

72090-2

72090-2

No. 72090-2

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

SQUARE TWO FINANCIAL CORP., a Delaware corporation,

Appellant,

CACH, LLC., a Colorado limited liability company,

Defendant.

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

BRIEF OF APPELLANT SQUARETWO FINANCIAL CORP.

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

Handwritten notes and stamps on the right margin, including a large 'X' and some illegible text.

ORIGINAL

Table of Contents

- I. INTRODUCTION 1
- II. ASSIGNMENTS OF ERRORS 1
- III. STATEMENT OF THE CASE 2
 - A. SquareTwo Is the Parent of CACH..... 2
 - B. The Arbitration Clause Agreed to by Consumers Benefits Assigns and Parent Companies 2
 - C. Consumers Defaulted and Their Accounts Were Assigned to CACH 3
 - D. The Underlying Litigation..... 4
 - E. The Lower Court Denies SquareTwo’s Motion to Compel Arbitration 4
- IV. ARGUMENT 5
 - A. STANDARD OF REVIEW..... 5
 - B. SQUARE TWO IS ENTITLED TO INVOKE ARBITRATION..... 5
 - 1. As CACH’s Parent, SquareTwo Is a Third-Party Beneficiary Under the Arbitration Clause 5
 - C. IF CACH IS ENTITLED TO ARBITRATION, THE DOCTRINES OF ESTOPPEL AND AGENCY ENTITLE SQUARETWO TO ARBITRATE, TOO..... 8
 - D. SQUARETWO DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION 11
 - 1. The Claims Here and the Collection Claims Are Not the Same and, Therefore, Cannot Constitute Waiver of the Right to Arbitration..... 11
 - 2. Assuming CACH Waived Its Right to Arbitration, that Waiver Is Not Imputable to SquareTwo, a Distinct Company. 13
 - 3. The Plaintiffs Cannot Establish Prejudice 15
- V. CONCLUSION 18

Table of Authorities

Allied-Bruce Terminix Cos. V. Dobson, 513 U.S. 265, 277 (1995)..... 5

accord PRM Energy Sys. v. Primenergy, L.L.C., 592 F.3d 830, 834 (8th
Cir. 2010)..... 6, 9, 10

American Int’l Group, Inc. v. Cornerstone Bus., Inc., 872 So.2d 333, 336
(Fla. 2004)..... 14

Anderson v. Sect.11, Inc., 28 Wn. App. 814, 818, 626 P.2d 1027 (1981) 13

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629-31 (2009) 6

Barton Enters, Inc. v. Cardinal Health, Inc., No. 4:10 CV 324 DDN, 2010
WL 2132744, at *4 (E.D. Mo. May 27, 2010)..... 9, 10

Cage v. CACH, C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wn.
May 22, 2014)..... 11

CD Partners, LLC v. Grizzle, 424 F.3d 795, 798-99 (8th Cir. 2005) 9

Dean Witter Reynolds, Inv. v. Byrd, 470 U.S. 213, 217 (1985)..... 10

*Droplets, Inc. v. E*Trade Fin. Corp.*, 939 F.Supp.2d 336, 347 (S.D.N.Y.
2013) 6

Fields v. Howe, No. IP-01-1036-C-B/S, 2002 WL 418011, at *8 (S.D. Ind.
Mar. 14, 2002)..... 11

Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986) ... 15,
17

Garcia v. Huerta, 340 S.W.3d 864, 869-70 (Tex. 2011)..... 14

Grayson v. Nordic Constr. Co., 92 Wn.2d 548, 552-53, 599 P.2d 1271
(1979)..... 12

Hodson v. Javitch, Block & Rathbone, LLP, 531 F.Supp.2d 827, 831 (N.D.
Ohio 2008) 11

Hooper v. Advance Am., Cash Adv. Ctrs. of Mo, Inc., 589 F.3d 917, 923
(8th Cir. 2009)..... 15

