

No. 69306-9-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DAMON TULIP,

Petitioner/Appellant,

v.

SERVICE CORPORATION INTERNATIONAL, SCI FUNERAL AND
CEMETERY PURCHASING COOPERATIVE, INC., SCI WESTERN
MARKET SUPPORT CENTER, L.P. a/k/a SCI WESTERN MARKET
SUPPORT CENTER, INC., SCI WASHINGTON FUNERAL
SERVICES, INC., GREENWOOD MEMORIAL PARK CEMETERY &
FUNERAL HOME, JANE D. JONES, THOMAS RYAN,

Defendants/Respondents.

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

Petitioner-Appellant Damon Tulip's ("Tulip") refuses to accept that by participating and/or allowing his counsel to pursue claims for wage and hour violations in various class action lawsuits he waived the right to seek arbitration of those claims. When Tulip left the employment of Respondent SCI Washington Funeral Services, Inc. in September 2007, he knew or should have known of the claims he now asserts. Instead of following the clear terms of the arbitration agreement he signed on February 5, 2005, he pursued class action litigation. After he and/or his counsel failed to obtain class action status in four separate lawsuits, he decided to seek arbitration.

The trial court's Order Denying Petitioner's Motion To Compel Arbitration And Motion For Summary Judgment (the "Order") should be affirmed. The record is clear: Tulip waived his right to arbitrate through his participation in federal proceedings that were substantially similar to the claims he now untimely claims he is entitled to arbitrate.

In the class actions, Tulip had the opportunity to utilize discovery not otherwise available to him in arbitration – but at the expense of Respondents – who have already expended significant resources to defend against those proceedings. Now, after years of litigation and only after

Tulip has been dismissed from the failed class actions, Tulip seeks a second bite of the apple through arbitration.

The trial court's Order denying Tulip's Petition should be affirmed because (i) Tulip waived his right to compel arbitration by joining and participating in multiple lawsuits, using discovery not typically available in arbitration, and delaying his request to arbitrate; or alternatively, (ii) Tulip failed to meet his burden to show that an agreement to arbitrate exists between him and certain Respondents.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly deny Tulip's Motions To Compel Arbitration and for Summary Judgment because:

- (a) Tulip waived the right to arbitrate as a result of his participation in substantially similar federal actions and waiting three and half years to seek arbitration; and/or
- (b) Tulip failed to meet his burden to show an agreement to arbitrate exists between some of the Respondents and himself?

III. COUNTERSTATEMENT OF THE FACTS

Regardless of the various disagreements between the parties, it is undisputed that both parties in various pleadings have taken the position that the other has waived any right to arbitrate these claims by participating in litigation in numerous courts for over four years, thereby

indicating their intent to proceed with litigation rather than arbitration. The trial court did nothing more than to accept Tulip's counsel's original position on that issue. This Court should do the same. The fact that Tulip, through his counsel, has taken a completely contrary position was not discussed below and is not mentioned in Tulip's Opening Brief.

In an attempt to insulate himself from the lengthy litigation that has transpired, Tulip narrowly describes the facts relevant to this appeal. Tulip's counsel, however, has repeatedly recited this contentious history in various motions and pleadings and it is relevant here. (CP 494, ¶¶ 15, 16 and CP 608-659; 678-696) Indeed, the facts described in subsection B below are largely taken from Tulip's counsel's filing in *Christopher Reynolds, et al. v. Service Corporation International, et al.*, in the U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case No. 10-cv-1552-WTL-TAB ("*Reynolds*"). (CP 494 ¶ 16; 678-696)

A. Tulip's Employment

In 2004, Tulip began to work for Respondent SCI Washington Funeral Services, Inc. at a location called Greenwood Memorial Park Cemetery & Funeral Home in Renton, Washington. (CP 493 ¶ 11) Tulip worked as a Family Service Counselor and Community Service Counselor. (*Id.*) In connection with his employment, Tulip signed an agreement entitled "Principles of Employment and Arbitration

Procedures” (the “PEAP”). (CP 11-14) The PEAP requires the parties to arbitrate any dispute regarding Tulip’s employment. The PEAP also provides that all claims relating to any aspect of Tulip’s employment must be brought *no later than one year after Tulip was aware of the claims:*

Notification/Timeliness of Claims Any claim which either party has against the other must be presented in writing by the claiming party to the other *within one year of the date the claiming party knew or should have known of the facts giving rise to the claim.* Otherwise, the claim shall be deemed waived and forever barred even if there is a federal or state statute of limitations which would have given more time to pursue the claim.

(CP 13 ¶ 3) (emphasis added).

Tulip’s employment ended in September 2007.¹ (CP 493 ¶ 11) Respondents’ first notice of Tulip’s desire to arbitrate any claims arising from his employment came three and half years later on May 19, 2011. (CP 16-17) The trial court properly found that Tulip’s delay was too long.

