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No. 72090-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JENNIFER WIESE and CANDY BRADISON,
Individually and on Behalf of All Others Similarly Situated,

Respondents,

v.

SQUARE TWO FINANCIAL CORP., a Delaware corporation,

Appellant.

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

BRIEF OF RESPONDENTS

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INTRODUCTION

Appellant Square Two Financial Corporation wholly owns and totally controls CACH, LLC, a shell corporation which holds consumer credit card debts Square Two has negotiated from account originators, such as FIA Card Services, N.A. CP 4-5 (Complaint at ¶¶ 2.3-2.4). Square Two directs its attorneys to file collection lawsuits under CACH's name against account debtors, including Respondents Wiese and Bradison ("Plaintiffs") and the Class they seek to represent. *Id.*

Since neither Square Two nor CACH were licensed under the Washington Collection Agency Act, the collection lawsuits were unlawful, and the judgments obtained in those suits are null and void and must be vacated. *See Gray v. Suttell & Assoc.*, No. 88414-5, 2014 Wash. LEXIS 647, at *1 (Aug. 28, 2014) ("debt buyers fall within the definition of 'collection agency' under the Act when they solicit claims for collection" and "cannot file collection lawsuits without a license"); RCW 19.16.440 (filing of a collection lawsuit by an unlicensed collection agency is an "unfair act or practice" under the Washington Consumer Protection Act); *Finch v. LVNV Funding LLC*, 71 A.3d 193, 199 (Md. Ct. Spec. App. 2013) (a "judgment obtained by an unlicensed collection agency is void"); *accord LVNV Funding, LLC v. Trice*, 952 N.E.2d 1232 (Ill. App. 2011).

This action by Respondents Wiese and Bradison ("Plaintiffs") seeks to vacate the judgments entered in the collection lawsuits: "[T]he lawsuits against Plaintiffs and all other Class members violated RCW

19.16.260 and the judgments are therefore void and voidable.” CP 9 (Complaint at ¶ 4.15). The central questions in this vacatur action are “whether Defendants committed fraud upon the courts” and whether the judgments in the collection actions “should be vacated due to fraud, misrepresentation and/or misconduct, as void or voidable.” CP 14-15 (Complaint at ¶ 5.3(c)(i)-(j)). As such, the primary relief sought is declaratory, injunctive, and equitable: Plaintiffs seek orders “to vacate the judgments and default judgments” the Defendants unlawfully obtained in the collection actions. CP 16, 20 (Complaint at ¶ 5.7, Prayer H).

Square Two asserts that it was an intended third-party beneficiary of the arbitration agreement Plaintiffs entered with FIA years ago. But the agreements did not identify Square Two as a beneficiary of that agreement, and the parties did not intend Square Two to be a beneficiary. And the subsequent sale of the right to collect on the credit card accounts to CACH did not somehow retroactively make Square Two an intended beneficiary. *See Burke & Thomas v. Int’l Org. of Master*, 92 Wn.2d 762, 767 (1979) (third-party beneficiary must be intended at the time of the contract’s formation).

Nor does the doctrine of equitable estoppel allow non-signatory Square Two to invoke the arbitration clause. That rare doctrine only applies where the plaintiff relies on an agreement to formulate its claims against the non-signatory such that, in equity, the plaintiff should be estopped from denying the availability of the arbitration clause contained in that same agreement. *See PRM Energy Sys. v. Primenergy, LLC*, 592

F.3d 830, 835 (8th Cir. 2010) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), and *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981)). The Plaintiffs' vacatur action is not based upon rights or duties imposed by the credit card agreements; to the contrary, this action is independent of any contractual duties and is premised entirely on Square Two's directing litigation which constituted a fraud upon the court and resulted in void judgments.

Moreover, even if Square Two were entitled to invoke the arbitration clause, it cannot do so here since the clause itself contains a plain and unambiguous restriction on the right to select arbitration: "Arbitration may be selected at any time unless a judgment has been rendered." CP 54-103 (Exs. A and B to Mills Decl.) (underline added). Since judgments regarding the account dispute were entered in the collection actions, no one can now seek to arbitrate that dispute.

