration and stay litigation in *Riensch* on December 7, 2012. Renewed Motion to Compel Arbitration, C06-1325TSZ, docket no. 193. Cingular moved to compel arbitration and stay litigation in *Peck* on December 18, 2012. Motion to Compel Arbitration, C09-106TSZ, docket no. 83.

II. Discussion

At issue is whether the Court must compel arbitration of Plaintiffs' claims pursuant to the change in law announced by the Supreme Court in *AT & T Mobility LLC v. Concepcion*,

— U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Plaintiffs do not contest the applicability of the arbitration provisions at issue. Rather, they argue that AT & T waived its right to compel arbitration by failing to notify the Plaintiffs of its intent to seek arbitration until after the Ninth Circuit issued its mandate, more than a year and a half after the Supreme Court issued its decision in *Concepcion* on April 27, 2011. Plaintiffs also argue that the Court should refrain from ordering arbitration for policy reasons. Alternatively, in the event the Court grants the motion to compel arbitration, Plaintiffs contend that the arbitration agreement is unenforceable as to Plaintiffs' claims for injunctive relief. The Court will address each argument in turn.

A. Did Cingular Waive its Right to Compel Arbitration?

The parties agree that the applicable three part test to determine whether a party has waived the right to arbitration was set forth by the Ninth Circuit in *Fisher v. A.G. Becker Paribas Incorporation*, 791 F.2d 691 (9th Cir.1986).

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.

Id. at 694. Plaintiffs' waiver argument fails with respect to elements two and three of the *Fisher* test. They have not demonstrated that Cingular's acts in the Ninth Circuit after the Supreme Court issued its decision *Concepcion* were inconsistent with the right to arbitration and they have not demonstrated prejudice resulting from the allegedly inconsistent acts.

"Because waiver of the right to arbitration is disfavored, 'any party arguing waiver of arbitration bears a heavy burden of proof.'" *Id.* "The question of what constitutes a waiver of the right of arbitration depends on the facts of each case." "*AT & T Mobility v. Holaday-Parks-Fabricators, Inc.*, 2011 WL 5864112, at *8 (W.D.Wash., Nov.22, 2011) (quoting *USA Payday Cash Advance Ctr. # 1, Inc. v. Evans*, 281 Ga.App. 847, 849, 637 S.E.2d 418 (2006)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay,

or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

*3 Plaintiffs argue that Cingular's failure to promptly notify them after the Supreme Court issued its decision in *Concepcion*, of its intent to compel arbitration, combined with Cingular's further pursuit of a judicial resolution in the Ninth Circuit, supports a finding of waiver. Cingular responds that, under the circumstances of this case, they could not have renewed their motion to compel arbitration until jurisdiction was returned to this Court and that they promptly so moved after the Ninth Circuit issued a mandate. Moreover, they point out that, to the extent they continued to litigate the merits of the case in the Ninth Circuit after the Supreme Court issued its decision in *Concepcion*, such litigation was pursuant to Plaintiffs' appeal of this Court's summary judgment orders in favor of Cingular. Both sides argue that case law supports their position. In fact, no case cited by either party deals with the circumstances at issue here, where the district court did not have jurisdiction over the proceedings for the intervening time between the date the moving party had notice of the change in the law and the date the motion to compel arbitration was filed because the case was on appeal.

1. Knowledge of Existing Right to Compel Arbitration

With respect to the first prong of the *Fisher* test, Cingular had knowledge of an existing right to arbitrate on April 27, 2011, the date the Supreme Court issued its decision in *Concepcion*. Prior to that date, this Court had concluded that the arbitration provision in Cingular's contracts was substantively unconscionable and therefore, unenforceable under Washington law. Minute Order, C06-343TSZ, docket no. 22; *Riensch v. Cingular Wireless*, 2006 WL 3827477 (W.D.Wash., Dec.27, 2006).⁴ In *Concepcion*, the Supreme Court held that California's *Discover Bank* rule, which held that an arbitration agreement in a consumer contract of adhesion that prohibits class actions and class arbitration is unconscionable under California law, was preempted by the FAA. — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). The Supreme Court's holding in *Concepcion* constituted a change in the law and gave rise to an existing right to arbitration under the facts of this case. See, e.g., *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir.1986) (holding “no existing right to arbitration” where the prevailing law in the circuit would have rendered such a motion “futile”).

