APPENDIX A

SUPREME COURT OF TEXAS

Hiawatha Henry, Addie Harris, Montray Norris, and Roosevelt Coleman, Jr., on behalf of themselves and for all other similarly situated,

Petitioners,

v.

CASH BIZ, LP, Cash Zone, LLC d/b/a Cash Biz, and Redwood Financials, LLC, Respondents

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NO. 16–0854

[Argued September 15, 2017]

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OPINION DELIVERED: February 23, 2018

Synopsis

Background: Borrowers brought putative class action against short-term lender for malicious prosecution, fraud, and violations of the Deceptive Trade Practices Act, Consumer Protection Act, and the Finance Code. The 166th Judicial District Court, Bexar County, No. 2015-CI-01545, Laura Salinas, J., denied lender's motion to compel arbitration. Lender filed an interlocutory appeal. The San Antonio Court of Appeals, 2016 WL 4013794, reversed. Borrowers petitioned for review.

Holdings: The Supreme Court, Phil Johnson, J., held that:

[1] arbitration agreement applied to borrowers' claims, and

[2] lender did not substantially invoke judicial process, and thus did not impliedly waive its right to arbitrate.

Judgment of the Court of Appeals affirmed.

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Justice Johnson delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Guzman, Justice Lehrmann, Justice Boyd, Justice Devine, and Justice Brown joined.

Opinion

Phil Johnson, Justice

*1 This case involves an arbitration provision in short-term loan contracts. The questions presented are whether the borrowers' claims against the lender come within the arbitration provision and, if so, whether the lender waived its right to arbitrate by providing information to the district attorney that checks written to the lender by the borrowers had been returned for insufficient funds. The court of appeals answered the first question "yes," and the second, "no." We affirm.[1]

I. Background

Cash Biz, LP is a registered Texas credit services organization that assists customers in obtaining short-term loans. See TEX. FIN. CODE ch. 393.

Hiawatha Henry, Addie Harris, Montray Norris, and Roosevelt Coleman, Jr. (collectively, the Borrowers) contracted with Cash Biz for such loans. Each of the loan contracts contains an identical Waiver of Jury Trial and Arbitration Provision. It provides that "all disputes ... shall be resolved by binding arbitration only on an individual basis with you." The contracts further provide that

the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Disclosure Statement (including the Arbitration Provision), ... (c) all counterclaims, cross-claims and third party claims; (d) all common law claims, based on contract, tort, fraud, or intentional torts; (e) all claims based on a violation of any state or federal constitution, statute or regulation; ... (f) ... claims for money damages to collect any sum we claim you owe us and/or the Lender; (g) all claims asserted by you individually against us ... including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on your behalf by another person; (I) all claims asserted by you as a private attorney general, as a representative and member of a class of persons, or in any other

representative capacity, against us ...; and/or (j) all claims arising from or relating directly or indirectly to the disclosure by us ... of any non-public personal information about you.

As security for the loans, the Borrowers provided postdated personal checks made out to Cash Biz for the amount of the loan plus a finance charge. After the Borrowers defaulted on the loans, Cash Biz deposited their checks. The checks, predictably, were returned for insufficient funds. The parties do not disagree that the Borrowers were charged with issuance of bad checks, see TEX. PENAL CODE § 32.41, and that the charges were eventually dismissed. But they disagree about what the record shows as to whether Cash Biz simply forwarded information about the Borrowers and their returned checks to the district attorney as Cash Biz maintains it did, or somehow actually filed criminal charges, as the Borrowers argue Cash Biz did.

*2 In any event, the Borrowers sued Cash Biz, Redwood Financials, LLC, and Cash Zone LLC, d/b/a Cash Biz (collectively, Cash Biz) on behalf of themselves and a proposed class of similarly situated borrowers. They claimed that Cash Biz wrongfully used the criminal justice system to collect unpaid loans by filing false charges against them. The Borrowers asserted causes of action for malicious prosecution, fraud, and violations of the Deceptive Trade Practices Act, Consumer Protection Act, and the Finance Code. Cash Biz

responded by filing a motion to compel arbitration. It argued that the loan documents—including the contracts—comprised the basis of the Borrowers' claims because the claims arose out of Cash Biz's attempts to collect the loans. Further, according to Cash Biz, the broad arbitration provision waived the Borrowers' right to file a class action lawsuit. The Borrowers countered that the arbitration clause was inapplicable because they were not suing on the contract. Rather, their allegations related solely to Cash Biz's illegal use of the criminal justice system to enforce civil debts. The Borrowers also contended that even if the arbitration and class action waiver provisions applied, Cash Biz's "filing of criminal charges," participating in criminal trials, and obtaining "criminal judgments" substantially invoked the judicial process and therefore waived its right to enforce the provisions.

The trial court denied Cash Biz's motion. The court agreed with the Borrowers that (1) their allegations related solely to Cash Biz's use of the criminal justice system so the arbitration clause was inapplicable, and (2) Cash Biz waived its right to arbitration by substantially invoking the judicial process.

Cash Biz filed an interlocutory appeal. The court of appeals reversed. ––– S.W.3d ––––, ––––, 2016 WL 4013794 (Tex. App.–San Antonio 2016). The appeals court first determined that the Borrowers'

claims fell within the scope of the arbitration provision because the Borrowers' allegations were factually intertwined with the loan contracts. Thus, the broad definition of "dispute" in the arbitration provision encompassed the claims. Id. at ––––. The court next concluded that Cash Biz did not waive its right to enforce the arbitration provision because "Cash Biz's filing of a criminal complaint [did] not rise to the extent of active engagement in litigation that Texas courts have consistently held to be specific and deliberate actions inconsistent with a right to arbitrate or that display an intent to resolve a dispute through litigation." Id. Justice Martinez disagreed, maintaining that Cash Biz substantially invoked the judicial process by deliberately and repeatedly invoking the criminal justice system. Id. at –––– (Martinez, J., dissenting).

In this Court, the Borrowers assert the same substantive arguments that they did in the court of appeals. That is, they first argue that Cash Biz failed to meet its burden to prove their claims are within the scope of the arbitration agreement. In the alternative, they maintain that if the claims fall within the scope of the agreement, Cash Biz waived its right to arbitration by substantially invoking the judicial process to their prejudice by filing criminal charges against them.

Cash Biz responds, as it did in the courts below, that it met its burden to prove the arbitration agreement encompasses the claims and that the

Borrowers failed to meet their burden to prove it waived its right to arbitrate. Further, it contends that the Borrowers produced no evidence to prove they were actually prejudiced by any of its actions. Finally, Cash Biz asserts that the trial court erred by not enforcing the contractual waiver-of-class-action provision.