Furthermore, even in the absence of those judgments, Square Two waived any right to arbitrate the dispute over whether or not CACH was entitled to collect on the Plaintiffs' accounts when Square Two chose to litigate that issue in court. See *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756 (9th Cir. 2002); accord *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582 (2009).

For any or all of these reasons, the trial court's decision denying Square Two's motion to compel arbitration should be affirmed.

STATEMENT OF THE ISSUES

1. Was Square Two an intended third-party beneficiary of the arbitration agreement between Plaintiffs and FIA? **(No)**
2. Are the Plaintiffs bringing claims against Square Two which depend on the agreement containing the arbitration clause, such that they should be estopped from denying non-signatory Square Two the availability of the arbitration clause in that agreement? **(No)**
3. Since judgments were rendered on the collection disputes in the collection actions directed by Square Two, can it now select arbitration, given the plain language of the arbitration agreement? **(No)**
4. Does Square Two's decision to litigate the collection disputes constitute a waiver of any right to arbitrate those disputes? **(Yes)**

STATEMENT OF THE CASE

Square Two solicits claims for collection from credit card account originators like FIA. Square Two wholly-owns and operates a shall corporation called CACH. CACH has “no business presence, no office, no telephone number and no employees, no capacity to collect on the accounts, and no assets; instead, all of its assets are payable and owed as liability to Square Two.” CP 6-8 (Complaint at ¶¶ 4.24-.29). CACH does not file federal tax returns, but is consolidated with Square Two. *Id.* Square Two's officers manage CACH, which “is run entirely by Square Two.” *Id.* It is Square Two, not CACH, which purchases debt portfolios from original creditors, and Square Two represents that *it* “has purchased \$16 billion in charged-off debt portfolios.” *Id.* It describes CACH as

merely one of “its wholly owned debt purchasing subsidiaries.” *Id.* Square Two retains and directs all of the attorneys who pursue its debts, regardless of the name of the shell company in whose name the debt is placed. *Id.*

Indeed, the Servicing Agreement between Square Two and CACH spells out the arrangements: Square Two controls all of the accounts placed in CACH’s name. Square Two is “solely responsible for the retention and compensation of any collection entities for purposes of pursuing collection actions and litigation on the accounts.” *Id.* (at ¶ 4.27.)

In fact, Square Two “directed all of the collection efforts taken in CACH’s name against Mr. Wiese and Ms. Bradison.” *Id.* (at ¶ 4.28). It was Square Two that directed attorneys Suttell & Hammer to file the complaints in the collection actions which alleged CACH had paid all licenses and fees and was authorized to bring the actions.

Square Two’s conduct—operating a collection agency without a license—that is alleged to violate the Washington Collection Agency Act, and for which this vacatur action has been filed by the Plaintiffs. Square Two moved to compel this vacatur action to arbitration. Judge (now Justice) Mary Yu properly denied that motion.

ARGUMENT

I. Square Two is not entitled to invoke the arbitration clause.

Square Two was not a party or signatory to the arbitration agreements and it was not related in any way to FIA or the Plaintiffs, who

were the only parties to the agreements. A non-party to an arbitration agreement has no authority to enforce an agreement against a signatory. *See Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993). Thus, a court should allow “a non-signatory to invoke an arbitration agreement only in rare circumstances.” *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002). And “[a]lthough law and policy both favor arbitration, neither can supply an agreement to arbitrate where there is none. An agreement to arbitrate a dispute with one party cannot encompass disputes against another party when the second party is not mentioned in the written agreement.” *Hansford v. Cappaert Manufactured Hous.*, 911 So.2d 901, 906 (La. Ct. App. 2005) (housing retailer was not entitled to invoke arbitration clause entered into between housing manufacturer and purchaser).