4 This was consistent with other contemporaneous orders from this district. In addition, the Washington Supreme Court and the Ninth Circuit subsequently held that an arbitration provision that prohibits classwide relief was substantively unconscionable under Washington law. See *Luna v. Household Fin. Corp. III*, 236 F.Supp.2d 1166, 1178-79 (W.D.Wash.2002); *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000 (2007); *Lowden v. T-Mobile, USA, Inc.*, 2006 WL 1009279, at *5-6 (W.D.Wash., Apr.13, 2006), *aff'd*, 512 F.3d 1213 (9th Cir.2008).

To the extent that the Plaintiffs' argue that Cingular waived its right to arbitration prior to the date the Supreme Court issued its decision in *Concepcion*, the Court disagrees. Riensch argues that Cingular should have appealed this Court's decision denying its motion to compel arbitration in December 2006, see Order, C06-1325TSZ, docket no. 22, and that its failure to do so constitutes waiver. This argument is not supported by authority. Rather, because case law in this Circuit holds that where a motion to compel arbitration would be futile, failure to make such a motion does not constitute waiver, see, e.g., *Swift v. Zynga Game Network, Inc.*, 805 F.Supp.2d 904, 913-14 (N.D.Cal.2011) (holding failure to move to compel arbitration prior to *Concepcion* did not constitute waiver where such motion would have been futile); *Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1129-31 (C.D.Cal.2011) (concluding defendant's failure to move to compel arbitration prior to *Concepcion* would have been futile, and therefore, its failure to seek to enforce the arbitration agreement did not reflect any intent to forego arbitration), the same analysis supports the conclusion that failure to appeal the denial of a motion to compel arbitration does not constitute waiver where such appeal would have been futile.

*4 Riensch does not credibly argue that an appeal of Cingular's motion to compel arbitration in 2006 would not have been futile. Rather, he relies on *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 720 (9th Cir.2012), and, in particular, that court's citation to *Franceschi v. Hosp. Gen. San Carlos, Inc.*, 420 F.3d 1, 4 (1st Cir.2005). Neither *Gutierrez* nor *Franceschi* is on point. *Gutierrez* does not involve the issue of failure to appeal the denial of a motion to compel arbitration. *Franceschi* is also not helpful to the Plaintiffs. There, the hospital argued that the parties' contract required mandatory arbitration of the plaintiff's claims at summary judgment. *Id.* at 4. After the district court rejected the hospital's argument, the parties continued to litigate the matter and three years later

the case went to trial. On appeal, the First Circuit rejected the hospital's argument that summary judgment should have been granted in its favor on the basis of the arbitration clause. In particular, the First Circuit concluded that the hospital waived its right to arbitration because no interlocutory appeal of the Court's summary judgment motion was filed. *Id.* However, the hospital did not argue on appeal that the right to arbitration was based on a change in law.

Bowden argues that Cingular waived the right to arbitration by failing to file a motion to compel arbitration against him after he joined the lawsuit in 2008. This argument is also without merit. Consistent with its knowledge of the arbitration provision in its contracts, Cingular moved to arbitrate in both *Riensch* and *Peck* at the outset of the litigation in 2006. Although Cingular did not move to arbitrate again after Bowden was added as a plaintiff in *Peck*, it did raise arbitration as an affirmative defense. See Defendants' Answer, Affirmative Defenses, and Counterclaims to Plaintiffs' First Amended Complaint at 5, No. 06-2-05747-3 SEA (King County Superior Court). Moreover, it is clear that a motion to compel Bowden to arbitrate when he was added as a plaintiff in late 2008 would have been futile given this Court's orders on the two previous motions to compel arbitration in *Riensch* and *Peck*, and the Washington Supreme Court's intervening decision in *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000 (2007), holding that an arbitration clause prohibiting class arbitration in a wireless service agreement was unconscionable under Washington law and that this aspect of Washington law was not preempted by the FAA.

2. Acts Inconsistent with Existing Right

With respect to the second prong of the *Fisher* test, Plaintiffs contend that Cingular's continued litigation of these cases in the Ninth Circuit after the Supreme Court issued its decision in *Concepcion* was inconsistent with an existing right to compel arbitration.⁵ No case that they cite is analogous to the circumstances here. See *Kingsbury v. U.S. Greenfiber*, 2012 WL 2775022 (C.D.Cal., June 29, 2012); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir.1988); *Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices Prods. Liab. Litig.*, 828 F.Supp.2d 1150, 1163-64 (C.D.Cal.2011); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772 (D.C.Cir.1987); *Gutierrez*, 704 F.3d 712. Moreover, the Plaintiffs' claims that Cingular "continued to take affirmative steps toward a litigated resolution" and "actively sought

a judicial resolution" after *Concepcion* do not accurately represent the facts. See, e.g., Plaintiff's Response to Motion to Compel at 8-9, C06-1325TSZ, docket no. 88.