II. Law and Standard of Review

[1] [2] [3] [4] [5]The Federal Arbitration Act (FAA) generally governs arbitration provisions in contracts involving interstate commerce. In re Rubiola, 334 S.W.3d 220, 223 (Tex. 2011) (citing 9 U.S.C. § 2). The loan contracts specifically provide that the arbitration provision at issue here is governed by the FAA, and neither party argues otherwise. Under the FAA, a presumption exists favoring agreements to arbitrate. In re FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001). A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement. Venture Cotton Coop. v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014). If the party seeking to compel arbitration meets this burden, the burden then shifts, and to avoid arbitration, the party opposing it must prove an affirmative defense to the provision's enforcement, such as waiver. Id. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of

waiver, delay, or a like defense to arbitrability." In re Serv. Corp. Intern., 85 S.W.3d 171, 174 (Tex. 2002) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

*3 [6] [7] [8]We review a trial court's order denying a motion to compel arbitration for abuse of discretion. In re Labatt Food Serv., L.P., 279 S.W.3d 640, 642–43 (Tex. 2009). We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo. Id. Whether the claims in dispute fall within the scope of a valid arbitration agreement and whether a party waived its right to arbitrate are questions of law, which are reviewed de novo. Id.; Perry Homes v. Cull, 258 S.W.3d 580, 598 & n.102 (Tex. 2008).

III. Analysis

A. Are the Claims Within the Scope of the Arbitration Agreement?

[9]The Borrowers assert that their claims are not within the scope of the arbitration provision because the claims relate solely to Cash Biz's illegal use of the criminal justice system. They also contend that all the damages claimed are based solely on criminal fines, jail time, and loss of reputation related to the criminal charges, rather than breach of contract.

[10] [11] [12] [13]Both Texas policy and federal policy favor arbitration. In re FirstMerit Bank, 52 S.W.3d at 753. Thus, courts "resolve any doubts about an arbitration agreement's scope in favor of arbitration." Id. Further, in deciding questions like those before us, courts focus on the factual allegations and not on the legal causes of action asserted. Id. at 754. The presumption in favor of arbitration "is so compelling that a court should not deny arbitration 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.' " Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 899 (Tex. 1995) (quoting Neal v. Hardee's Food Sys., Inc., 918 F.2d 34, 37 (5th Cir. 1990)). Further, the scope of an arbitration clause that includes all "disputes," and not just claims, is very broad and encompasses more than claims "based solely on rights originating exclusively from the contract." See Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428, 439 (Tex. 2017) (examining a forum-selection clause and noting the analogies between such clauses and arbitration agreements).

Here, the arbitration agreement applies to "all disputes" and specifies that " 'dispute' and 'disputes' are given the broadest possible meaning and include, without limitation ... all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision." Given the presumption favoring arbitration and the policy of construing

arbitration clauses broadly as noted above, it follows that the arbitration clause here applies—just as it says—to all disputes, even those relating only indirectly to the loan agreements.

The Borrowers asserted that after they missed payments, Cash Biz deposited their postdated checks; the checks were returned for insufficient funds; Cash Biz threatened the Borrowers with criminal prosecution unless the loans were repaid; and when the Borrowers failed to pay, Cash Biz indeed pursued charges for issuance of bad checks. The Borrowers allege that when Cash Biz entered into the loan agreements, it failed to disclose the possibility that if the personal checks were presented to the banks for payment and were not paid, criminal prosecutions would follow.

The Borrowers' claims are not for breach of any specific obligations under the loan contracts. Nevertheless, their claims are based on the manner in which Cash Biz pursued collection of loans and are at least indirectly related to the contracts the Borrowers signed obligating them to repay the loans. Therefore, we agree with Cash Biz that the Borrowers' claims are within the scope of the arbitration provision.

*4 In light of the foregoing, the Borrowers must arbitrate their claims unless they prove the affirmative defense on which they rely, that Cash

Biz waived its right to arbitrate disputes. See Freeman, 435 S.W.3d at 227.

B. Waiver

[14]The Borrowers assert that Cash Biz impliedly waived its right to arbitration by its conduct, not that it expressly waived the right. To establish the implied waiver that they rely on—substantial invocation of the judicial process—the Borrowers had the burden to prove that (1) Cash Biz substantially invoked the judicial process in a manner inconsistent with its claimed right to compel arbitration, and (2) the Borrowers suffered actual prejudice as a result of the inconsistent conduct. G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 511–12 (Tex. 2015); Perry Homes, 258 S.W.3d at 589–90.

[15] [16]As to whether a party has substantially invoked the judicial process, courts consider a wide variety of factors and look to the specifics of each case. G.T. Leach Builders, LLC, 458 S.W.3d at 512. The necessary conduct must go beyond merely filing suit or seeking initial discovery. Perry Homes, 258 S.W.3d at 590. We have declined to conclude that the right to arbitrate was waived in all but the most unequivocal of circumstances. Compare id. at 595–96 (holding that the plaintiffs waived the right to arbitrate by participating in extensive discovery including hundreds of requests for production and interrogatories, then requesting arbitration

fourteen months after filing suit and only four days prior to the scheduled trial date), with G.T. Leach Builders, LLC, 458 S.W.3d at 512 (holding plaintiffs did not waive arbitration by asserting counterclaims; seeking change of venue; filing motions to designate responsible third parties, for continuance, and to quash depositions; designating experts; and waiting six months to move for arbitration), In re Fleetwood Homes of Tex., L.P., 257 S.W.3d 692, 694 (Tex. 2008) (holding party did not waive arbitration by noticing deposition, serving written discovery, and waiting eight months to move for arbitration), In re Bruce Terminix Co., 988 S.W.2d 702, 703–04 (Tex. 1998) (holding arbitration was not waived by sending eighteen interrogatories and nineteen requests for production and waiting six months to seek arbitration).

Here, the factors generally examined to determine waiver—how much discovery has been conducted, who initiated it, and whether it relates to the merits; how much time and expense has been incurred in litigation; and the proximity in time between a trial setting and the filing of the motion seeking arbitration—may serve as guideposts. See Perry Homes, 258 S.W.3d at 590–92. But those factors are not wholly on point because the conduct in question in this case involves the criminal justice system.

In attempting to meet their burden, the Borrowers introduced a list of cases and case summaries for criminal prosecutions in a Harris County Justice of the Peace Court. Cash Biz was named "complainant" in many of these cases, including those of the named Borrowers. The complaints resulted in criminal charges against the Borrowers for "issuance of a bad check." The Borrowers assert that without the information from Cash Biz, no criminal prosecutions would have occurred. And although the Borrowers argued, and continue to argue, that Cash Biz filed criminal complaints against them, the record does not reflect that it did. Rather, the record contains an affidavit from a Cash Biz representative, David Flanagan, in which he stated in part as follows:

*5 Cash Biz simply left the information entirely to the discretion of the district attorney, and any action taken by the district attorney thereafter was made completely on his/her own. Cash Biz did not make any formal charges, did not participate in any criminal trial, and did not obtain criminal judgments. Similarly, Cash Biz was neither a witness in any criminal proceeding nor was it asked to appear in any such proceeding.