Indeed, any federal policy favoring arbitration does not apply to the question of whether a non-signatory can enforce an arbitration clause. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Carson v. Giant Food, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999); *Victoria v. Super. Ct.*, 710 P.2d 833, 834 (Cal. 1985) (“the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate”); *Hendrick v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 538 (E.D. Va. 1999) (to apply the policy of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists in the first place “would permit the presumption to displace the fundamental rule that

parties can be required to arbitrate only that which they have agreed to arbitrate”).

A. Square Two was not an intended third-party beneficiary of the arbitration agreement between FIA and the Plaintiffs.

“A party must be intended as a third-party beneficiary to benefit from a contract.” *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 396 (2002). “The creation of a third-party beneficiary requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.” *Burke & Thomas*, 92 Wn.2d at 767; *see also Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (“NoteWorld submitted no evidence that Rajagopalan intended to designate NoteWorld as a third-party beneficiary, that NoteWorld assumed any duties or obligations under the First Rate contract, or that any party assumed direct obligations to NoteWorld.”); *Murphy v. DirecTV, Inc.*, 734 F.3d 1218 (9th Cir. 2013).

The agreements between FIA and the Plaintiffs were to create and service credit card accounts: FIA agreed to provide credit accounts under certain terms; the Plaintiffs agreed to pay back extensions of credit under certain terms; and FIA and Plaintiffs agreed to arbitrate disputes about the credit accounts unless one of them chose to litigate to judgment such a dispute. Square Two had nothing to do with this agreement. The Plaintiffs did not “assume a direct obligation” to Square Two “at the time they enter[ed] the contract.”

Indeed, the written agreements specifically identify those non-signatories who the parties *did* intend to benefit from the arbitration clause: “For purposes of this Arbitration and Litigation Section, ‘we’ and ‘us’ means FIA Card Services, N.A., its parent, subsidiaries, affiliates, licensees, predecessors, successors, assigns, and any purchaser of your account, and all of their officers, directors, employees, agents, and assigns or any and all of the them.” CP 98 (Ex. A to Mills Decl., p 43). Square Two was not a parent, subsidiary, affiliate, licensee, predecessor, successor, assign, or purchaser of the Plaintiffs’ accounts. At the time the Plaintiffs entered into the agreements with FIA, they had no idea that Square Two even existed—Square Two simply had nothing to do with the FIA credit card agreements.

Indeed, the enumeration of those entities who *were* intended by the parties (parent, subsidiary, affiliate, etc.) manifests the parties’ intention to include as beneficiaries *only* those third-parties and to exclude any others: *expression unius est exclusion alterius*. See *Ellensburg Cement Prods., Inc. v. Kittitas County*, No. 88165-1, 2014 Wash. LEXIS 73, at *18-19 (Feb. 6, 2014) (citing *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571 (1999)). That is, where an arbitration clause specifically mentions parties subject to an arbitration clause, courts decline to stretch the agreement to cover other non-parties or to apply an exception to the general rule against non-signatories. *E.g., Mundi v. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009); see also *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166 (11th Cir. 2011) (since clause said “you” or “we” can

compel arbitration, it implicitly excluded third-parties who were not mentioned); *Jenkins v. Atelier Homes, Inc.*, 62 So.3d 504, 510-511 (Ala. 2010) (when contract explicitly refers to parties entitled to arbitrate, non-signatories cannot invoke doctrines of third-party beneficiary or equitable estoppel).

Square Two is asking this Court to dramatically re-write the Plaintiffs' agreements with FIA in one of three ways. First, Square Two would have this Court add it to the list of non-parties entitled to invoke the arbitration agreement:

For purposes of this Arbitration and Litigation Section, "we" and "us" means FIA Card Services, N.A., its parents, subsidiaries, affiliates, licensees, predecessors, successors, assigns, **<corporations who own debt buying companies to whom we may, at some point in the future, sell your account if you default>**, and any purchaser of your account, and all of their officers, directors, employees, agents, and assigns or any and all of them.