5 Riensch appears to argue that discovery, depositions, and summary judgment motions propounded by Cingular prior to *Concepcion* are acts inconsistent with an existing right to arbitrate. This argument is without merit because there was no existing right to arbitrate until *Concepcion*.

*5 Although Cingular did not file its motions to compel arbitration until December 2012, more than a year and a half after the Supreme Court issued its decision in *Concepcion*, the Court concludes that its actions were not inconsistent with the right to arbitration under the facts of this case. First, Cingular filed a motion to compel arbitration at the outset of litigation in both *Riensch* and *Peck*. Second, Cingular subsequently prevailed on the merits at summary judgment and the cases were on appeal in the Ninth Circuit when *Concepcion* was issued. Third, Cingular had no reason to move to compel arbitration until the Ninth Circuit reversed this Court's summary judgment orders in its favor. And fourth, Cingular filed its motions to compel arbitration promptly after the Ninth Circuit issued its mandate and jurisdiction was returned to this Court. The cases cited by the Plaintiffs to support their argument of waiver are not persuasive under these facts.

A party's acts are inconsistent with the right to compel arbitration where the party makes a " 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims.' " *Van Ness Townhouses*, 862 F.2d at 759 (quoting *Nat'l Found. for Cancer Research*, 821 F.2d at 777). "There is no concrete test in the Ninth Circuit to determine whether or not actions taken by a party are 'inconsistent' with the right to arbitrate." *Airbus S.A.S v. Aviation Partners Inc.*, 2012 WL 5295145, at *3 (W.D.Wash., Oct.25, 2012). Because waiver is disfavored, "the Ninth Circuit has been hesitant to conclude that a party's actions are inconsistent" with the right to arbitrate. *Id.* (citing *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir.1990); *Fisher*, 791 F.2d at 694-95).

The cases cited by Plaintiffs to support their argument of waiver are distinguishable on one or more of the following grounds. First, the parties did not leave the trial court before the defendant moved to compel arbitration. Second, the court concluded that the moving party had an existing right to arbitration prior to the alleged change in the law, making further analysis of whether that party acted inconsistent with

such right after the change in law unnecessary. Third, the continued litigation after the change in law was driven by the actions of the moving party, rather than the party resisting arbitration.

Kingsbury v. U.S. Greenfiber is distinguishable for all three reasons outlined above. First, the parties never left the district court. 2012 WL 2775022, at *1. Second, the Court concluded that the defendant had an existing right to arbitration prior to *Concepcion*, and waived that right by litigating the case for four years prior to moving to compel arbitration. *Id.* at * 4–6. Third, even if the defendant's right to arbitration did not arise until the Supreme Court's decision in *Concepcion*, rather than immediately moving to compel arbitration after the Supreme Court issued its decision in *Concepcion*, the defendant waited several months until after the district court ruled on the plaintiff's pending motion for class certification and the Ninth Circuit denied the defendant's motion to appeal the court's order granting class certification. *Id.* at * 6.

*6 *Van Ness Townhouses v. Mar Industries Corporation* is similarly distinguishable for all three reasons discussed above. There, the district court compelled arbitration and the plaintiffs appealed. 862 F.2d at 759. The Ninth Circuit reversed, concluding that the defendants waived the right to arbitration because they had an existing right to arbitrate some of plaintiffs' claims at the outset of the litigation, but failed to demand arbitration of the arbitrable claims until two years later on the eve of trial. *Id.* at 758–59. The Ninth Circuit concluded that the defendants' decision to “litigate actively the entire matter—including pleadings, motions, and approving a pre-trial conference order” was inconsistent with the asserted right to arbitration. *Id.* at 759. The Court's holding of waiver in *Van Ness Townhouses* is not useful in analyzing the waiver issue under the facts in the present case.

Plaintiffs also rely on *Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices Prods. Liability Litigation* to support their argument of waiver. But there, the Court's waiver analysis was conducted as an alternative basis for denying the motion to compel arbitration, after the Court first concluded that the asserted arbitration provision did not apply to the claims at issue. 828 F.Supp.2d at 1154.