<i>In re Advanta Bank Corp.</i> , Nos. 11-07-00276-CV, 11-07-00315-CV, 2008 WL 615921, at *2 (Tex. App. Mar. 6, 2008)	11
<i>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</i> , 863 F.2d 315 (4 th Cir. 1988)	8
<i>Kelly v. Golden</i> , 352 F.3d 344, 349 (8 th Cir. 2003).....	15
<i>Lemon Drop Props v. Pass Marianne LLC</i> , 73 So.3d 1131, 1136 (Miss. 2011)	14
<i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 361, 662 P.2d 385 (1983).....	6
<i>McClure v. Davis, Wright and Tremaine</i> , 77 Wn. App. 312, 890 P.2d 466 (1995).....	7
<i>Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.</i> , 460 U.S. 1, 24 (1983).....	5, 17
<i>NCR Credit Corp. v. Underground Camera, Inc.</i> , 581 F. Supp. 609, 612 (D. Mass. 1984).....	13
<i>Nicholas v. KBR, Inc.</i> , 565 F.3d 904, 910 (5 th Cir. 2009).....	16
<i>Perry Homes v. Cull</i> , 258 S.W.3d 580, 597 (Tex. 2008).....	16
<i>Radian Ins., Inc. v. Deutsche Bank Nat. Trust Co.</i> , 638 F. Supp.2d 443, 454 (E.D. Pa. 2009).....	13
<i>Rena-Ware Dist., Inc. v. State</i> , 77 Wn.2d 514, 463 P.2d 622 (1970)	13
<i>Riensch v. Cingular Wireless LLC</i> , Nos. C06-1325 TSZ, C09-106 TSZ, 2013 WL 951012, at *5 (W.D. Wn. Mar. 12, 2013).....	10
<i>Sam Reisfeld & Son Import Co. v. S.A. Eteco</i> , 530 F.2d 679, 681 (5 th Cir.1976)	8
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781, 797, 225 P.3d 213 (2009).....	5
<i>Schwartz v. CACH, LLC</i> , No. 13-12644-FDS, 2014 WL 298107, at *3 (D. Mass. Jan. 27, 2014).....	11
<i>Shell Oil Co. v. Livingston Fertilizer & Chem. Co.</i> , 9 Wn. App. 596, 600, 513 P.2d 861 (1973).....	12

I. INTRODUCTION

The issue in this appeal concerns the right of the appellant, SquareTwo Financial Corp., (“SquareTwo”), to arbitration of consumer-protection-act claims asserted by Jennifer Wiese and Candy Bradison (“Consumers”).

The court below held that SquareTwo waived its contractual right to arbitration because its subsidiary, CACH, LLC (“CACH”), commenced collection lawsuits against Consumers back in 2010 and 2011.

The lower court erred. Litigation of the collection lawsuits cannot waive SquareTwo’s right to arbitration. CACH is a separate legal entity and, moreover, SquareTwo was not a party to that litigation. The collection claims are also different from the consumer-protection claims being asserted now. And there is no prejudice to Consumers by having to arbitrate their new claims against SquareTwo.

SquareTwo is entitled to arbitration of the claims against it. It therefore asks that the lower court’s decision be reversed and that the claims be stayed so they can be arbitrated.

II. ASSIGNMENTS OF ERRORS

Did the Trial Court err in finding that SquareTwo waived its right to arbitration of the consumer-protection-act claims based on collection litigation between Consumers and CACH in 2010 and 2011?

III. STATEMENT OF THE CASE

A. SquareTwo Is the Parent of CACH

SquareTwo is the sole member of CACH and is its parent company. CP 4-5.

B. The Arbitration Clause Agreed to by Consumers Benefits Assigns and Parent Companies

Consumers used credit cards issued by FIA Card Services, N.A. (“FIA”). CP 23-24. To do so, Consumers agreed to the terms of cardholder agreements (“agreements”). CP 23-24. The agreements contained a provision entitled Arbitration and Litigation (“arbitration provision”) that provided that Consumers agreed to arbitrate “any claim or dispute ... arising from or relating in any way to this Agreement ... (whether under a statute, in contract, tort, or otherwise ...).” CP 67, 74. The arbitration provision also provided that Consumers would not commence arbitration on a class-wide basis or serve as class representative. CP 67, 74. The arbitration provision added that the right to arbitrate extended to the FIA’s “parent, subsidiaries, affiliates ...” CP 69, 74.¹

¹ SquareTwo is in the process of supplementing the Clerk’s Papers to include a Second Declaration of Jay Mills in Support of Defendant CACH’s Motion to Compel Arbitration & Dismiss (“Second Declaration”). SquareTwo relied on that declaration in its motion to the lower court but inadvertently failed to include it among the Clerk’s Papers it designated for filing with this Court. The Second Declaration shows that Candy Bradison’s agreement with FIA contained the same We May Sell Your Account provision as agreed to by Jennifer Wiese. At present, the Clerk’s Papers contain only the

The agreements contained another provision entitled We May Sell Your Account, which stated that FIA could “sell, assign or transfer your account” and that the “person or entity to whom we make any such sale, assignment or transfer shall be entitled to all of our rights” CP 66.