The Borrowers do not attack Flanagan's affidavit or reference evidence contradicting the statements in it. The Borrowers argue that the court of appeals did not consider all of the evidence, but the only information they provided to the trial court apart

from case summaries consisted of news reports and online magazine articles stemming from a Texas Appleseed investigation. Those documents indicate that Texas Appleseed, an Austin-based organization that advocates for the poor, investigated payday lenders and discussed what it labeled as questionable practices by many of these businesses, including Cash Biz. But the reports—assuming they were properly before the trial court—do not refer to evidence of conduct by Cash Biz beyond providing information to the district attorney as was set out in Flanagan's affidavit. And while the Borrowers argue that the court of appeals failed to defer to the trial court's factual determinations that Cash Biz "participated in criminal trials [and] obtained criminal judgments," we agree with the appellate court that these findings are not supported by legally sufficient evidence. See In re Labatt Food Serv., L.P., 279 S.W.3d at 643 (holding that deference to trial court findings is limited to those supported by the record). The Borrowers simply provided no evidence of any actions by Cash Biz related to the criminal charges other than evidence that Cash Biz was the complainant in them. This evidence alone does not meet the Borrowers' burden to prove that Cash Biz substantially invoked the judicial process.

The Borrowers reference Principal Investments, Inc. v. Harrison in which a lender filed more than 16,000 individual collection actions in justice of the peace courts and obtained default judgments

against many of the borrowers. 366 P.3d 688, 690–91 (Nev. 2016). The Supreme Court of Nevada held that the lender waived its right to arbitrate by initiating the collection actions and inviting the borrowers to appear and defend on the merits of the claims. Id. Here, in contrast, the evidence shows only that Cash Biz informed the district attorney of the checks returned for insufficient funds. Thus, the district attorney, not Cash Biz, ultimately made the decision to prosecute or not prosecute in a particular case.

The Borrowers also point to In re Christus Spohn Health System Corp. to support their position that a lender's actions within the criminal justice system can waive its rights within the civil justice system. 231 S.W.3d 475 (Tex. App.–Corpus Christi 2007, no pet.). In that case, after a murder in a hospital parking lot, the victim's husband filed a civil suit against the hospital, and the hospital moved to compel arbitration. Id. at 481. The trial court denied the motion because the hospital had sought an order of contempt against the husband's counsel during the criminal proceedings. Id. The appeals court explained that while it ordinarily "would not consider actions in a separate cause as indicative of waiver," the hospital's actions were "part of its strategic plan of defense in the underlying matter that would be inconsistent with a right to arbitrate." Id. The Borrowers contend that Cash Biz's actions mirror that of the hospital—the criminal proceedings arising from Cash Biz's

contacts with the district attorney were part of a strategic plan to collect on the debts owed.

*6 Without passing judgment on the decision in In re Christus Spohn Health System Corp., a no petition case, Cash Biz's conduct in this case consisted solely of providing information to the district attorney and letting the chips fall where they may. We have no doubt that Cash Biz hoped that the falling chips would result in the borrowers paying their loans. But the Borrowers did not present evidence that Cash Biz went beyond providing truthful information to the district attorney. Cash Biz's conduct arguably demonstrates an intent to cause the district attorney to initiate a judicial proceeding. But even so, it is not more than initiating litigation, which we have held does not substantially invoke the judicial process and waive the right to arbitrate. Perry Homes, 258 S.W.3d at 590.

We conclude that Cash Biz did not substantially invoke the judicial process. Accordingly, we need not address whether the Borrowers were actually prejudiced by Cash Biz's conduct.

We recognize that our opinion does not accord with the decision in Vine v. PLS Financial Services, Inc., 689 Fed.Appx. 800 (5th Cir. 2017) (per curiam). There, as did Cash Biz here, a short-term lender had borrowers sign postdated checks, which

were presented for payment after the borrowers defaulted. *Id.* at 801. When the checks were not paid, the lender submitted the unpaid checks and affidavits to the local district attorneys. *Id.* The Vine court declined to follow the decision of the court of appeals in this case. Id. at 806. Rather, it concluded that the lender's actions in submitting affidavits to prosecuting attorneys waived its right to enforce the arbitration agreement. *Id.*

With due respect, and recognizing that it is important for federal and state law to be as consistent as possible in this area where we have concurrent jurisdiction, we agree with the dissenting justice in Vine. *Id.* at 807 (Higginson, J., dissenting). We conclude, as he did, that although some lenders may be "gaming the system" by taking actions like the lenders took there and as Cash Biz took here, more is required for waiver of a contractual right to arbitrate. *Id.*

IV. Conclusion

The claims brought by the Borrowers fell within the scope of the arbitration agreement and there was no evidence to support the trial court's finding that Cash Biz waived its right to arbitrate. We affirm the judgment of the court of appeals.

Justice Blacklock did not participate in the decision.

APPENDIX B

Court of Appeals of Texas,

San Antonio

CASH BIZ, LP, Redwood Financial, LLC, Cash Zone, LLC dba Cash Biz,

Appellants

v.

Hiawatha HENRY, Addie Harris, Montray Norris, and Roosevelt Coleman Jr., et al., Appellees

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No. 04-15-00469-CV

[Delivered and Filed: July 27, 2016]

[Review Granted June 23, 2017]

Synopsis

Background: Borrowers brought putative class action against short-term lender for malicious prosecution, fraud, and violations of the Deceptive Trade Practices Act and the Finance Code. The 166th Judicial District Court, Bexar County, No. 2015-CI-01545, Laura Salinas, J., denied lender's motion to compel arbitration. Lender filed an interlocutory appeal.

Holdings: The Court of Appeals, Jason Pulliam, J., held that:

[1] borrowers' claims fell within scope of arbitration provision, and

[2] lender did not substantially invoke judicial process, and thus did not impliedly waive its right to arbitrate.

Reversed, rendered, and remanded.

Rebeca C. Martinez, J., filed dissenting opinion

*345 From the 166th Judicial District Court, Bexar County, Texas, Trial Court No. 2015-CI-01545, Honorable Laura Salinas, Judge Presiding

Attorneys and Law Firms

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Sitting: Karen Angelini, Justice, Rebeca C. Martinez, Justice, Jason Pulliam, Justice

MEMORANDUM OPINION

Opinion by: Jason Pulliam, Justice

INTRODUCTION

This appeal arises from the trial court's denial of a motion to compel arbitration and to enforce a class action waiver provision contained within loan documents between the Cash Biz appellants and its customers. The issues on appeal are: (1) whether the Plaintiff borrowing parties' alleged causes of action fall within the scope of the arbitration provision contained within the loan documents, and if so, (2) whether Cash Biz waived the right to enforce the arbitration provision because it substantially invoked the judicial process by filing criminal complaints against the borrowing parties. Dependent upon whether the arbitration provision applies, the parties also dispute whether the Plaintiff borrowing parties waived the ability to proceed through a class action.