¹ In his Opening Brief, Tulip notes that he was later employed at Acacia Memorial Park and Funeral Home in Seattle, Washington. (Opening Brief, p. 3) However, Tulip is not seeking remuneration from that entity and that period of his employment was not part of his Petition or this appeal. This is likely because while working at Acacia, Tulip was an exempt outside sales person or a community service advisor, that was paid a commission only. (CP 109) Acacia was also not included in Tulip’s Demand for Arbitration dated May 19, 2011. (CP 16-17)

B. The Parties' Lengthy Litigation History

On December 8, 2006, Tulip's counsel initially filed an action in the Western District of Pennsylvania, titled *Prise, et al. v. Alderwoods Group, Inc. et al.*, Case No. 06-cv-1641 ("*Prise*"), asserting state law claims on behalf of a proposed class of individuals that included Tulip, along with federal Fair Labor Standards Act ("FLSA") claims, against SCI for its alleged failure to pay employees for all hours worked. The *Prise* complaint also named Alderwoods Group, Inc. ("Alderwoods") as a defendant.² (CP 679-680)

On December 5, 2007, Tulip's counsel reasserted class claims encompassing Tulip's state law claims against SCI in the Superior Court of the State of California for the County of Alameda. (CP 680) The action included the state law claims of employees in every state where SCI does business, including Washington. Respondents³ removed that action to the Northern District of California, *Bryant, et al. v. Serv. Corp. Int'l, et al.* ("*Bryant*"), Case No. 08-cv-1190 SI. (CP 681-682) In discussing the Respondents' reaction to the filing of *Bryant*, Tulip's counsel told a

² Prior to the filing of the *Prise* complaint, SCI had acquired Alderwoods.

³ The defendants in the California lawsuit were identical to Respondents here except that SCI Washington Funeral Services, Inc. was not a party.

federal court judge “defendants had an opportunity to raise the issue of arbitration but did not and instead, sought to have the outcome of the state law claims determined in federal court.” (CP 681) To this day, Tulip’s counsel has never explained why Tulip did not likewise have “an opportunity to raise the issue of arbitration” back in early 2008.

Around the same time of the *Bryant* filing, Tulip’s counsel re-filed their federal wage and hour claims against SCI and others, in the United States District Court of Arizona, in an action titled *Stickle, et al. v. SCI W. Mkt. Support Ctr., L.P.*, Case No. 08-CV-83 (“*Stickle*”). (CP 226 at ¶ 5; 682) This complaint also named other SCI corporate entities and officers, including Respondents, except for SCI Washington Funeral Services, Inc. The various defendants filed three separate motions to dismiss on February 2, 2008. Certain defendants sought dismissal for lack of personal jurisdiction. All defendants sought dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Those motions were granted in part and denied in part. Thereafter, on October 1, 2009, the court granted conditional certification of plaintiffs’ FLSA claims, notice was issued and approximately 1,400 employees opted into that lawsuit, including Tulip. (CP 683)

On December 14, 2009, Tulip filed his Notice of Consent to Become a Named Party in *Stickle* (“Consent”). (CP 112-15) In his

Consent, which was executed on November 3, 2009, Tulip agreed to become a plaintiff or “representative plaintiff” seeking “payment of unpaid wages **under Federal or State law**, including overtime wages and related relief against any of my employer(s) including any individual(s) who may be considered my employer(s) on my behalf and other former employees”⁴ (*Id.* at 114, emphasis added)

In *Stickle* and as described in the Petition, Tulip claimed that he was not paid for all overtime worked when performing community services or pre-need sales outside of work, meal breaks when he was interrupted at work, or time that he did not record on his time sheet. (CP 493 ¶ 11; 594-596) Tulip also claimed that his overtime rate of pay was improperly calculated. (*Id.*)

Between the dates in which Tulip became a party in *Stickle* and his dismissal, 847 court docket entries were made, including entries relating to discovery initiated by plaintiffs, including Tulip. (CP 492 at ¶¶ 6-7) During that same period, over 60 depositions were taken, over a thousand

⁴ The page of the Consent that contains Tulip’s signature does not mention *Stickle*. More importantly, in one of the multitude of lawsuits filed, Tulip’s counsel acknowledged that the Consents used in *Stickle* were not limited to the *Stickle* action. Tulip’s counsel stated that “The forms here do not contain any caption or expressly limit the scope of the consent to any particular action.” (CP 751:25-27)

interrogatories were issued and 740 answered, neither of which discovery methods were limited in scope to certification issues. (*Id.* at ¶¶ 8-9)

As a result of the *Stickle* litigation, Respondents incurred significant litigation fees and costs to defend that lawsuit, which has been ongoing since January 2008. (*Id.* at ¶ 14) Further, Respondents were prejudiced because they were required to participate in discovery that would have been avoided in arbitration proceedings, such as the interrogatories and depositions described above. (*Id.*) Respondents were also forced to endure a frivolous Motion for Sanctions to disqualify defense counsel and other questionable discovery pleadings. (*Id.* at ¶ 13)

While continuing to litigate *Stickle*, the parties continued to litigate the state law claims (including Washington) in *Bryant*. Discovery in *Bryant* also included depositions and written discovery. Plaintiffs' filed numerous motions for Rule 23 class certification. On July 22, 2010, the district court granted the parties' Stipulation and Order dismissing without prejudice those claims asserted in plaintiffs' Second Amended Complaint in the *Bryant* action on which plaintiffs did not move for certification in their June 18, 2010 motion. The dismissed claims included the state law claims of employees in Washington. (CP 611 at ¶¶ 14-16)

Then Tulip's counsel re-filed the claims of employees in states outside of California, in 18 separate state law actions. Relevant to this

case, on October 5, 2010, Tulip's counsel filed a Class Action Complaint in Washington state court titled *Emmick, et al. v. Service Corporation International, et al.*, Case No 10-2-35204-0 SEA ("*Emmick*"), which specifically encompassed Tulip's state law wage claims.⁵ Plaintiffs asserted claims on behalf of all former and current Washington employees (which would necessarily include Tulip) for unpaid wages stemming from alleged violations of RCW 49.12.020, 49.46.020, 49.46.130, 49.48.010, 49.52.050 and WAC 296-126-021, 296-126-025, 296-126-092, and common law claims for breach of contract, fraud, unjust enrichment, restitution, breach of implied covenant of good faith and fair dealing, conversion, misrepresentation, and claims under the Washington Consumer Protection Act. (CP 494 at ¶ 15; 608-659)