Such revisions are clearly forbidden under basic contract law. *See, e.g., Condon v. Condon*, 177 Wn.2d 150, 162 (2013) ("Washington follows the objective manifestation theory of contracts, which has [courts] determine the intent of the parties based on the objective manifestations of the agreement."). And it strains credulity that any consumer who signs up for a credit card intends to benefit some unknown, unidentified, foreign corporation who would only be involved in some uncertain, inchoate future based on a number of contingencies (default, charge-off, sale, sale to a company owned by another company). There is simply no

evidence—in the record or in the language of the contract FIA drafted for the Plaintiffs to sign—that entities like Square Two would be covered by the arbitration clause.

In the alternative, Square Two would have this Court add it to the list as an entity related to one of the other entities on the list. That is, CACH—or rather, a company like CACH—is identified in the arbitration clause: “any purchaser of your account.” Square Two is CACH’s parent. But to include Square Two, the Court would, once again, have to resort to re-writing the parties’ agreement:

For purposes of this Arbitration and Litigation Section, “we” and “us” means FIA Card Services, N.A., its parents, subsidiaries, affiliates, licensees, predecessors, successors, assigns, and any purchaser of your account, **<any parent company of any purchaser of your account>**, and all of their officers, directors, employees, agents, and assigns or any and all of them.

This is an equally inappropriate revision of the contract. As is the third alternative, which is to replace FIA as the party to the agreement with CACH, such that Square Two would fall under the category of “parent”:

For purposes of this Arbitration and Litigation Section, “we” and “us” means ~~FIA Card Services, N.A.~~ **<CACH, LLC>**, its parents, subsidiaries, affiliates, licensees, predecessors, successors, assigns, and any purchaser of your account, and all of their officers, directors, employees, agents, and assigns or any and all of them.

This revision is inappropriate because it creates redundancy. *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 842-843 (2008) (an interpretation of a contract which gives effect to all of its provision is favored over one

which renders some of the language redundant). That is, CACH was already covered by the arbitration agreement as a “purchaser of your account.” Plaintiffs and FIA had considered the possibility that the accounts may be sold to someone like CACH, and they extended the arbitration agreement to include such a purchaser. There is no objective manifestation of any intent that the parties would write FIA out of the agreement and a purchaser into the agreement—that is, to novate the contract upon sale of the account. Instead, they agreed that purchasers would be covered as intended third-party beneficiaries. But they excluded parents or others related to account purchasers. Indeed, they only included “officers, directors, employees, agents, and assigns” of account purchasers as beneficiaries of the arbitration clause.

Thus, under the plain language of the credit card agreements, Square Two is not entitled to invoke the arbitration clause. *See Corbray v. Stevenson*, 98 Wn.2d 410, 415 (1982) (words in a contract should be given their ordinary meaning; courts cannot make another or different contract for the parties under the guise of construction; *see also Am. Pipe & Constr. Co. v. Harbor Constr. Co.*, 51 Wn.2d 258, 265 (1957) (a court cannot “create a contract where none was intended”).

B. The doctrines of estoppel and agency do not allow Square Two to invoke the arbitration clause.

Square Two argues that equitable estoppel or agency principles are an alternative way for it to obtain the benefit of an arbitration agreement to which it was neither a party nor an intended beneficiary. Equitable

estoppel is an “extraordinary remedy” that courts apply only in the rarest of circumstances. *See Sawyers v. Herrin-Gear Chevrolet*, 26 So.3d 1026, 1039. The doctrine has come under such sharp criticism that some courts have outright rejected it: contract law simply does not allow a non-signatory to enforce a contract merely because it engaged in similar misconduct as a party that did sign the contract. *See Kramer*, 705 F.3d at 1132-1133 (“contract law does not allow a non-signatory to enforce an arbitration agreement based upon a mere allegation of collusion or interdependent misconduct between a signatory and a non-signatory”); *In re Merrill Lynch Trust Co.*, 253 S.W.3d 185, 191-195 (Tex. 2007) (“As other contracts do not become binding on non-parties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, contrary to the Arbitration Act’s purpose.”); *Hirsch v. Amper Fin. Services, LLC*, 71 A.3d 849, 859-862 (N.J. 2013) (estoppel cannot be applied solely because claims and parties are intertwined); *see also* Christopher Driskill, *A Dangerous Doctrine: The Case Against Using Concerted-Misconduct Estoppel to Compel Arbitration*, 60 Ala. L. Rev. 443 (2009).