We conclude the Plaintiff borrowing parties' causes of action fall within the scope of the parties' arbitration agreement, and Cash Biz's filing of a criminal complaint was not an act that substantially invoked the judicial process to constitute waiver of this agreement. We conclude the Plaintiff borrowing parties waived the right to bring a class action. Accordingly, we reverse the trial court's order denying Cash Biz's motion to compel arbitration and denying Cash Biz's motion to enforce the class action waiver provision. We render an order granting Cash Biz's motion. We remand for arbitration.

***346 FACTUAL BACKGROUND**

Cash Biz, LP, Redwood Financial, LLC, and Cash Zone, LLC d/b/a Cash Biz (collectively referred to as "Cash Biz") provide short-term consumer loans, also known as "payday loans." See TEX. FIN. CODE ANN. § 393.221 (defining a payday loan). As is normal practice with "payday loans", Cash Biz required all borrowers to provide a post-dated personal check in the amount of the loan plus the finance charge. As a general practice, if a borrower defaulted, Cash Biz deposited the post-dated check on the loan's due date in satisfaction of the loan.

Also as part of the process of obtaining the loan, borrowers signed written credit service agreements along with disclosure statements, promissory notes, and security agreements (collectively, "Loan Contracts"). Each written credit service agreement contained a provision entitled "Waiver of Jury Trial and Arbitration Provision" (hereinafter referred to as "arbitration provision"). This arbitration provision requires arbitration of any of the following "disputes":

the words "dispute and "disputes" are given the broadest possible meaning and include, without limitation

• (a) claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision;

• (b) all federal or state law claims ... arising from or relating directly or indirectly to this Agreement ..., any past and/or future claims or disputes between you and us and/or any Lender who provides you with a loan as a result of our services; ...

• (d) all common law claims, based upon contract, tort, fraud, or other intentional torts;

• (e) all claims based upon a violation of any state or federal constitution, statute, or regulation;

• (f) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; ...

• (g) all claims asserted by you individually against us ... including claims for money damages and/or equitable or injunctive relief; ...

• (i) all claims asserted by you as a private attorney general, as a representative and member of a class ... against us ...; and/or

• (j) all claims arising from or relating directly or indirectly to the disclosure by us ... of any non-public personal information about you.

In addition, relevant to this appeal, the arbitration provision states:

You acknowledge and agree that by entering into this Arbitration Provision:

(a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US, THE LENDER AND/OR OUR/ITS RELATED THIRD PARTIES; ... and

(c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE ... OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS IN ANY LAWSUIT FILED AGAINST US....

Finally, the arbitration provision contains a waiver of class action in arbitration provision, which states,

all disputes ... shall be resolved by binding arbitration only on an individual *347 basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION.... Notwithstanding any other provision herein to the contrary, the validity, effect, enforceability of this waiver of class action lawsuit and class-wide arbitration shall be determined solely by a court of competent jurisdiction and not by the arbitrator.

Hiawatha Henry, Addie Harris, Montray Norris, and Roosevelt Coleman, Jr. (the Borrowing Parties) obtained loans from Cash Biz and subsequently defaulted on their repayment obligations. Cash Biz attempted to deposit the post-dated checks written upon execution of the loan documents; however, the checks were declined based upon insufficient funds.

Cash Biz contacted the applicable local district attorneys and submitted information necessary to make a criminal complaint, stating these borrowers "engaged in criminal conduct during the formation and performance of the loan transactions, including the issuance of bad checks and check fraud." The district attorneys then filed criminal charges against each of the Borrowing Parties for violation

of Texas Penal Code Section 32.41, which prohibits issuance of "bad checks". But see TEX. PENAL CODE ANN. § 32.41 (West Supp. 2015) (offense requires issuer's knowledge of insufficient funds at the time of issuance; knowledge may be presumed except for postdated check).

The criminal charges against each of the Borrowing Parties were eventually dismissed; however, several of the Borrowing Parties were arrested and detained. In addition, other Cash Biz borrowers within the purported class faced criminal convictions for theft by check and were assessed jail time, restitution, and fines as punishment.

PROCEDURAL BACKGROUND

On January 30, 2015, the Borrowing Parties filed a class action petition on behalf of themselves and all others similarly situated in Texas,1 alleging Cash Biz: (1) illegally and wrongfully used the criminal justice system to collect payday loans through the wrongful filing of criminal charges; (2) illegally and wrongfully threatened its customers with criminal prosecution for failure to repay payday loans in violation of the Texas Finance Code, Texas Penal Code, and Texas Constitution; and (3) illegally and wrongfully classified post-dated checks as bad checks and pursued criminal charges against its customers in violation of the Finance Code and Penal Code. The Borrowing Parties alleged Cash Biz engaged in the described conduct knowing it was in violation of the law.2

Based upon these allegations, the Borrowing Parties pled specific causes of action *348 of malicious prosecution, fraud, violation of the DTPA, and violation of Finance Code Section 393.301. Cash Biz filed a motion to compel arbitration under the Loan Contracts and to enforce the class action waiver provision within the arbitration provision. Cash Biz requested that the trial court compel individual arbitration with each Plaintiff and stay the action pending completion of the individual arbitrations.

At the conclusion of the hearing on the motion, the trial court denied Cash Biz's motion to compel and enforce the arbitration and class action waiver provisions and signed a written order finding:

(1) the plaintiffs' claims "relate solely to Cash Biz's illegal use of the criminal justice system to enforce a civil debt";

(2) the challenged conduct occurred after the expiration of any contracts entered into by the Borrowing Parties; and

(3) all of the damages are "solely related to criminal fines, jail time, and loss of reputation related to plaintiffs' criminal convictions."

Based on these findings, the trial court concluded the arbitration provision and class action waiver within the Loan Contracts are "not applicable" to the type of action brought by the Borrowing Parties. In addition, the trial court concluded Cash Biz waived its right to arbitration by substantially invoking the judicial process when it "filed criminal

charges against Plaintiffs, participated in criminal trials, obtained criminal judgments, and attempted to collect from Plaintiffs." Cash Biz perfected this interlocutory appeal pursuant to Texas Civil Practice and Remedies Code Sections 51.016 and 171.098.

ANALYSIS

Burden of Proof to Compel Arbitration

[1] [2]A party seeking to compel arbitration bears the burden to establish (1) the existence of a valid agreement to arbitrate; and (2) the claims in dispute fall within the scope of the arbitration agreement. In re Rubiola, 334 S.W.3d 220, 223 (Tex. 2011); J.M. Davidson v. Webster, 128 S.W.3d 223, 227 (Tex. 2003). If the party seeking arbitration meets its two-pronged burden to establish the agreement's validity and scope, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcement of the arbitration agreement, such as, in this case, waiver of arbitration. Venture Cotton Co-op. v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014); J.M. Davidson, 128 S.W.3d at 227.