On December 17, 2010, under the Class Action Fairness Act, *Emmick* was removed to the United States District Court for the Western District of Washington at Seattle, as federal Case No. 2:10-CV-2027-MJP. (CP 494 at ¶ 15) Plaintiffs fought removal and moved to remand *Emmick*, which was denied on March 17, 2011. (*Id.*) Thereafter, a scheduling order issued, and plaintiffs filed their First Amended Complaint, adding

⁵ As noted above, Tulip consented to being a representative plaintiff in both federal and state actions seeking the type of damages alleged in *Emmick*. (CP 494 at ¶ 15)

Respondent SCI Washington Funeral Services, Inc., which defendants moved to dismiss as duplicative of *Stickle*. (*Id.*) While the motion was pending, on May 17, 2011, plaintiffs filed a notice voluntarily dismissing their case. (*Id.*) Two days after this dismissal, on May 19, 2011, Tulip **for the first time** sought to arbitrate his wage claims. (CP 16-17; 475 at ¶ 7)

C. Facts Relating to *Reynolds*

As noted in Section II.B., after losing the bid to pursue multiple state law claims in *Bryant*, Tulip's counsel refiled the claims of employees in 18 separate actions, including *Emmick*. One of the other 17 lawsuits was *Christopher Reynolds, et al. v. Service Corporation International, et al.*, in the U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case No. 10-cv-1552-WTL-TAB ("*Reynolds*"). Respondents in *Reynolds* did not seek an order compelling arbitration, but instead requested dismissal of *Reynolds* for lack of subject matter jurisdiction. (CP 494-5 ¶ 16)

Notably, however, in their opposition to the motion to dismiss, Tulip's counsel argued that:

Defendants have waived any right they may have had to arbitrate this matter through their actions during the lengthy period that these claims have been pending. Defendants' actions clearly indicate their intention to proceed with litigation, rather than arbitration. Since the state law claims were first filed as part of the *Prise* action in December 2006, defendants have participated in the litigation of these claims for more than four (4) years, only raising for the first

time in the instant motion to dismiss filed on February 4, 2011, that these claims should now be arbitrated. It is clear based on defendants' actions during the more than four-year course of the litigation of these matters, that this is merely just another tactic to prevent these claims from being heard in any forum, and defendants have no intention of actually arbitrating these claims.

(CP 685-86) In addition, Tulip's counsel cited extensive case law supporting a party's waiver of an arbitration provision due to the party's delay in compelling arbitration. (*Id.*)

D. Facts Relating to the Trial Court's Order.

On July 10, 2012, the trial court heard oral argument with respect to Tulip's Petition and Motion for Summary Judgment on Petition to Compel Arbitration. (7/10/12 Transcript ("Tr.") at 1:17-19) On August 14, 2012, the trial court entered its Order dismissing Tulip's claims with prejudice. (CP 833-34) Tulip timely appealed. (CP 455-59).

IV. ARGUMENT

A. The Trial Court Properly Denied Tulip's Motions to Compel Arbitration and for Summary Judgment Because Tulip Waived His Right to Arbitration.

1. The Legal Standard Governing Waiver of the Right to Arbitration Supports the Trial Court's Order.

The law governing the issue of Tulip's waiver is well settled. The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as

exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

The parties agree that the FAA governs the PEAP. (CP 5:5-7)

Although there is a broad mandate in favor of arbitration under the FAA, there are certain exceptions. *See, i.e., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 219-21 (1985) (the federal policy embodied in the Arbitration Act is a policy favoring enforcement of contracts, not a preference for arbitration over litigation). In particular, the FAA expressly excludes the application of arbitration provisions where the party seeking arbitration delays in its demand. 9 U.S.C. § 3; *see also Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (holding that an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate); *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 339-40 (6th Cir. 2010) (finding defendant waived arbitration by filing multiple dispositive and non-dispositive motions); *Hoffman Constr. Co. of Oregon v. Active Erectors and Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992). Accordingly, the FAA itself expressly rejects the application of an arbitration provision where the party requesting arbitration has not requested arbitration in a timely manner.

Likewise, in Washington, a contractual right to arbitration can be waived. *See Lake Wash. Sch. Dist. 414 v. Mobile Modules, N.W., Inc.*, 28

Wn. App. 59, 62, 621 P.2d 791 (1980); *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997) (issue of waiver under the Federal Arbitration Act is governed by federal law). This Court has held that to show waiver under federal law “the party opposing arbitration must demonstrate (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that right, and (3) prejudice.” *Kinsey v. Bradley*, 53 Wn. App. 167, 169, 765 P.2d 1329 (1989); *see also Riverside Publishing Co v. Mercer Publishing LLC*, 829 F. Supp. 2d 1017, 1019-20 (W.D.Wash. 2011) (2011) (same). The *Kinsey* court noted that “when a party fails to demand arbitration during pretrial proceedings and in the meantime engages in pretrial activity inconsistent with an intent to arbitrate the party opposing a motion to compel may more easily show its position has been compromised (i.e. prejudice).” 53 Wn. App. at 170 (citations omitted).

In *Kinsey*, investors asserted claims against commodities broker and related parties. Plaintiffs commenced the action in superior court. Defendants removed the action to the District Court for Eastern Washington where a substantially identical action was pending against virtually the same party. After extensive pretrial activity, the district court dismissed five of the claims and remanded the balance of the action to the superior court. After the action was remanded from federal court, defendants moved to compel arbitration pursuant to customer agreement.