Even if estoppel is a part of Washington contract law, it only applies in those limited cases in which a plaintiff attempts to hold a defendant to the terms or obligations of a contract while simultaneously trying to avoid the contract’s arbitration clause. *See R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 161 (4th Cir. 2004). To put this another way, estoppel only applies when “the signatory to a

written agreement containing an arbitration clause must rely on the terms of the agreement in asserting claims against the non-signatory.” *Griegson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5th Cir. 2000); *see also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-1129 (9th Cir. 2013); *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 800 (8th Cir. 2005); *Choctaw Generation Ltd. P’ship v. Am. Home Assurane Co.*, 271 F.3d 403 (2nd Cir. 2001); *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 1187, 199-200 (3rd Cir. 2001).

A claim only “relies” on a contract if it attempts to hold the non-signatory party to the terms of the contract, or arises from the obligations imposed by the contract. *See Golman v. KPMG, LLC*, 92 Cal. Rptr. 3d 534 (Ct. App. 2009) (“a non-signatory may compel arbitration only when the claims against the non-signatory are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause”). Here, the Plaintiffs’ claims are not founded in the obligations of the credit card agreements. Those obligations were limited to FIA’s providing the Plaintiffs with credit accounts according to certain terms—which, of course, has nothing to do with this case. The claims in this case (that CACH and Square Two obtained unlawful judgments by way of a fraud upon the court regarding their licensure status) do not depend in any way on the obligations imposed by the credit card agreements.

Equitable estoppel does not apply simply because an agreement was a factual predicate for the relationships later giving rise to a claim. *See Lawson*, 648 F.3d at 1166. So, while it is true that Square Two would never have exercised control over credit card accounts purchased by CACH absent the creation of those accounts by way of the agreements between FIA and Plaintiffs, the claims in this case do not depend on any of the rights or obligation contained in those agreements. *See Murphy*, 724 F.3d at 1218 (“Even if Best Buy is correct that Plaintiffs’ claims on some abstract level require the existence of the Customer Agreement, the law is clear that this is not enough for equitable estoppel.”); *In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 923-924 (8th Cir. 2013) (estoppel inapplicable to claims that arise out of statutory duties); *Kramer*, 705 F.3d at 1129 (complaint’s “merely making reference to an agreement with an arbitration clause is not enough”).

In stark contrast, all of the estoppel cases Square Two cites involved plaintiffs seeking to rely on a contractual right in order to make a claim against a non-signatory: In *Sunkist Soft Drinks, Inc.*, 10 F.3d 753, the plaintiff’s claims were that a non-signatory, through its management of a signatory, caused the signatory to breach the terms of a license agreement. In *PRM Energy Sys.*, 592 F.3d 830, the plaintiff’s claims were for tortious interference with a contract and inducement of a breach. In *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), the plaintiff’s claims arose from threats by the defendant to have its affiliates breach contracts.

Thus, in each of these cases, the plaintiff was relying on contractual rights to formulate contract-related claims against the defendant. The Plaintiffs in this case, however, are not seeking to use any term or right of the credit card agreements to formulate their case against Square Two. To the contrary, this case arises from Square Two's use of CACH to accomplish a fraud upon the court in the collection actions.

Moreover, a parent-subsidary relationship is not enough to allow a non-signatory parent to enforce an arbitration clause signed by the subsidiary—and, of course, in this case, subsidiary CACH was not even a signatory. *See Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 68 (7th Cir. 2005); *see also Variable Annuity Life Ins. Co. v. Dull*, 2009 WL 3064750, at *4 (S.D. Fla. Sept. 22, 2009) (“a corporate relationship alone will not be sufficient to bind a non-signatory to an arbitration agreement”); *In re Trammel*, 246 S.W.3d 815, 820 (Tex. App. 2008) (same).