The Plaintiffs reliance on *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.* is equally misplaced. There, the district court denied defendant's motion to compel arbitration and the Eighth Circuit affirmed. 821 F.2d at 777. *National Foundation for Cancer Research* is distinguishable

for two of the reasons discussed above. First, the parties were litigating in the trial court when the change in law was announced. *Id.* at 773. Second, the party seeking arbitration continued to litigate the action for over a year in the trial court after the change in law was announced, waiting for the trial court to rule on its pending motion for summary judgment before moving to compel arbitration. *Id.* at 773–74.

Finally, *Gutierrez v. Wells Fargo Bank*, on which the Plaintiffs' also rely, is distinguishable. The arbitration provision at issue in that case is dissimilar to the provision at issue here because it was not mandatory and permitted class arbitration on consent. 704 F.3d at 719–720. Based on this distinction, the Ninth Circuit concluded with respect to the first prong of the *Fisher* test, that the futility of an arbitration demand prior to *Concepcion* was not clear cut. *Id.* at 721. Additionally, because the arbitration provision did not require arbitration, the Court concluded that ordering arbitration would undercut the plaintiff's contractual expectations, be inconsistent with the parties' agreement, and contradict their conduct throughout the litigation. *Id.* at 721–22. As the Ninth Circuit noted, *Gutierrez* is “an unusual, perhaps sui generis, case” in which the specific circumstances counseled the result.⁶

6 The other cases cited by Plaintiffs to support their waiver argument are similarly distinguishable from the facts at issue in the present case. See, e.g., *Mirant Corp. v. Castex*, 613 F.3d 584, 589 (5th Cir.2010) (concluding that defendant had substantially invoked the judicial process and waived the right to compel arbitration by filing three motions to dismiss plaintiffs' claims, partially on the basis of affirmative defenses, prior to invoking arbitration); *Se. Stud & Components Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 969 (8th Cir.2009) (holding that defendant waived the right to arbitration by waiting thirteen months after plaintiff filed suit to move to compel arbitration, and concluding that plaintiff was prejudiced by delay where it incurred expenses responding to discovery requests and defendant's motion for judgment on the pleadings); *Hooper v. Advance Am. Cash Advance Ctr. of Mo., Inc.*, 589 F.3d 917, 921–22 (8th Cir.2009) (holding defendant in putative class action waived its right to arbitration when it filed and pursued an “extensive and exhaustive” motion to dismiss that sought judgment on the merits).

3. Prejudice

*7 Addressing the third prong of the *Fisher* test, Plaintiffs contend that they have been prejudiced by Cingular's

failure to promptly notify them of its intent to seek arbitration after the Supreme Court issued its decision in *Concepcion*. Specifically, they contend that: (1) they have incurred significant fees and costs in litigating this case, and (2) that Cingular has engaged in discovery that would not have been available in arbitration and that may prejudice Plaintiffs' position in any future arbitration proceedings. The Court rejects these arguments.

In the Ninth Circuit, "when a party to an agreement that makes 'arbitration of disputes mandatory' chooses to 'violate [] that agreement' by opting to litigate claims in court, any 'extra expense' incurred by that party as a result of its 'deliberate choice of an improper forum, in contravention of [its] contract' cannot be charged to the other party." *Apple & AT & TM Antitrust Litigation*, 826 F.Supp.2d 1168, 1174 (2011) (quoting *Fisher*, 791 F.2d at 698). The fact that the parties have engaged in discovery also does not "constitute sufficient prejudice to establish waiver" of the right to compel arbitration. *Fisher*, 791 F.2d at 697.

Any costs and fees incurred in this litigation prior to the issuance of the Supreme Court's decision in *Concepcion* do not support Plaintiffs' contention that they have suffered prejudice. See *Apple & AT & TM Antitrust Litig.*, 826 F.Supp.2d at 1174 (concluding that similar conduct did not constitute prejudice sufficient to deprive defendant of its right to compel arbitration after the Supreme Court announced a change in the prevailing law in *Concepcion*). However, Plaintiffs also argue that they were prejudiced by Cingular's failure to promptly notify them of its intent to seek arbitration after the Supreme Court issued its decision in *Concepcion* because Cingular continued to take "affirmative" action toward a litigated resolution of the case. Plaintiffs' Response to Renewed Motion to Compel Arbitration at 8, C06-1325TSZ, docket no. 200.