The superior court denied the motion to compel, finding the broker waived any right to arbitrate.

On appeal, the Court of Appeals rejected the defendants' argument noting that defendants failed to seek arbitration during any of those procedures and, thus, manifested a clear intent to utilize the judicial process rather than seek non-judicial resolution for arbitrable issues. Accordingly, the Court held that the evidence supported findings that: (i) the broker had knowledge of its right to compel arbitration and (ii) the broker engaged in acts inconsistent with that right. *Id.* at 171-72.

Likewise, in *Riverside Publishing, supra*, Riverside initiated its action against Mercer for breach of a settlement agreement in August 2011. Several days later, Riverside filed a motion for a temporary restraining order and preliminary injunction. The court denied Riverside's motion and several days later, Riverside made an arbitration demand. The district court held that Riverside took acts that were inconsistent with its arbitration right when it filed the lawsuit and sought injunctive relief. In explaining its conclusion, the court noted that "neither filing a lawsuit covering an arbitration dispute nor seeking injunctive relief in that suit are *per se* inconsistent with the right to compel arbitration." But, the court held, "Riverside did not file suit or seek injunctive relief *in aid of arbitration*. Instead, it filed suit and requested injunctive relief without

acknowledging the arbitrability of its claims.” In support of this conclusion, the court cited the fact that Riverside’s complaint was wholly silent as to the parties’ arbitration agreement, Riverside’s request for actual damages, its demands for jury trial, and its request for injunctive relief through the time of *trial*. These acts “alone,” the court held, were “sufficient to satisfy the first two prongs of the waiver-of-arbitration inquiry.” 829 F. Supp. 2d at 1020-21. The court also held that defendants were prejudiced by Riverside’s actions. *Id.* at 2021-22. Accordingly, Riverside’s motion to compel arbitration was denied.

Also, in *Steele, supra*, this Court held that an employer waived his right to arbitrate a former employee’s discrimination claim after the employee engaged in litigation for ten months. The employer did not assert his right to arbitrate during any of the “obvious opportunities” including in the answer, at the time the employee amended his complaint, at the time of substitution of counsel, at the time the case was assigned to an individual calendar, or at the time of filing a confirmation of joinder. 85 Wn. App. at 853-55. Additionally, the employer engaged in “overly aggressive” discovery. *Id.* at 854. On the whole, the Court found that the employer’s conduct demonstrated that he was “weigh[ing] his options.” *Id.* at 855-56. The court held that under the totality of the circumstances the employer’s actions were inconsistent with arbitration and affirmed the

trial court's finding that the employer waived its right to arbitrate the dispute. *Id.* See also *Ives v. Ramsden*, 142 Wn. App. 369, 384, 174 P.3d 1231 (2008) (defendant "answered the complaint, engaged in extensive discovery, deposed witnesses, and answered interrogatories")

These cases demonstrate the type of conduct that supports a trial court's finding of waiver. The right to arbitration must be timely invoked. As discussed below, Tulip did not timely invoke his right to arbitration.

2. The Evidence Submitted by Respondents Establish Knowledge and Inconsistent Action.

On February 5, 2005, Tulip signed the PEAP. Tulip was therefore aware of the arbitration agreement. (CP 12-14; 251-52) Nothing in the record contests this fact. The first prong of the waiver test is satisfied.

The evidence before the trial court likewise establishes that between September 2007 and May 2011 Tulip's actions were inconsistent with the terms of the PEAP and his right to arbitration. First, under the express terms of the PEAP, the parties agreed to arbitrate all claims relating to Tulip's employment and that Tulip would give his employer notice of his desire to arbitrate within one year of the date he knew or should have known of the facts giving rise to the claim. (CP 13)

Tulip knew or should have known of the facts giving rise to the claims asserted here no later than September 2007 when Tulip stopped working for Respondent SCI Washington Funeral Services, Inc. (CP 493

¶ 11) At the very minimum, Tulip knew no later than December 14, 2009, when he filed his Notice of Consent to Become a Named Party in *Stickle* (“Consent”). (CP 112-15) Tulip’s failure to request arbitration within one year after knowledge of his claim is inconsistent with his current demand to arbitrate and the terms of his agreement. Thus, even without the lawsuits, there is substantive evidence to support a finding of waiver.

Second, Tulip acted inconsistently with his current position by participating in *Stickle*, *Bryant*, and *Emmick*. The precise nature of Tulip’s claims is immaterial. The question is whether those claims relate to Tulip’s employment. If the claims relate to his employment, the PEAP mandates arbitration. The evidence before the trial court conclusively established that instead of seeking arbitration, Tulip elected litigation. That decision is inconsistent with the terms of the PEAP and establishes that Tulip waived his rights under the PEAP.

The details of Tulip’s involvement are discussed in detail above, and will not be repeated here. However, the record before the trial court establishes that there is no difference between the matters Tulip

unsuccessfully litigated in the previous actions (*Stickle/Bryant/Emmick*) and the matters which he now seeks to arbitrate.⁶

Because the FLSA provides the exclusive remedy for enforcement of rights created under the FLSA, Tulip cannot circumvent this provision by asserting equivalent state law claims (in court or in arbitration) in addition to his *Stickle* FLSA claims, particularly when Tulip is seeking the very same remedies in both actions. *See Roman v. Maietta Const., Inc.*, 147 F.3d 71, 76 (1st Cir. 1998) (“the FLSA is the exclusive remedy for enforcement of rights created under the FLSA.”). This is an improper attempt to forum shop, in the hope of achieving a “second chance” to re-litigate significant substantial issues that Tulip lost in the previous court action. *See Welborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 637 (7th Cir. 2002) (“[W]e do not want parties to forum shop, taking a case to the courts and then, if things go poorly there, abandoning their suit in favor of arbitration.”). Tulip’s prolonged decision to litigate, not arbitrate, has resulted in a waiver of his right to proceed in arbitration.