The one case Square Two cites, *Barton Enterprises, Inc. v. Cardinal Health, Inc.*, 2010 U.S. Dist. LEXIS 52435, at *2 (E.D. Mo. May 27, 2010), gets it nowhere. In that case, the parent company was “specifically mentioned in the license agreement” and was, therefore, an intended third-party beneficiary. Absent that specific mention, there is no indication that a mere corporate relationship allows every affiliate under the sun the right to enforce contract terms, including arbitration clauses, against the signatories to the agreement.

II. Under the terms of the arbitration agreement, once judgments were rendered in the collection actions, no party can select arbitration.

Square Two is not entitled to invoke the arbitration clause because it was a non-signatory who was not intended, at the time of the agreement, to benefit from it. Even if Square Two were somehow entitled to enforce the agreement, the language of the clause prohibits arbitration.

The arbitration clause in the consumer credit card agreements expressly limits the parties' option to arbitrate: "Arbitration may be selected at any time unless a judgment has been rendered." Judgments were rendered on the account dispute. Thus, under the plain language of the arbitration agreement, Square Two cannot—after judgment were entered on the account dispute—select arbitration. That is the beginning and the end of the analysis.

Indeed, "Washington continues to follow the objective manifestation theory of contract [which seeks] to determine the parties' intent by focusing on the objective manifestation of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Communs., Inc. v. Seattle Times*, 154 Wn.2d 493, 503 (2005). Thus, courts must "give words in a contract their ordinary, usual, and popular meaning" and must only look at "what was written." *Id.* at 504.

The arbitration clause is clear and unambiguous, and it clearly establishes a condition precedent to selecting arbitration—that no judgment has been rendered. To put this another way, the arbitration

clause contains a basic restriction on the parties' ability to select arbitration—that no judgment has yet been rendered on their dispute.

Thus, this Court need only apply the express terms of the agreement: Since judgments were rendered in the collection cases, neither Square Two nor the Plaintiffs' can now select arbitration, and Square Two's motion to compel that forbidden selection was properly denied.

There is no grey area in the language FIA employed in its arbitration clause: "Arbitration may be selected at any time unless a judgment has been rendered." This clause so clearly dictates the outcome of this appeal that Square Two can only try to change the clause to say something it does not.

Like CACH, Square Two tries to characterize the judgment limitation as claim specific. So, in the Appellants' view, they are only precluded from arbitrating the breach of contract cause of action that was brought in the collection actions. In this way, the Appellants are asking this Court to re-write the arbitration clause in their favor, as follows:

Arbitration **<of a specific cause of action>** may be selected at any time unless a judgment **<on that specific cause of action>** has been rendered.

Such additions are forbidden. *See Hearst Comms., Inc.*, 154 Wn.2d at 504 ("We do not interpret what was intended to be written but what was written.").

Moreover, this claim-specific argument misreads the arbitration clause. The arbitration agreement says: "Any claim or dispute ("Claim")

by either you or us against the other [may be subject to arbitration].” Appellants consistently ignore the words “or dispute” and focus exclusively on “claim,” which they take to mean a specific cause of action. And, so the argument goes, since only the breach of contract claim was litigated to judgment in the collection action, the arbitration clause only prohibits arbitration of that specific quote-unquote “claim.”

But the arbitration clause is not limited to “causes of action” or even “claims.” It also includes “disputes.” *See Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 425 (1997) (“or” is a disjunctive conjunction). Once again, Appellants would have this Court impermissibly re-write the contract, this time by deleting a key term:

Any claim ~~or dispute~~ (“Claim”) by either you or us against the other [may be subject to arbitration].

This the Court cannot do. Instead, it must give the word “dispute” its ordinary, usual, and popular meaning: “a conflict or controversy.” *Black’s Law Dictionary* (7th ed.), p. 383. It is beyond cavil that the parties have a conflict or controversy between them: Appellants asserts that they are entitled to collect on the credit card accounts; Plaintiffs assert that collection is forbidden because neither Appellant was not properly licensed.