C. Consumers Defaulted and Their Accounts Were Assigned to CACH

Consumers failed to pay their FIA credit card bills. CP 24. FIA “charged off” the accounts and assigned them, pursuant to two identical bills of sale, to CACH. The bills of sale stated that FIA “sells, transfers, assigns, sets-over, quitclaims and conveys to CACH, LLC ... all of [FIA’s] right, title and interest in and to each of the loans ...” CP 77, 83.

In 2010 and 2011, CACH commenced suit against Ms. Bradison and Ms. Wiese, respectively, to collect the amounts they owed on their FIA credit cards and obtained default judgments against both of them. CP 7-8, 25, 88-89, 91-92. Consumers did not challenge these judgments until this action was filed in 2013.

first Declaration of Jay Mills in Support of Defendant CACH’s Motion to Compel Arbitration & Dismiss, which includes the arbitration provision of the cardholder agreement with Ms. Bradison, but not the We May Sell Your Account provision. The We May Sell Your Account provision of Ms. Bradison’s agreement is on page 28 of Exhibit A to the Second Declaration of Jay Mills in Support of Defendant CACH’s Motion to Compel Arbitration & Dismiss that will be filed shortly with this Court.

D. The Underlying Litigation

On September 25, 2013, more than two years after the defaults by Consumers, they commenced litigation against CACH and SquareTwo, among others. CP 1. They alleged that, as a debt buyer, CACH was required by Washington law to obtain a license as a collection agency and that commencement of the collection lawsuits in 2010 and 2011 by CACH without a license violated the state's consumer protection act. CP 8-9, 11, 17-18. Consumers allege that, as sole member of CACH, SquareTwo is responsible for CACH's actions and liable for CACH's conduct as the alter ego of CACH. CP 4-5, 9-12, 17-19.

E. The Lower Court Denies SquareTwo's Motion to Compel Arbitration

SquareTwo filed a motion to compel arbitration and to dismiss or stay the class action claims. CP 99-110. Consumers opposed the motion. CP 111-25. While the motion was pending, the lower court denied a motion previously filed by CACH, holding that CACH had waived its right to arbitration when it sued the Consumers in 2010 and 2011.² At the hearing on the motion by SquareTwo, the lower court requested additional briefing on the issue of whether the litigation waived SquareTwo's right to arbitration. Transcript of Proceedings at 59. The parties subsequently

² CACH has appealed this decision and this Court is presently considering this appeal under Appeal No. 71806-1.

briefed the issue of waiver. CP 165-72, 175-79. The lower court held that SquareTwo had waived its right to arbitration, ruling: “Square Two is the parent company of CACH and CACH’s waiver in this case is imputable to Square Two.” CP 189-90.

IV. ARGUMENT

A. STANDARD OF REVIEW

A trial court’s decision on the arbitrability of a matter is reviewed *de novo* by this Court. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

B. SQUARE TWO IS ENTITLED TO INVOKE ARBITRATION

1. As CACH’s Parent, SquareTwo Is a Third-Party Beneficiary Under the Arbitration Clause

The Federal Arbitration Act is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce. *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 277 (1995). The Supreme Court has held that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). Where there is any ambiguity about the scope of an arbitration provision, disputes should always be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp.*, 460 U.S. at 25-26.

The Supreme Court has ruled that, under the Federal Arbitration Act, whether a nonparty to an agreement containing an arbitration provision can compel arbitration is governed by state law. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629-31 (2009). The Supreme Court held there that non-signatories could compel arbitration based on state law principles, including third-party beneficiary theories. *Id.* at 631 (internal citations and quotations omitted); *accord PRM Energy Sys. v. Primenergy, L.L.C.*, 592 F.3d 830, 834 (8th Cir. 2010) (confirming the right of a non-signatory to a contract to enforce an arbitration clause based on state law grounds).

Under Washington law, the law of third-party beneficiaries is well defined:

The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.

...

If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person ... The 'intent' which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a particular benefit upon him,' nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him.

Lonsdale v. Chesterfield, 99 Wn.2d 353, 361, 662 P.2d 385 (1983)

(internal citations omitted).