In fact, the District Court for the Northern District of California in another related action *Bryant et al. v. Service Corporation International et*

⁶ This is established by comparing the *Stickle* complaint (CP 785-834) and *Emmick* complaint. (CP 608-659 at ¶¶ 250-266, 270)

al., Case No. 08-01190-SI, found a waiver in these exact circumstances. (CP 200-04) There, plaintiffs asserted state wage and hour class action against Respondents. After three years of discovery and active litigation, the court denied plaintiffs' motion for Rule 23 class certification. Thereafter, like Tulip seeks here, individually named plaintiffs sought to compel Respondents to arbitrate. In response to their motion to compel arbitration, the court found that plaintiffs acted inconsistently with a known right by litigating for three years, which caused Respondents prejudice by the time and expense of litigating for that time period. (*Id.* 203: 9-13) Similar reasoning applies here, as Tulip has waived any right to arbitrate his claims by participating in *Stickle* for years.

3. The Evidence Submitted by Respondents Establish Prejudice.

Prejudice is dependent on the varying circumstances of an individual case. *Steele*, 85 Wn. App. at 858. "Prejudice . . . *can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense.*" *Id.* at 859 (quoting *Com-Tech Assoc. v. Computer Assoc. Int'l, Inc.*, 938 F.2d 1574, 1576 (2d Cir. 1991) (emphasis in the original)). Moreover, forum shopping after failing to succeed in another venue evidences prejudice. *See Riverside*, 829 F. Supp. 2d at 1022 (citing other

courts' decisions "taking a dim view of litigants who seek arbitration after an unfavorable result in litigation").

Here, the record amply shows the prejudice Respondents have suffered. Tulip joined the *Stickle* action on December 14, 2009, yet he did not demand arbitration until May 19, 2011 – 18 months later and after he was dismissed from the *Stickle* action on April 14, 2011. (CP 112-15; 16-17; 198 at Dkt. 1995) Because of the sheer amount of litigation the parties engaged in during that one-year period, Respondents incurred significant litigation fees and costs to defend *Stickle* (and the case at bar). (CP 228 at ¶ 15) Respondents were further prejudiced because they were required to participate in discovery that would have been avoided in arbitration, such as the interrogatories and depositions described above. (*Id.*) Finally, Tulip's belated decision to compel arbitration is evidence of his desire to forum shop now that the *Stickle* action has been dismissed. Tulip's actions have clearly prejudiced Respondents.

Because Tulip had knowledge about the arbitration agreement, acted inconsistently with arbitration, and prejudiced Respondents, the trial court's Order denying Tulip's Petition to arbitrate should be affirmed.

4. Tulip's Attempts at Class Certification Support a Finding of Waiver.

In a factually similar situation, one court held that attempts at class certification resulted in a waiver of individual rights to arbitrate. *See*

Parler v. KFC Corp., 529 F. Supp. 2d 1009, (D. Minn. 2008); *see also Davidson v. PDS Technical Services, Inc.*, 2010 WL 4639311 (M.D. Fla. Nov. 8, 2010) (same). In *Parler*, current and former assistant restaurant managers brought a collective action claiming their employer had violated the FLSA and various state wage and hour laws by wrongly classifying and paying them as salaried managers, rather than hourly employees. The court conditionally certified a class and then later granted a motion to decertify. 529 F. Supp. 2d at 1011. Like Tulip here, the plaintiffs in *Parler* had also filed and participated in similar lawsuits in various other federal courts around the country, however, after decertification some individuals sought to force KFC into arbitration. KFC moved for an order declaring that those plaintiffs had waived their right to arbitrate and to enjoin them from proceeding with arbitration. *Id.*

The court analyzed KFC's waiver argument using the Ninth Circuit *Hoffman* three-prong test. *Id.* at 1014-15. Having conceded knowledge of the arbitration provision by seeking to invoke it, the court focused its analysis on the second prong: whether the plaintiffs had acted inconsistently with their right to arbitrate. *Id.* The court found that the plaintiffs had substantially invoked the litigation machinery by filing the lawsuit and/or opting into the litigation, and filing various motions for relief with the court. *Id.* By doing so, plaintiffs' actions demonstrated that

their first choice forum was federal court and the court admonished, “Now that the litigation has not gone as they hoped, plaintiffs want to turn to their second choice forum, arbitration. Filing a case in federal court and seeking arbitration only after the litigation goes badly is acting inconsistently with the right to arbitrate.” *Id.* That same assessment applies with equal force, if not more so, to this action.

The court in *Parler* went on to find that participating in the class action was prejudicial to KFC because individual class members are responsible for the entire class, and through such participation, KFC was forced to participate in litigation, motion practice and discovery that it would not have had to be involved with if the case had initially been resolved in arbitration. *Id.* at 1015. As outlined above, Tulip has similarly “substantially engaged the litigation machinery” by pursuing Respondents in *Stickle*, *Bryant* and *Emmick* over the last four years.