The collection lawsuits were part of this conflict or controversy: on Square Two’s command, CACH sued the Plaintiffs in order to collect on the credit card accounts. This vacatur action is part of the same conflict or

controversy: Plaintiffs sued Appellants in order to prevent collection on the credit card accounts.

Since the conflict central to both the collection actions and this vacatur action are the same—and judgment was rendered on that conflict in the collection actions—under the plain terms of the arbitration agreement, no party can now elect arbitration of this “dispute.”

By the same token, since Square Two chose to litigate this “dispute” in court, it waived any right to elect arbitration of the controversy thereafter.

III. Square Two waived any right to arbitrate by deciding to litigate and directing the litigation.

Given the judgment limitation, Square Two has no right to compel arbitration of the dispute with the Plaintiffs. Even if it did have such a right, it waived arbitration by choosing to litigate its dispute by directing its attorneys to file the collection lawsuits in CACH’s name.

A. Arbitration agreements are simply contracts, governed by contract law, including the law of waiver.

“Arbitration is simply a matter of contract between parties.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The purpose of the Federal Arbitration Act was simply “to place arbitration agreements on the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the U.S. Supreme Court has expressly rejected suggestions, like those of Square Two here, that the Act was intended to promote or mandate arbitration;

rather, the Act “merely [supports] the enforcement ... of privately negotiated arbitration agreements.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Indeed, the Act was intended only “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

“The right to arbitration, like any other contract right, can be waived.” *United States v. Park Place Assoc.*, 563 F.3d 907, 921 (9th Cir. 2009); *see also Welborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 637 (7th Cir. 2002) (“Like any other contractual right, the right to arbitrate a claim may be waived.”); *Burton-Dixie Corp v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 407 (5th Cir. 1971) (“It is well established that agreements to submit disputes to arbitrators, just like any other contract terms, may be waived.”); *Nat’l Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) (waiver applies to arbitration agreements “as in any other contractual context”). Indeed, “Washington courts have long held that the contractual right to arbitration may be waived.” *Otis Hous. Ass’n*, 165 Wn.2d at 587.

“In the Ninth Circuit, arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that part inconsistent with such an existing right; and (3) there must be prejudice resulting from the waiving party’s inconsistent acts.” *United Computer Sys.*, 298 F.3d at 765; *cf. Otis Hous. Ass’n*, 165 Wn.2d at 587

(“The right to arbitrate is waived by conduct inconsistent with any other intent...”).

B. Directing litigation of the account dispute is action inconsistent with arbitration.

The Washington Supreme Court has been crystal clear: “Simply put ... a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Otis Hous. Ass’n*, 165 Wn.2d at 587. Washington appellate courts, including this one, have consistently applied this rule. *See Shelper Constr., Inc. v. Leonard*, 175 Wn. App. 239, 248-249 (Wash. Ct. App. 2013) (Division I); *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221 239 (Wash. Ct. App. 2012) (Division III).

Federal appellate courts, including the Ninth Circuit, have adopted and applied the same rule: “A party who brings suit acts inconsistently with its right to compel arbitration.” *United Computer Sys., Inc.*, 298 F.3d at 756; *see also Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011); *Louisiana Stadium & Expo. Dist. v. Merrill Lynch*, 626 F.3d 156, 160 (2nd Cir. 2010); *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co.*, 946 F.2d 473, 477 (6th Cir. 1991); *Cabintree of Wis., Inc. v. Kraftmade Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

Square Two chose to litigate the account dispute by directing its attorneys to file the collection lawsuits on CACH’s behalf, all the way to judgment. It is only now, post-judgment, that Square Two seeks to arbitrate the Plaintiffs’ half of the account dispute.

Square Two's arguments boil down to this: since the lawsuits were filed in CACH's name, only CACH waived the right to arbitrate. But this is an overly mechanistic, and far too narrow, reading of waiver law. Any act inconsistent with the right to arbitrate waives that right. Square Two's acts were inconsistent with litigation, regardless of whether it was the party named in the caption: Square Two hired trial lawyers, it directed those lawyers to file lawsuits, it commanded the lawyers to obtain judgments, and it used CACH to collect on those judgments.