Standard of Review

[3] [4] [5]An appellate court will review a trial court's order denying a motion to compel arbitration for an abuse of discretion, deferring to the trial court's factual determinations if they are supported by the record and reviewing legal determinations de novo. In re Labatt Food Serv., L.P., 279 S.W.3d 640, 643 (Tex. 2009) (orig.

proceeding); Bonded Builders Home Wty Ass'n of Texas, Inc. v. Smith, 488 S.W.3d 468, 475-76 (Tex. App.—Dallas 2016, no. pet. h.); Garcia v. Huerta, 340 S.W.3d 864, 868 (Tex. App.—San Antonio 2011, pet. denied). A trial court's determination whether a valid arbitration agreement exists and whether the claims in dispute fall within the scope of an arbitration agreement are legal determinations subject to de novo review. In re Labatt, 279 S.W.3d at 643; J.M. Davidson, Inc., 128 S.W.3d at 227. If the moving party satisfies its burden of proof, the trial court has no discretion but to grant the motion to compel arbitration unless the opposing party satisfies its burden to prove an affirmative *349 defense. Henry v. Gonzalez, 18 S.W.3d 684, 688-89 (Tex. App.—San Antonio 2000, pet. dism'd by agrm't); Dallas Cardiology Assoc., P.A. v. Mallick, 978 S.W.2d 209, 212 (Tex. App.—Texarkana 1998, writ denied).

[6] [7]In this case, the only affirmative defense at issue is waiver of the right to arbitrate. Determination whether a party waived its right to arbitrate presents a question of law subject to de novo review. Sedillo v. Campbell, 5 S.W.3d 824, 826 (Tex. App.—Houston [14th Dist.] 1999). If the opposing party satisfies its burden, the trial court must deny the motion to compel arbitration. See Henry, 18 S.W.3d at 688-89; see also In re FirstMerit Bank, N.A., 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding); In re Washington Mut. Fin., L.P., 173 S.W.3d 189, 192 (Tex. App.—Corpus Christi 2005, no pet.).

Issue One: Enforcement of the Arbitration Provision

On appeal, Cash Biz challenges the trial court's denial of its motion to compel arbitration contending it satisfied its burden of proof to compel arbitration, and the Borrowing Parties failed to establish waiver. The parties do not contest the first element of Cash Biz's burden of proof: whether a valid arbitration agreement exists. Instead, Cash Biz's appellate argument focuses on the second prong: whether the claims in dispute fall within the scope of the parties' arbitration provision.

1. Cash Biz's Burden of Proof to Compel Arbitration: Whether the Borrowing Parties' asserted claims fall within the scope of the arbitration provision

[8]On appeal, Cash Biz argues it proved the Borrowing Parties' claims fall within the scope of the arbitration provision because the supporting factual allegations, contending Cash Biz used the criminal justice system to enforce a civil debt arise out of the Loan Contract which created the civil debt and which contains the arbitration provision. Cash Biz contends these factual allegations and basis of the action are encompassed within the broad definition of "dispute" in the arbitration provision.

The Borrowing Parties assert their claims are not based on the parties' legal relationship created by

the Loan Contract, but arise independently based upon Cash Biz's ancillary action of illegally initiating criminal prosecutions against them.

Applicable Law

[9] [10]When determining whether a particular claim falls within the scope of an arbitration agreement, courts employ a strong presumption in favor of arbitration. In re Rubiola, 334 S.W.3d at 225; Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 899 (Tex. 1995). Any doubt as to whether a claim falls within the scope of a valid arbitration agreement must be resolved in favor of arbitration. In re Rubiola, 334 S.W.3d at 225; Prudential Sec. Inc., 909 S.W.2d at 899.

[11] [12]Under a broad arbitration clause, arbitration can be compelled even though a particular dispute that arises between the parties does not specifically pertain to formation of, or obligations created by, the originating contract. See In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 570 (Tex. App.—Waco 2000, orig. proceeding) (holding broad arbitration provision encompassed statutory and tort claims not based on the formation, negotiation, terms, or performance of contract); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 197 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Hou–Scape, Inc. v. Lloyd, 945 S.W.2d 202, 205-06 (Tex. App.—Houston [1st Dist.] 1997, no writ). To determine whether a claim falls within the scope of *350 the agreement, courts must focus on the factual allegations outlined in the petition, rather than the legal causes of action asserted.

Prudential Sec. Inc., 909 S.W.2d at 899; Hou–Scape, Inc. v. Lloyd, 945 S.W.2d at 205.

[13]If the facts alleged in support of a cause of action have a "significant relationship" to or are "factually intertwined" with an underlying contract that contains the arbitration agreement, then the asserted cause of action is within the scope of the arbitration agreement. See Pennzoil Co. v. Arnold Oil Co., 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding); Hou–Scape, Inc. v. Lloyd, 945 S.W.2d at 205-06. If the facts alleged stand alone and are completely independent of the contract, the asserted cause of action is not subject to arbitration. Pennzoil, 30 S.W.3d at 498.

Application

Here, the Borrowing Parties' allege in their first amended class action petition that Cash Biz "illegally and wrongfully used the criminal justice system to collect payday loans," "illegally and wrongfully threatened its customers with criminal prosecution," and "illegally and wrongfully classified post-dated checks as bad checks and pursued criminal charges."

While the torts alleged are based upon independent acts outside the formation or performance of the Loan Contracts, the arbitration provision compels a very broad definition of "dispute". By defining "dispute" as "all common law claims based upon tort, fraud, or other intentional tort", this broad definition encompasses all claims based on acts that occur outside the formation or performance of the Loan Contracts, and specifically

the causes of action alleged here. Therefore, the causes of action alleged by the Borrowing Parties against Cash Biz fall within the broad definition of "dispute" with the arbitration provision. This broad definition, which encompasses "any claim" between the parties, is limited only by the legal requirement that the facts be "intertwined" or have a "substantial relationship." See Pennzoil Co., 30 S.W.3d at 498; Hou–Scape, Inc., 945 S.W.2d at 205-06.

The factual allegations within the first amended petition focus upon Cash Biz's filing of criminal complaints against the Borrowing Parties to collect on the civil debt created by the Loan Contracts. As alleged, the Loan Contracts serve as basis for the underlying allegations because the Borrowing Parties' civil debt arose out of the Loan Contracts, and the existence of this debt served as the impetus for Cash Biz to complain of criminal activity. For this reason, the facts alleged in support of the asserted causes of action have a significant relationship to and are factually intertwined with the underlying Loan Contracts. Although the allegations are centered upon tortious conduct that does not pertain to the parties' obligations within the Loan Contracts, these alleged torts would not have occurred except for the existence of the Loan Contracts.

Because the facts as alleged to support the causes of action are factually intertwined with the Loan Contracts and because the broad definition of "dispute" within the arbitration provision

encompasses these allegations, Cash Biz satisfied its burden of proof to show the claims in dispute fall within the scope of the arbitration provision. Thus, the burden of proof shifted to the Borrowing Parties to establish an affirmative defense, that is, waiver of the right to enforce the arbitration provision. Venture Cotton Co-op., 435 S.W.3d at 227; J.M. Davidson, 128 S.W.3d at 227.