To be a third-party beneficiary, it is not necessary that the contract identify the party by name. *Droplets, Inc. v. E*Trade Fin. Corp.*, 939 F.Supp.2d 336, 347 (S.D.N.Y. 2013) (“a third party can be a third party beneficiary even if the contract does not identify that party by name”); *Atlantic Marine Fla., LLC v. Evanston Ins. Co.*, 721 F.Supp.2d 1244, 1250 (M.D. Fla. 2010) (“It is important to note that the third party need not be mentioned by name in the contract to be deemed a third party beneficiary”).

SquareTwo is a third-party beneficiary of the arbitration clause of the agreements. The arbitration clause identifies FIA’s parent as a party that can enforce the arbitration clause. FIA’s parent was a third-party beneficiary of the arbitration clause. The fact that FIA’s parent was not identified by name in the arbitration clause is immaterial. By assigning its rights to CACH, FIA also assigned the right its parent had under the arbitration clause to CACH’s parent, SquareTwo. The We May Sell Your Account provision of the agreements makes this clear, stating that, by selling the accounts to CACH, CACH “shall be entitled to all of our rights and/or obligations under this Agreement.” The fact that SquareTwo is not identified by name in the arbitration clause is similarly immaterial. Similar to FIA’s parent, SquareTwo is a third-party beneficiary of the arbitration clause with the right to enforce it.

C. IF CACH IS ENTITLED TO ARBITRATION, THE DOCTRINES OF ESTOPPEL AND AGENCY ENTITLE SQUARETWO TO ARBITRATE, TOO

In *McClure v. Davis, Wright and Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995), the Washington appellate court held that a nonparty to a contract can enforce the contract's arbitration provision "under the doctrine of equitable estoppel or under normal contract and agency principles." *Id.* at 315. Federal cases applying these principles have compelled arbitration for a nonparty to an agreement if there is a close relationship between the nonparty and a party to the arbitration agreement and if the claims against the nonparty and party are similar. In *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), the plaintiff moved to compel arbitration based on a contract signed by the plaintiff and the defendant's affiliates. The Fourth Circuit Court of Appeals agreed that the plaintiff was entitled to arbitration even though the defendant had not signed the agreement containing the arbitration clause, holding:

When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement. As the Fifth Circuit explained under similar circumstances, "If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."

Id. at 320-21, quoting *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir.1976) (“we hold that the trial court had discretion to include Eteco's parent and successor corporations in its stay order, even though they were not formally parties to the 1960 contract. The charges against these two defendants were based on the same operative facts and were inherently inseparable from the claims against Eteco. If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted”).

Courts have also required arbitration with a nonparty defendant when there are allegations of “pre-arranged, collusive behavior” by that nonparty defendant and a defendant that is a party to an arbitration agreement. *PRM Energy Sys., Inc.*, 592 F.3d at 835 (affirming ruling compelling arbitration of claims against a non-signatory based on allegations that non-signatory and signatory engaged in collusive and conspiratorial conduct against the plaintiff). And citing the agency doctrine, courts have required arbitration based entirely on a close corporate or employment relationship between signatory and non-signatory defendants. *See, e.g., CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-99 (8th Cir. 2005); *Barton Enters, Inc. v. Cardinal Health, Inc.*, No. 4:10 CV 324 DDN, 2010 WL 2132744, at *4 (E.D. Mo. May 27, 2010) (“The first circumstance relies on agency principles, and allows a

non-signatory to compel arbitration when the relationship between the non-signatory and signatory is so close, that failing to do so would eviscerate the arbitration agreement”).

In this case, if CACH has the right to compel arbitration, the doctrines of estoppel and agency permit SquareTwo to enforce the arbitration provisions, too.³ There is, first, the close relationship between CACH and SquareTwo – subsidiary and parent. Under agency principles, that is sufficient to entitle SquareTwo to enforce the arbitration clause. *Barton Enters, Inc.*, 2010 WL 2132744, at *4. There is also the fact that the claims against CACH and SquareTwo are identical. Consumers seek to hold SquareTwo liable for the conduct of CACH based on an alter ego theory. This factor is also sufficient to warrant arbitration of the claims against SquareTwo. *PRM Energy Sys., Inc.*, 592 F.3d at 835. The fact that CACH and SquareTwo are subsidiary and parent *and* are being sued based solely on their alleged relationship with one another requires that the claims against SquareTwo be arbitrated.