5. Tulip’s State And Federal Claims Are Substantially Similar.

Despite Tulip’s actions between September 2007 (end of his employment) and May 2011 (demand for arbitration) which are reflected amply in the record, he clings to what he describes as the “well-

established rule” that he must have actually litigated the **same claims** that he now seeks to arbitrate. (Opening Brief, pp. 11-14)⁷

This argument is premised on the assumption that a party can only waive the right to arbitrate by asserting the **same** claim in prior litigation. As noted above, however, whether a party has waived his or her right to arbitrate is not an objective consideration. This Court has cautioned that each case must be examined in context and that there is no single test to determine waiver of arbitration. *Hill v. Garda CL Northwest, Inc.*, 169 Wn. App. 685, 381 P.3d 334 (2012); *Steele*, 85 Wn. App. at 853.

Also, Tulip ignores the fact that filing any lawsuit concerning his employment violates the PEAP. The PEAP specifically provides that binding arbitration is the exclusive remedy for “all disputes relating to any aspect of Employee’s employment with the company.” (CP 12, ¶ 1)

⁷ Moreover, state and federal claims arising from the same conduct are essentially a single cause of action that cannot be split. *See, e.g., Boccardo v. Safeway Stores, Inc.*, 184 Cal. Rptr. 903, 911-12 (Cal. Ct. App. 1982), stating that when a plaintiff brings suit in federal court under the federal antitrust laws, and the federal court would have had supplemental jurisdiction over claims brought under state antitrust laws, judgment entered by the federal court bars a party bringing in a subsequent suit in state court for the state law claims, even though he did not raise those claims in the federal action); *McCaffrey v. Wiley*, 103 Cal.App.2d 621, 623, 230 P.2d 152, 154 (1951) (finding it well settled that a party may not split a single cause of action, using the same obligation as the basis of separate suits).

Under Tulip's theory, a party to an agreement like the PEAP can file a lawsuit asserting one or more legal claims for relief. If that lawsuit is unsuccessful (short of a final judgment), the party would be free to seek arbitration on an alternative legal claim not included in the lawsuit, but based upon the same facts.⁸ The party could avoid a claim of waiver by making the same arguments presented here, thus taking a second bite at the apple while seeking the same damages. It is respectfully submitted that there is no legal support for such a result.

Nor is there a "well-established rule that in order to support a finding of waiver, it must be established that the parties seeking arbitration previously litigated *the same claims* that the party now seeks to arbitrate." (Opening Brief, p. 13, emphasis in original) The case law on which Tulip relies is easily distinguishable from this case and does not create a "well-established rule."

For example, *MicroStrategy v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001), considered three separate actions and the claims involved with

⁸ This could happen by the filing of a lawsuit alleging a tort and later seeking to arbitrate a contractual claim, based on the same facts. Also, it could be like this case where an individual, based on one set of operative facts, has both federal and state claims. For example, under Tulip's theory a party can file a federal lawsuit for sex discrimination under Title VII and if unsuccessful, seek to arbitrate her state law discrimination claim.

each. The court determined that the state law claims, which concerned the *disclosure of trade secrets*, were completely different than the federal *discrimination* claims at issue. *Id.* Second, the first claim was filed by the employer (trade secrets) and the other (discrimination) by the employee. Thus, the court was unable to “support a finding that *MicroStrategy* waived its right to arbitrate the unrelated [state law] claims.” *Id.*

Equally important were the terms of the arbitration agreement in *MicroStrategy*. The agreement included a paragraph requiring plaintiff to arbitrate “[a]ny controversy or claim arising out of or relating to this Employee Handbook, procedures delineated in it, or the employment relationship otherwise cognizable at law and that could be the subject of legal action.” *Id.* at 246. The employer filed the lawsuits that the plaintiff used to claim waiver. The arbitration agreement did not require the employer to arbitrate its claims against the employee.

Similarly, in *Doctor’s Associates, Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997), the court did not find that the plaintiff waived an arbitration provision by filing *collections-related eviction proceedings* where the later action in which plaintiff sought to compel arbitration was factually distinct and related to *fraud and breach of contract* claims.

Moreover, in *Doctor’s* there were two contracts. First, when purchasing franchises each plaintiff executed a standard franchise

agreement that required the parties to arbitrate claims arising under the agreement. The plaintiffs also entered into a standard sublease with a leasing company affiliated with defendant. The first action was brought under the sublease agreement that did not contain an arbitration provision. The second lawsuit, which defendant sought to compel arbitration, arose from the franchise agreement.

Finally, *Subway Equipment Leasing Corporation v. Forte*, 169 F.3d 324 (5th Cir. 1999), is no more compelling. There, the court did not find waiver where the initial action related to obligations under a contract for leasing equipment and real estate, but the latter action related to a wholly separate contract not previously at issue. *Id.* at 328.

6. Tulip's Claims Were Judicially Addressed.

Tulip also argues that because the merits of *Stickle* were not decided, and only class certification was addressed, he did not waive his right to arbitrate. However, the merits of Tulip's claims do not need to be adjudicated to judgment because:

[W]hen a party fails to demand arbitration during pretrial proceedings, and in the meantime engages in pretrial activity inconsistent with an intent to arbitrate, the party opposing a motion to compel arbitration may more easily show its position has been compromised, *i.e.*, prejudiced.

Kinsey, 53 Wn. App. at 170 (citing *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161 (5th Cir. 1986)). This is because “[t]he waiver

determination necessarily depends upon the facts of the particular case and is not susceptible to bright line rules.” *Steele*, 85 Wn. App. at 853. Thus, Tulip’s actions throughout the year he participated in *Stickle*, including his use of various discovery vehicles, evidence his desire not to arbitrate.