*2. The Borrowing Parties' Burden of Proof to Defeat Arbitration: Whether *351 Cash Biz Waived its Right to Enforce Arbitration Agreement*

[14]The Borrowing Parties' sole defense to arbitration is Cash Biz waived its right to arbitrate by substantially invoking the judicial process through its filing of criminal complaints. Accordingly, the Borrowing Parties assert Cash Biz sought to obtain a satisfactory result of repayment of the civil debts through restitution.

Cash Biz responds it merely provided information to support a complaint of potentially criminal activity, and the prosecuting district attorneys facilitated independent investigation and arrest. Because the district attorneys held discretion whether to file and/or prosecute criminal charges, Cash Biz asserts it did not invoke any judicial process.

<u>Applicable Law</u>

[15] [16] [17] [18] [19]As a defense to a motion to compel arbitration, the opposing party may show that the party seeking arbitration either expressly or impliedly waived its right to enforce

the arbitration agreement. Perry Homes v. Cull, 258 S.W.3d 580, 584 (Tex. 2008). Whether waiver occurs depends on the individual facts and circumstances of each case. See Pilot Travel Ctrs v. McCray, 416 S.W.3d 168, 183 (Tex. App.—Dallas 2013, no pet.); Southwind Group, Inc. v. Landwehr, 188 S.W.3d 730, 735 (Tex. App.—Eastland 2006, no pet.). To establish an implied waiver of a right to enforce arbitration, a party must show, based upon the totality of circumstances: (1) the party seeking arbitration substantially invoked the judicial process; and (2) the party opposing arbitration suffered actual prejudice as a result. G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 511-12 (Tex. 2015); Perry Homes v. Cull, 258 S.W.3d 580, 589-93 (Tex. 2008); Williams Indus., Inc. v. Earth Dev. Sys. Corp., 110 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Again, because public policy favors arbitration, there is a strong presumption against finding a party waived its right to arbitration. In re Bruce Terminix Co., 988 S.W.2d 702, 704–05 (Tex. 1998) (orig. proceeding); EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 89 (Tex. 1996) (orig. proceeding). The burden to prove waiver is thus a heavy one, and any doubts regarding waiver are resolved in favor of arbitration. Perry Homes, 258 S.W.3d at 584; In re Bruce Terminix Co., 988 S.W.2d at 705.

No Texas caselaw addresses the specific issue whether the filing of a criminal complaint constitutes substantial invocation of a judicial process to constitute waiver of arbitration in a civil

suit. However, caselaw establishing factors to consider and interpreting acts which constitute substantial invocation apply to guide this determination under these facts.

[20] [21] [22] [23]With regard to the first prong, in determining whether the party seeking arbitration substantially invoked the judicial process, courts review the circumstances of each case to determine whether a party made specific and deliberate acts after suit was filed that are inconsistent with its right to arbitrate or if a party otherwise engaged in active participation to substantially invoke judicial process.3 See Pilot Travel Ctrs, 416 S.W.3d at 183; Southwind Group, Inc., 188 S.W.3d at 735; *352 Sedillo, 5 S.W.3d at 827. This requisite action necessitates more than filing suit or initiation of litigation; a party must engage in deliberate conduct inconsistent with the right to arbitrate, that is, an active attempt to achieve a satisfactory result through means other than arbitration. See e.g. G.T. Leach Builders, LLC, 458 S.W.3d at 512 (holding no waiver by asserting counterclaims, seeking change of venue, filing motions to designate responsible third parties, for continuance, and to quash depositions, designating experts and waiting six months to move for arbitration); Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C., 455 S.W.3d 573, 576 (Tex. 2014) (holding no waiver by initiating lawsuit, invoking forum-selection clause, moving to transfer venue, propounding request for disclosure, and waiting nineteen months after being sued to move

for arbitration); In re Fleetwood Homes of Texas, L.P., 257 S.W.3d 692, 694 (Tex. 2008) (holding no waiver by noticing deposition, serving written discovery, and waiting eight months to move for arbitration); In re Bruce Terminix, 988 S.W.2d at 703–04 (holding no waiver by propounding requests for production and interrogatories and waiting six months to seek arbitration); EZ Pawn Corp., 934 S.W.2d at 88-89 (holding no waiver by propounding written discovery, noticing deposition, agreeing to reset trial date, and waiting nearly a year to move for arbitration). To waive arbitration, the party must "engage in some overt act in court that evince[s] a desire to resolve the arbitrable dispute through litigation rather than arbitration." Tuscan Builders, LP v. 1437 SH6 L.L.C., 438 S.W.3d 717, 721 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Haddock v. Quinn, 287 S.W.3d 158, 177 (Tex. App.—Fort Worth 2009, pet. denied).

[24] [25]Within the context of a criminal case,

[a] person procures a criminal prosecution if his actions were enough to cause the prosecution, and but for his actions the prosecution would not have occurred. A person does not procure a criminal prosecution when the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, unless the person provides information which he knows is false. A criminal prosecution may be procured by more than one person.

Browning–Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 293 (Tex. 1994); Daniels v. Kelley, 2010 WL 2935789, at *4 (Tex. App.—San Antonio July 28, 2010, no pet.) (mem. op.).

Application

To prove Cash Biz waived arbitration, the Borrowing Parties presented evidence consisting of a series of criminal case summaries and a case list of criminal cases initiated in Harris County Justice of the Peace court. This evidence reveals Cash Biz was the "complainant" in a number of criminal cases, including those of the named Borrowing Parties, which resulted in criminal charges for "issuance of bad check".

To refute this assertion, Cash Biz presented an affidavit and supplemental affidavit of David Flanagan, an "authorized representative" whose "principal business for Cash Biz includes all general affairs and operations of the business." In his supplemental affidavit, Flanagan attested:

Cash Biz simply left the information entirely to the discretion of the district attorney, and any action taken by the district attorney thereafter was made completely on his/her own. Cash Biz did not make any formal charges, did not participate in any criminal trial, and did not obtain criminal judgments. Similarly, *353 Cash Biz was neither a witness in any criminal proceeding nor was it asked to appear in any such proceeding.

The case list presented by the Borrowing Parties impliedly reveals that absent Cash Biz's complaint,

no criminal prosecution would have occurred. The case list does not reflect, however, the extent of Cash Biz's involvement in the criminal process, which is necessary for determination of the issue whether Cash Biz substantially invoked the judicial process.

[26]The trial court's order contains fact findings that Cash Biz "filed criminal charges against Plaintiffs, participated in criminal trials, obtained criminal judgments, and attempted to collect from Plaintiffs." While this court must defer to the trial court, as fact finder, this deference is limited to those fact findings supported by the record. See In re Labatt Food Serv., L.P., 279 S.W.3d at 643; Bonded Builders Home Wty Ass'n of Texas, Inc., 488 S.W.3d at 475-76; Garcia, 340 S.W.3d at 868. Here, the trial court's fact findings are not supported by the record. The case list and summaries presented do not reflect that Cash Biz "participated in criminal trials, obtained criminal judgments, and attempted to collect from Plaintiffs." The evidence submitted reveals only that Cash Biz provided information and filed criminal complaints against the Borrowing Parties. The only evidence submitted that pertains to the trial court's fact findings is Flanagan's supplemental affidavit, which is contrary to all of the trial court's findings. Flanagan attests Cash Biz did not initiate criminal proceedings and did not participate in, or was in any way involved in, the criminal prosecution of the Borrowing Parties. Consequently, this court need not defer to these

specific fact findings. See In re Labatt Food Serv., L.P., 279 S.W.3d at 643; Bonded Builders Home Wty Ass'n of Texas, Inc., 488 S.W.3d at 475-76; Garcia, 340 S.W.3d at 868.