C. Prejudice

Although the test for prejudice "is not a bright line rule," factors to consider include "(1) the extent of delay, (2) the degree of litigation preceding the motion to compel arbitration, (3) the resulting expenses, and (4) other surrounding circumstances." *Grant & Assoc. v. Gonzales*, 2006 Wash. App. LEXIS 2290, at *12 (Wash. Ct. App. Oct. 17, 2006) (citing *Letizia v. Prudential Bache Sec. Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986)). Each of these factors is present in this case.

1. Extent of Delay

The collections lawsuits against Ms. Wiese was filed in 2011 and against Ms. Bradison in 2010. CP 7-8 (Complaint at ¶¶ 4.3, 4.8). Square Two did not seek arbitration until December 2013. CP 39-49 (Square Two's Motion to Compel Arbitration). This multiple-year delay is substantially greater than the four-month delay the court of appeals found to be prejudicial in *Grant & Assoc.*, 2006 Wash. App. LEXIS 2290 at *4.

2. Degree of Litigation

The collection actions were litigated all the way to judgment. This is the ultimate use of judicial machinery and is certainly a far greater degree of litigation than that which was found to be prejudicial in *Steele v. Lundgren*, 85 Wn. App. 845, 856 (Wash. Ct. App. 1997) (filing an answer and reaching an agreement on joinder). Square Two also instructed its attorneys to take action upon the judgments by using further judicial process: garnishment against Ms. Wiese. CP 7 (Complaint at ¶ 4.7).

3. Resulting Expenses

As a result of Square Two's decision to litigate in the judicial forum rather than to arbitrate in the arbitral forum, each Plaintiff incurred \$299.50 in litigation costs; Ms. Bradison incurred \$650.00 in attorney's fees; and Ms. Wiese had her wages garnished. CP 116-120, CP 4 (Judgments against Wiese and Bradison; Complaint at ¶¶ 2.1-2.2). While no court has suggested a dollar-amount standard for prejudice, the court of appeals in *Grant & Assoc.* recognized that, especially for people in "precarious financial situation[s]," incurring litigation expenses is prejudicial. 2006 Wash. App. LEXIS 2290 at *14. Ms. Wiese was "financially struggling" and Ms. Bradison was "financially struggling" after he husband and daughter both passed away within 11 days of each other. CP 4 (Complaint at ¶¶ 2.1-2.2).

4. Other Circumstances

Judgments have already been entered against the Plaintiffs on the collection dispute. If Plaintiffs are compelled to submit to arbitration,

Square Two will stand upon those judgments and argue that the arbitrator should not—or cannot—second-guess superior court judgments. The existence of the judgments will undoubtedly put the Plaintiffs at a severe and unfair disadvantage before the arbitration even begins. It is because of this sort of prejudice that courts have observed that “[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.” *Christensen v. Dewor Developments*, 661 P.2d 1088, 1092 (Cal. 1983) (quoting *DeSaprio v. Kohlmeyer*, 321 N.E.2d 770, 773 (N.Y. 1974)).

CONCLUSION

Square Two is not entitled to invoke the arbitration clause because it was not a signatory to the agreement, it was not an intended beneficiary of the agreement, and the doctrine of estoppel or agency does not apply because the Plaintiffs are not relying on contractual rights to bring their claims. Moreover, no party can arbitrate the account dispute at the heart of this matter because judgments were rendered on those in the collection actions that Square Two instructed its attorneys to file under CACH’s name. And even if such judgments had not been entered, Square Two’s decision to litigate the account dispute in court waived its right to arbitrate that dispute when the Plaintiffs took up their side of it.

Therefore, Justice Yu's decision denying Square Two's motion to compel arbitration should be affirmed and this case remanded for further proceedings.

Respectfully submitted on October 8, 2014,

s/ Drew Legando

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CERTIFICATE OF SERVICE

I hereby certify that on 10-8-14, I served the foregoing via JIS to the Clerk's Office of the Court of Appeals Division I and provided a copy of the document via email to all counsel of record as follows:

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