Although this argument is not clearly refuted by the case law, analysis of the Ninth Circuit dockets leads to only one conclusion: any costs incurred by Plaintiffs during the pendency of their appeal to the Ninth Circuit are squarely the result of Plaintiffs' deliberate choice to appeal this Court's summary judgment dismissal of their claims. The appeal in each case was fully briefed by May 2010. See *Peck v. Cingular Wireless LLC*, No. 09-36113 (9th Circuit), docket nos. 25-27, 66. The only events that occurred after *Concepcion* was issued in April 2011 were (1) an October 2011 brief submitted to the Washington Supreme Court by Cingular in response to an amicus brief, (2) oral argument before the Washington

Supreme Court on October 20, 2011, and (3) supplemental briefing to the Ninth Circuit in July 2012 after the Washington Supreme Court issued its decision on the certified question. The lion's share of the appellate process had occurred prior to the Supreme Court's decision in *Concepcion*. The additional events that occurred after *Concepcion* were necessary before the Ninth Circuit could issue an opinion disposing of the Plaintiffs' appeals. Under the unique circumstances of this case, any events that occurred in the Ninth Circuit after April 2011 are not sufficient to support a finding of prejudice.⁷

⁷ It is not reasonable to suggest that Cingular should have filed a motion to compel arbitration prior to the Ninth Circuit's decision because, until that time, Cingular was the prevailing party and there were no claims left to arbitrate. Thus, even if Cingular had notified Plaintiffs of its intent to seek arbitration if the Ninth Circuit reversed, it is highly unlikely that this case would be in any different posture than it is in now.

III. Policy Argument

*8 In addition to arguing that Cingular waived its right to compel arbitration under the *Fisher* test, Plaintiffs argue that ordering arbitration at this stage in the proceedings would be fundamentally inconsistent with the purposes of the FAA. This argument is not persuasive.

Plaintiffs rely on *Gutierrez* to support their argument. But *Gutierrez* is distinguishable. There, the arbitration provision at issue did not make arbitration mandatory, but rather contemplated "that the parties [could] decide to remain within the judicial system to settle their disputes." 704 F.3d at 720. Moreover, the trial court had certified a class and conducted a class-wide trial before the defendants raised arbitration for the first time on appeal. *Id.* at 718. For these reasons, the Ninth Circuit concluded that ordering arbitration "at this juncture would frustrate the purpose of the FAA," which is to "ensure enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 721 (quoting *Concepcion*, 131 S.Ct. at 1748). The factors supporting the Ninth Circuit's conclusion in *Gutierrez* are not present here.

As the Supreme Court confirmed in *Concepcion*, "the 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" 131 S.Ct. at 1748 (quoting *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Thus, this Court must order

arbitration of Plaintiffs' claims pursuant to the mandatory arbitration clause included in their contracts. Any other result would be inconsistent with the purposes of the FAA.

IV. If the Court Grants Cingular's Motion to Compel Arbitration, Should it Strike the Contract Provision Concerning Injunctive and Declaratory Relief?

Plaintiffs argue that, if the Court grants the Defendants' motions to compel arbitration, it should strike the portion of the arbitration agreement that provides:

The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by the party's individual claim.

See Plaintiff's Response to Renewed Motion to Compel Arbitration at 12, C06-1325TSZ, docket no. 200; Plaintiff's Response to Defendants' Motion to Compel Arbitration at 12, C09-106TSZ, docket no. 88. Plaintiffs argue that Cingular has not challenged the Court's prior holding that this limitation on injunctive relief was substantively unconscionable. *See* Order at 21, No. C6-1325TSZ, docket no. 22.

This argument is not persuasive. The Court's 2006 order denying Cingular's motion to compel arbitration in *Riensch* concluded that Cingular's arbitration agreement was unconscionable for two reasons. First, the Court concluded after a thorough analysis of the existing case law that the prohibition on all class proceedings was substantively unconscionable. *Id.* at 19-21. The Court then concluded that the limitation on injunctive relief "is substantively unconscionable for the same reasons that the class action prohibition is unconscionable." *Id.* at 21. Because the Court's analysis of the prohibition on class proceedings is no longer good law under *Concepcion* and its progeny, the Court's reliance on that analysis with respect to the limitation on injunctive relief is also no longer controlling law.

V. Conclusion

*9 The Court GRANTS the motions to compel arbitration in both cases, C06-1325TSZ, docket no. 193, and C09-106TSZ, docket no. 83, and STAYS both of these actions pending further Order of the Court. The parties are DIRECTED to file a joint status report ("JSR") within fourteen (14) days of any determination by the arbitrator, or by September 1, 2013, whichever occurs earlier.