In any event, Cash Biz presents a limited issue on appeal, and the Borrowing Parties limit their argument on appeal, to the issue whether Cash Biz's filing of criminal complaints was sufficient to constitute waiver of the contractual right to arbitrate. The borrowing Parties do not present argument that Cash Biz engaged in any conduct beyond the filing of criminal complaints. The evidence that pertains to this limited issue is not disputed, that is, Cash Biz provided information and filed criminal complaints against the Borrowing Parties. Therefore, this court's determination of waiver need only focus on this undisputed evidence.

Cash Biz's filing of a criminal complaint does not rise to the extent of active engagement in litigation that Texas courts have consistently held to be specific and deliberate actions inconsistent with a right to arbitrate or that display an intent to resolve a dispute through litigation. To begin, courts consistently evaluate a party's conduct after suit is filed to determine whether it waived its right to arbitration. See Pilot Travel Ctrs, 416 S.W.3d at 183; Sedillo, 5 S.W.3d at 827; Nationwide of Bryan, Inc. v. Dyer, 969 S.W.2d 518, 521 (Tex. App.—Austin 1998, no pet.). Here, the parties focus on Cash Biz's conduct in a separate proceeding before the underlying litigation was filed by the

Borrowing Parties. Further, under these facts, Cash Biz was not a party to the criminal prosecutions and did not serve as a witness or provide any interviews to facilitate prosecution. Cash Biz's actions, though presumably vindictive, do not evince a desire to achieve repayment of any loans through the criminal process. Thus, Cash Biz's actions were not sufficiently active or deliberate to constitute substantial invocation of the judicial process. See *354 G.T. Leach Builders, LLC, 458 S.W.3d at 512; Richmont Holdings, Inc., 455 S.W.3d at 576. Finally, Cash Biz's actions, even if wrong, were insufficient to rise to the level of "substantial invocation" of a litigation process. In Texas, the filing of criminal charges and initiation of criminal process is the discretion of the prosecuting attorney. Even if this court were to construe Cash Biz's preliminary act as an initiation of litigation to "achieve a satisfactory result," the filing of suit or initiation of litigation is not "substantial invocation of judicial process". See G.T. Leach Builders, LLC, 458 S.W.3d at 512; Richmont Holdings, Inc., 455 S.W.3d at 576. Therefore, the filing of a criminal complaint, though the impetus for initiation of criminal process, is insufficient to be construed as substantial invocation of a judicial process.

Conclusion

As in precedential and persuasive cases involving similar or greater participation in litigation than occurred here, we decline to find waiver under these circumstances. Consequently, the Borrowing Parties failed to satisfy their burden

of proof to establish Cash Biz waived its right to arbitration as a matter of law. Because the Borrowing Parties failed to satisfy the first prong of their burden of proof, we do not address the remaining prong: whether the Borrowing Parties were prejudiced by Cash Biz's actions.

Cash Biz's first issue is sustained.

Issue Two: Enforcement of the Class-Action Waiver Provision

The class-action waiver provision is not an independent agreement or provision, but is included within the arbitration provision in the Loan Contracts. Therefore applicability of the class action waiver provision is dependent upon the validity and applicability of the arbitration provision.

Cash Biz contends the trial court erred by denying its motion to enforce the class action waiver provision based upon the plain language of the provision, itself. The Borrowing Parties argue generally that the class action waiver does not apply under these facts for the same reasons and based upon the same arguments as that presented to dispel application of the arbitration provision.

We have already concluded the Borrowing Parties' asserted causes of action fall within the scope of the arbitration provision, and therefore, the provision applies, and further concluded Cash Biz did not waive its right to arbitration. This conclusion necessarily compels application of the class action waiver contained therein. Therefore,

the class-action waiver contained within the arbitration provision must also apply, unless shown to be independently invalid. See NCP Fin. Ltd. P'ship v. Escatiola, 350 S.W.3d 152, 155 (Tex. App.—San Antonio 2011, no pet.).

Here, the Borrowing Parties do not contest the validity of the class action waiver provision. Absent any argument or basis to hold the class action waiver provision internally invalid, this court must conclude it applies, and the trial court erred by denying Cash Biz's motion to enforce the class action waiver provision.

Cash Biz's second issue is sustained.

CONCLUSION

For these reasons, the trial court's order denying Cash Biz's motion to compel arbitration and motion to enforce the class action waiver is reversed and order is rendered granting this motion. The cause is remanded and stayed pending completion of individual arbitration.

Footnotes

1

The proposed Class is defined as "[a]ll residents of the State of Texas who received a 'deferred presentment transaction' or payday loan as defined by TEX. FIN. CODE § 393.221 from Cash Biz in the State of Texas and Cash Biz's pursuit of [sic] criminal charges to collect or recover the payday loan."

2

See TEX. CONST. Art. 1, sec. 18 ("No person shall ever be imprisoned for debt."); see also TEX. FIN. CODE ANN. § 392.301(a) (West 2006) ("In debt collection, a debt collector may not use threats, coercion or attempts to coerce that employ any of the following practices ... (2) accusing falsely or threatening to accuse falsely a person of fraud or any other crime"); TEX. FIN. CODE ANN. § 393.201(c)(3) (West Supp. 2015) (credit services contract must state "a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct.").

3

In the civil context, courts consider factors such as: (i) when the movant knew of the arbitration clause; (ii) the reason for any delay in moving to enforce arbitration; (iii) how much discovery was conducted; (iv) who initiated the discovery; (v) whether the discovery related to the merits; (vi) how much the discovery would be useful for arbitration; and (vii) whether the movant sought judgment on the merits. Perry Homes, 258 S.W.3d at 591-92.

APPENDIX C

Court of Appeals of Texas,

San Antonio

CASH BIZ, LP, Redwood Financial, LLC, Cash Zone, LLC dba Cash Biz,

Appellants

v.

Hiawatha HENRY, Addie Harris, Montray Norris, and Roosevelt Coleman Jr., et al., Appellees

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No. 04-15-00469-CV

[Delivered and Filed: July 27, 2016]

Rebeca C. Martinez, Justice, dissenting.