Tulip’s reliance on *St. Agnes Medical Center v. Pacificare of California et al.*, 31 Cal.4th 1187, 8 Cal.Rptr.3d 517 (Cal. 2003) and *Doers v. Golden Gate Bridge, Highway and Transportation District*, 23 Cal.3d 180, 151 Cal.Rptr. 837 (Cal. 1979), for the proposition that waiver does not occur until the arbitrable issues have been litigated to judgment is not only non-binding on this Court, but unavailing. (Opening Brief, p. 14) The issue presented in *St. Agnes* was whether repudiating a contract categorically precludes a party from invoking an arbitration clause. *Id.* at 1192. The *St. Agnes* Court decided no – repudiating a contract does not automatically preclude a party from invoking an arbitration clause. *Id.*

The holding in *Doers* is equally limited: “We hold that the mere filing of a lawsuit does not constitute a waiver of the right to arbitrate.” 23 Cal.3d at 183. Indeed, the *Doers* court noted in a footnote that it does “not

preclude the possibility that waiver could occur prior to a judgment on the merits if prejudice could be demonstrated.” *Id.* at 188, n.3.⁹

Here, Tulip has done more than simply file a lawsuit. The record shows that for over a year from the time he filed his Consent, Tulip participated substantively in *Stickle* as it relates to his overtime wage claims, which includes: (i) Respondents taking over 60 depositions; (ii) issuing 1,000 sets of interrogatories; (iii) reviewing over 740 answers to that discovery, including Tulip’s answers thereto; and (iv) filing motions to compel compliance with the interrogatories because certain of the *Stickle* defendants submitted defective interrogatory answers. (CP 177-92 at Dkts. 1847-1953; 145, 147-48 at Dkts. 1484, 1503; 227-28 at ¶¶ 10-13) Accordingly, Tulip’s arbitrable claims have been judicially addressed.

7. Reynolds Does Not Support Tulip’s Position.

Tulip also argues that Respondents have somehow conceded that his claims can be compelled into arbitration. (Opening Brief , p. 16-17)

⁹ Finally, Tulip cites to *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2011 U.S. Dist. LEXIS 138930 (N.D. Cal. Dec. 2, 2011), and argues that it is not inconsistent to litigate or arbitrate individual claims after class certification is denied. *Beauperthuy* is inapposite because it is not a waiver of arbitration case. Further, the *Beauperthuy* court dismissed all class members *except* for the named plaintiffs and gave them 60 days to decide whether they wanted to proceed on an individual basis or seek arbitration. *Id.* at *9. Here, the *Stickle* court dismissed Tulip and did not give him a choice about how to proceed; the action was fully dismissed.

This is simply incorrect and a mischaracterization of Respondents' filings in *Reynolds*. Respondents in *Reynolds* did not seek an order compelling arbitration. (CP 495-6 at ¶ 16). Rather, Respondents requested dismissal of the *Reynolds* complaint for lack of subject matter jurisdiction—nothing more. *Id.* Plaintiffs initially opposed the Motion to Dismiss, but later withdrew their objection, in effect agreeing to the dismissal. *Id.* Further, in its dismissal order, the Indiana District Court specifically clarified that it had not ordered or compelled arbitration as, “There was no motion to compel arbitration before the Court.” *Id.* Thus, Respondents' actions are not inconsistent with pleadings filed in *Reynolds*.

Contrary to Tulip's assertion, judicial estoppel does not apply in this context, as none of the *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), factors are met. First, as detailed above, Respondents' position in *Reynolds* is consistent with their position now. Second, Respondents did not persuade the *Reynolds* court into accepting any argument, as plaintiffs withdrew their objection to Respondents' Motion to Dismiss, and conceded Respondents' position. (CP 495-6 at ¶ 16) Because plaintiffs themselves sought dismissal, no unfair advantage resulted in favor of Respondents, and the third prong is not met. The *Reynolds* court made no substantive ruling on Respondents' Motion to Dismiss. *Id.*

Significantly, if prior pleadings in *Reynolds* have import or control the present inquiry, Tulip's counsel lauded the extensive case law supporting a party's waiver of an arbitration provision due to the party's delay in compelling arbitration, which was filed by plaintiffs before consenting to dismissal of the *Reynolds* action. *Id.* Therein, plaintiffs specifically argued that Respondents had waived any right to arbitrate by defending related litigation in numerous courts for many years, indicating an intention to litigate not arbitrate. *Id.* Accordingly, if Tulip's argument as to judicial estoppel is accepted (and it should not be), such principles apply equally to Tulip's counsel's concession that any right to arbitrate this dispute has long since been waived. *Id.*

B. Alternatively, Tulip Has Failed to Meet His Burden of Proving that Service Corporation International, SCI Funeral and Cemetery Purchasing Cooperative, Inc., SCI Western Market Support Center, L.P., Jane D. Jones, or Thomas Ryan Agreed to Arbitrate Tulip's Claims.¹⁰

Tulip fails to meet his burden in proving that a valid arbitration agreement exists between him and Respondents Service Corporation International, SCI Funeral And Cemetery Purchasing Cooperative, Inc.,

¹⁰ While the record is clear that Tulip waived his right to arbitrate and the Court does not need to consider the issue as to whether a valid arbitration exists, Respondents set forth the following argument in response to Tulip's argument in his Opening Brief at pp. 7-11.

SCI Western Market Support Center, L.P., Jane D. Jones, or Thomas Ryan (the “Non-Signatory Respondents”).