³ As mentioned, CACH is appealing the denial of its motion to compel arbitration, too. If this Court affirms the lower court’s decision finding that CACH waived its right to arbitration, the doctrines of estoppel and agency would not apply to SquareTwo. The remaining grounds for why SquareTwo is entitled to arbitration do not depend on whether CACH arbitrates or litigates the claims against it.

D. SQUARETWO DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION

1. The Claims Here and the Collection Claims Are Not the Same and, Therefore, Cannot Constitute Waiver of the Right to Arbitration

A party invokes the judicial process, waiving its right to arbitration only when it litigates a specific claim that it subsequently seeks to arbitrate. *Dean Witter Reynolds, Inv. v. Byrd*, 470 U.S. 213, 217 (1985); *Riensch v. Cingular Wireless LLC*, Nos. C06-1325 TSZ, C09-106 TSZ, 2013 WL 951012, at *5 (W.D. Wn. 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”); *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”).

Courts have held that a debt collector does not waive its right to arbitrate a consumer protection lawsuit brought by debtors by obtaining a judgment in state court. *Cage v. CACH*, C13-01741RSL, 2014 WL 2170431, at *1 (W.D. Wn. 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) (“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). As one court put it, in rejecting the argument that alleged improprieties during a state court collection action can waive a creditor’s right to arbitration of subsequent consumer protection act claims:

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

Id. at *8.

In this case, CACH did not waive its right to arbitrate the consumer protection claims asserted by Consumers by commencing collection lawsuits. For there to be waiver, the claims in the collection lawsuits and this consumer protection lawsuit must be the same. Clearly,

they are not. As such, CACH did not waive its right to arbitrate the claims in this suit. It follows that SquareTwo could not have done so, either.

2. Assuming CACH Waived Its Right to Arbitration, that Waiver Is Not Imputable to SquareTwo, a Distinct Company.

It is well established under Washington law that the corporate form must be respected. *See, e.g. Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552-53, 599 P.2d 1271 (1979) (“A corporation exists as an organization distinct from the personality of its shareholders”); *Shell Oil Co. v. Livingston Fertilizer & Chem. Co.*, 9 Wn. App. 596, 600, 513 P.2d 861 (1973) (“a corporation is treated as a separate entity”).

When a company is a subsidiary, that is, its shares are owned by another company, Washington law requires that both companies –the parent and its subsidiary – be treated as distinct and independent entities. *Anderson v. Sect.11, Inc.*, 28 Wn. App. 814, 818, 626 P.2d 1027 (1981) (“Mere subsidiary status does not permit disregard of the corporate entity”). As the Washington Supreme Court held long ago:

Under the law of this state, one corporation may subscribe for and own stock in another corporation. ... Two corporations may not only transact business with each other, but they may perfect such arrangements, if fairly done, as will work to their mutual advantage. The mere fact of intimacy and harmony of relationship between them, or the ownership by one of a controlling interest in the other, does not of itself destroy their separate identities, nor does it merge them into a single entity.

Sommer v. Yakima Mot. Coach Co., 174 Wn. 638, 653-54, 26 P.2d 92 (1933); *accord Rena-Ware Dist., Inc. v. State*, 77 Wn.2d 514, 463 P.2d 622 (1970) (parent and subsidiary “are separate entities”).

It follows therefore, that a subsidiary cannot waive the parent company's right to arbitration. Courts around the country have held that this is the law. For example:

- In *NCR Credit Corp. v. Underground Camera, Inc.*, 581 F. Supp. 609, 612 (D. Mass. 1984), the court held that a subsidiary did not waive a parent company's right to compel arbitration by commencing a suit against that customer.

- In *Radian Ins., Inc. v. Deutsche Bank Nat. Trust Co.*, 638 F. Supp.2d 443, 454 (E.D. Pa. 2009), the court held that waiver of the right to arbitration by a signatory did "not necessarily apply to the third-party beneficiaries, which are still entitled to invoke the mandatory arbitration provision."

- In *American Int'l Group, Inc. v. Cornerstone Bus., Inc.*, 872 So.2d 333, 336 (Fla. 2004), the court held that a parent company did not waive a subsidiary's right to compel arbitration against a customer by commencing suit against the customer since a "parent corporation and its wholly-owned subsidiary are separate and distinct legal entities."

- In *Lemon Drop Props v. Pass Marianne LLC*, 73 So.3d 1131, 1136 (Miss. 2011) the court held that waiver of the right of arbitration by a principal did not bind the agent since the decision to

compel arbitration was “personal” to the agent and could not be imputed to the agent by the principal’s actions.