As set forth above, Tulip and Respondents agreed that the FAA governs this action. (CP 5). Thus, when considering a motion to compel arbitration, the court applies a standard similar to the summary judgment standard of Fed. R. Civ. P. 56. Specifically, in considering a motion to compel arbitration which is opposed on the ground that there is no valid agreement to arbitrate, the court should give to the opposing party the benefit of all reasonable doubts and inferences that may arise. Only when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter in such an agreement. *Johnston v. Beazer Homes Tex., L.P.* 2007 U.S. Dist. LEXIS 20519, *6-7 (N.D. Cal. March 2, 2007); *see also Maganallez v. Hilltop Lending Corp.*, 505 F. Supp. 2d 594, 599-600 (N.D. Cal. 2007) (providing that a party seeking to compel arbitration bears the burden of proving the existence of a valid and enforceable arbitration agreement by a preponderance of the evidence).

Tulip offers two arguments: (i) the term “Company” as used in an arbitration agreement includes all of the Respondents; and (ii) judicial and equitable estoppel bar the Non-Signatory Respondents from asserting that

they are not bound by the Agreement. Opening Brief, pp. 8-9. For the following reasons, Tulip’s contentions fall far short of meeting his burden.

1. Respondents Are Not The Company’s “Affiliates.”

Tulip refers to the answer Respondents submitted in connection with his Petition wherein Respondents admitted “that SCI Washington Funeral Services, Inc. has utilized documents such as” the document referenced in paragraph 7 of Tulip’s Petition – the PEAP. (CP 88 at ¶ 7) Then, without providing any definition as to whom “affiliates” includes, Tulip concludes that all Respondents are bound by the Arbitration Agreement because of a single phrase in the agreement providing that “disputes relating to any aspect of Employee’s employment with the Company shall be resolved by binding arbitration,” which includes “the Company, its affiliates or their respective officers, directors, employees or agents” (Opening Brief, p. 9; *also* CP 12 ¶ 1) Tulip’s contention that all Respondents are bound is unsupported by the failure to identify or define any of the so-called “affiliates” in the agreement.

More importantly, as a matter of law, Tulip cannot claim that the Non-Signatory Respondents are “affiliates” of SCI and are therefore bound by the agreement. *DK Joint Venture I v. Weyand*, 649 F.3d 310, 318 (5th Cir. 2011), is instructive. In *Weyand*, the plaintiffs filed arbitration demands with the AAA alleging that defendants – including the

CEO and CFO, 15 corporations that they controlled, and two other individuals – committed fraud, breach of contract, and breaches of fiduciary duty. *Weyand*, 649 F.3d at 313. In seeking arbitration, the plaintiffs relied on arbitration provisions that were contained in contracts between plaintiffs and *some* of the defendant corporations. *Id.* The plaintiff also filed two petitions in state court alleging the same and seeking to compel *all* defendants to arbitrate the dispute. *Id.* The district court ordered that all of the defendants were bound by the arbitration agreements and awarded the plaintiffs damages. *Id.*

The corporate officers appealed whether, in their personal capacities, they were bound by the arbitration agreements that were entered into by the defendant corporations, of which they were the CEO and CFO at the time. *Id.* The appellate court held that, under state and federal principles of contract and agency law, the CEO and CFO were not personally bound by the contract entered into by the corporation. *Id.* at 314-15.

The plaintiffs in *Weyand* also argued that the CEO and CFO were bound by the arbitration clause because the agreements referred to “*affiliates*.” *Id.* at 318 (emphasis added). The court rejected this argument, stating that even if the CEO and CFO could be considered “*affiliates*,” the corporation did not have the authority to bind them

personally. *Id.* at 319. In doing so, the court again referred to traditional agency principles. *Id.* Unless the agent expressly agrees to be personally bound, the only other way to bind the agent is if the agent is made a party to the contract by the agent's principal acting on the agent's behalf with actual, implied, or apparent authority. *Id.*

The *Weyand* court held that the plaintiffs had offered no evidence, as here, to show that the defendant corporations (i.e. the principals) had any type of authority to bind the CEO and CFO (the agents) personally. *Id.* Absent such authority, the court held that the language about the "affiliates" was insufficient to make the arbitration provision binding on the CEO and CFO. *Id.*; see also *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 541-42 (5th Cir. 2001) (stating that the denial of the benefit of mandatory stay provision to non-signatories has been grounded in the recognition that the non-signatory's litigation with an arbitrating party cannot be referred to in arbitration). The same is true here.

2. Judicial And Equitable Estoppel Are Inapplicable.

Tulip argues that Respondents have somehow conceded that his claims can be compelled into arbitration by virtue of certain, unrelated actions – *Reynolds* and *Green*. (Opening Brief, pp. 10-11) This is simply incorrect and a mischaracterization of the filings. As to *Reynolds*, Respondents addressed this issue above and will not repeat it here.

SCI's filings in *Green v. Service Corporation International*, in the U.S. District Court in the Southern District of Texas, Case No. 06-cv-00833, likewise do not support Tulip. In *Green*, the defendant was attempting to arbitrate claims that the plaintiff had expressly agreed to submit to that resolution procedure. There was no argument of a waiver of that right by the parties through active litigation, like Tulip has done here by litigating extensively in *Stickle*.

C. Tulip Is Not Entitled to an Award of Attorneys' Fees.

Tulip has failed to cite to any legal authority or portions of the record permitting an award of attorneys' fees "on his motion and on this appeal." (Opening Brief, pp. 18-19) His request for fees should be denied. RAP 18.1; also *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) ("[J]udges are not archaeologists" and should not be forced to make litigant's arguments). Should the Court affirm the trial court's Order, Respondents are entitled to costs on appeal pursuant to RAP 14.2.

V. CONCLUSION

For the reasons set forth above, the trial court's Order Denying Tulip's Petition To Compel Arbitration And Motion For Summary Judgment On Petition To Compel Arbitration should be affirmed.

RESPECTFULLY SUBMITTED on February 21, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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