- In *Garcia v. Huerta*, 340 S.W.3d 864, 869-70 (Tex. 2011) the court held the agent’s right to arbitration was not waived by the principal since the agent had not engaged in litigation and, therefore, could not have waived the right to compel arbitration. The court added that imputing waiver of the right to arbitration was improper considering federal policy strongly favoring the arbitration of disputes.

In this case, CACH’s alleged waiver of the right to arbitration is not imputable to SquareTwo. SquareTwo is distinct from CACH and was not a party to the collection litigation. SquareTwo has an independent right to arbitration that it can enforce.

3. The Plaintiffs Cannot Establish Prejudice

Under federal law, a party asserting waiver from prior litigation has the burden of establishing it will be prejudiced if required to arbitrate. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Since waiver of the right to arbitration is disfavored, establishing prejudice is “a heavy burden.” *Id.* Prejudice will be found only if “parties use discovery not available in arbitration, when they litigate substantial issues on the merits, or when compelling arbitration would require a duplication of efforts.” *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003) (finding prejudice where the defendant “incurred expense and experienced

substantial delay as a result of the extensive litigation and would be required to extensively duplicate his efforts if he were now required to participate in arbitration”); *Hooper v. Advance Am., Cash Adv. Ctrs. of Mo, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) (“Compelling arbitration presumably would require a duplication of effort insofar as Advance America in arbitration would reargue issues upon which the district court ruled”); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 579 n.3 (5th Cir. 1991) (“we would be more likely to find that plaintiffs were prejudiced by the discovery that occurred in this case if the discovery work product revealed items that would not be discoverable in arbitration proceedings”). Another circuit defined prejudice to require proof of “delay, expense, and damage to a party’s legal position.” *Nicholas v. KBR, Inc.*, 565 F.3d 904, 910 (5th Cir. 2009). Regardless of the particular test, the bottom line, as stated by one court, is that prejudice “relates to inherent unfairness—that is, a party’s attempt to have it both ways by switching between litigation and arbitration to its own advantage.” *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008).

Here, Consumers cannot satisfy their heavy burden of establishing prejudice by having to arbitrate their claims against SquareTwo. Consumers allege that SquareTwo is liable for the alleged actions of CACH because it is CACH’s alleged alter ego. That issue – whether SquareTwo is liable for the alleged actions of CACH – was not litigated in

the collection lawsuits. It is, instead, being raised for the first time in this litigation. As such, there was no discovery related to that claim in the collection litigations in 2010 and 2011 that will not be available in the arbitration. There will be no re-litigation of issues, no duplication of efforts, and no damage to Consumers' position by having to arbitrate the alter-ego claims. Simply put, there is no inherent unfairness by having Consumers arbitrate their alter-ego claims against SquareTwo.

If this Court affirms the Trial Court's decision that CACH has waived its right to arbitration, the result may be that Consumers have to arbitrate their claims against SquareTwo while also litigating their claims against CACH. This, however, is insufficient as a matter of law to establish waiver. As the U.S. Supreme Court has made clear that, in light of the policies favoring arbitration, "the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 20. The Ninth Circuit has similarly held, "the Arbitration Act requires district courts to compel arbitration even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Fisher*, 791 F.2d at 698. Thus, to ensure that the policy favoring arbitration is upheld, requiring piecemeal adjudication is the proper result here.

V. CONCLUSION

For the foregoing reasons, SquareTwo respectfully requests that this Court reverse the Superior Court and find that the claims against SquareTwo must be arbitrated.

DATED this 10th day of September, 2014.

VERIS LAW GROUP PLLC

By 

Benjamin J. Stone, WSBA #33436

VERIS LAW GROUP PLLC

1809 7th Ave, Ste 1400

Seattle, WA 98101

206.829.9590 (t)

Attorneys for Appellant SquareTwo
Financial Corp

DECLARATION OF SERVICE

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

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

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

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

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

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

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

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

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

FILED
STATE OF WASHINGTON
SUPERIOR COURT
SEP 10 11:14 AM '10

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

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

Helen Kistler, Case Manager
Court of Appeals, Division One
One Union Square
600 University Street
Seattle, WA 98101
(206) 464-5371
Helen.kistler@courts.wa.gov

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

Dated at Seattle, Washington, this 10th day of September,
2014.


Alison Sepavich