While I agree that the Borrowing Parties' claims against Cash Biz in the underlying *355 suit are factually intertwined with the Loan Contracts, and thus fall within the broad scope of the Loan Contracts' arbitration agreement, I disagree with the majority's conclusion that Cash Biz did not "substantially invoke the judicial process" and thus did not waive its right to enforce the arbitration agreement. In my view, the Borrowing Parties met their burden to prove that Cash Biz waived its right to enforce arbitration by showing that Cash Biz filed criminal "bad check" complaints against the Borrowing Parties in an effort to collect restitution

on the debts created by the Loan Contracts, thereby substantially invoking the judicial process to obtain a satisfactory result and causing the Borrowing Parties actual prejudice.[1] See Perry Homes v. Cull, 258 S.W.3d 580, 584 (Tex. 2008) (stating the two-prong test for waiver). I therefore dissent to the portion of the majority opinion holding that the Borrowing Parties failed to prove that Cash Biz waived its right to enforce the arbitration agreement by substantially invoking the judicial process.

As the majority notes, the relevant issue presented on appeal is whether Cash Biz's action in filing criminal bad check complaints against the Borrowing Parties was sufficient to constitute substantial invocation of the judicial process, waiving its contractual right to arbitrate the Borrowing Parties' malicious prosecution and other claims against it. The majority concedes that the evidence is undisputed that Cash Biz "provided information and filed criminal complaints against the Borrowing Parties," and that "absent Cash Biz's complaint, no criminal prosecution would have occurred."[2] The majority holds that such evidence is insufficient, however, because it does not show that Cash Biz engaged in "deliberate conduct inconsistent with the right to arbitrate, that is, an active attempt to achieve a satisfactory result through means other than arbitration." See Maj. Op. at p. 352. The majority reasons that Cash Biz's filing of a criminal complaint does not rise to the level of "active engagement in litigation" through "specific

and deliberate actions" that are inconsistent with the right to arbitrate, or that reveal an intent to resolve the dispute through litigation rather than arbitration, because: (1) the criminal complaints were filed before the Borrowing Parties filed suit; (2) Cash Biz was not a party to, and did not participate as a witness in, the separate criminal prosecution; and (3) Cash Biz's actions do not show its desire to obtain repayment of the loans through the criminal process. See Maj. Op. at p. 353–54. The majority stresses that, even assuming Cash Biz's action in filing the complaints "initiated" the criminal prosecution, the mere filing of suit or initiation of litigation does not, by itself, constitute substantial invocation of the judicial process.

I disagree with the majority's analysis for several reasons. First, the traditional waiver requirement that the judicial process have been substantially invoked after the filing of the underlying lawsuit is based on the usual situation where there is only one legal proceeding. See, e.g., Perry Homes, 258 S.W.3d at 585, 591. Here, we are presented with the unique situation of *356 a civil lawsuit and a criminal proceeding, both of which arise out of the same civil debt. Second, while the formal parties in a criminal proceeding are the defendant and the State of Texas, In re Amos, 397 S.W.3d 309, 314 (Tex. App.—Dallas 2013, orig. proceeding), the victim or complainant has a personal interest in the prosecution and thus plays a unique role in criminal proceedings. See In re Ligon, 408 S.W.3d

888, 896 (Tex. App.—Beaumont 2013, orig. proceeding).

Third, I disagree with the majority that Cash Biz's actions in "merely" filing the criminal complaints do not show its desire to obtain repayment of the loans, or otherwise obtain a satisfactory result, through the criminal process. As Flanagan's supplemental affidavit indicates, Cash Biz has staunchly maintained that it acted with no self-interest, but "simply left the information [of potential criminal conduct] to the discretion of the district attorney, and any action taken by the district attorney thereafter was made completely on his/her own." To the contrary, the evidence in this case shows a pattern of specific, deliberate, and affirmative conduct by Cash Biz in filing sworn complaints (accompanied by documentation) with the district attorneys' offices as an immediate and direct reaction to its borrowers' defaults on their payday loans. The 13-page list of criminal cases in the Justice of the Peace Courts for Harris County, Texas, where the bad check cases against the Borrowing Parties were filed, shows that Cash Biz was the complainant in more than 400 bad check cases filed during the relevant time period from May 2011 through July 2012. The appellees represent that Cash Biz repeated this conduct in other Texas counties as well. Given the sheer number and geographic scope of the complaints, it is disingenuous to assert, as Cash Biz does, that it was simply acting as a concerned citizen who was aware of potentially criminal conduct, without any

desire for restitution from any of its borrowers. Moreover, at the hearing, counsel for Cash Biz ultimately conceded that Cash Biz would provide the "bad check" information to the prosecutors, and the prosecutors' office would send out letters "to collect."

In addition, in its appellate brief and at oral argument, Cash Biz conceded that it was "mistaken" in believing that it was a crime for its borrowers to give it a post-dated check as security for the loan (as it required). See TEX. PENAL CODE ANN. § 32.41 (West Supp. 2015) (defining the offense of issuance of a bad check). Indeed, the criminal charges against the four named Borrowing Parties were ultimately dismissed. This does not change the fact that they suffered prejudice as a result of the charges, arrests, and defense costs, as well as the mental, emotional, and reputational damages. Other defaulting borrowers against whom Cash Biz filed complaints suffered convictions and punishment, including restitution. Ultimately, Cash Biz invoked the collection authority of the district attorney's office with the expectation to obtain restitution, i.e., repayment of the loans.

While it may be technically correct that the district attorney made the ultimate decision whether to file bad check charges based on the information contained in Cash Biz's sworn complaints, it is also true that no criminal prosecution would ever have been initiated without Cash Biz alerting the district attorney's

office and supplying the information stated in, and attached to, its complaints. See Browning–Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 293 (Tex. 1994). By submitting the sworn complaints, Cash Biz not only procured the prosecution, it became a "witness" in the criminal prosecution, i.e., a person who presented personal knowledge of the borrowers' purported criminal conduct. *357 See Crawford v. Washington, 541 U.S. 36, 50-53, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (defining " 'witnesses' against the accused" within the context of the Sixth Amendment to include not only those who actually testify at trial, but also those whose out-of-court statements are used against the defendant). Once the complaint was submitted, the right of confrontation attached to each defendant. Id. at 50, 124 S.Ct. 1354. Whether Cash Biz was attempting to obtain repayment of the loans through restitution as its conduct suggests, or to obtain some other form of punishment against its defaulting borrowers, it deliberately and repeatedly invoked the criminal justice system in an attempt to achieve some form of satisfactory result based on the civil debt. In doing so, Cash Biz ignored its own right and obligation under the arbitration agreement contained in the Loan Contracts to seek collection of the debts through arbitration rather than judicially.

While the instant facts involving Cash Biz's actions in a separate criminal proceeding do not fit within the traditional waiver analysis applied to a single civil lawsuit, the parties have presented us

with some cases that are instructive on the application of waiver law to similar fact scenarios. Only one Texas case discusses the interplay between civil and criminal litigation in a waiver-of-arbitration context. In In re Christus Spohn Health Sys. Corp., 231 S.W.3d 475 (Tex. App.—Corpus Christi-Edinburg 2007, orig. proceeding), a nurse was murdered in her employer hospital's parking lot and her family sued the hospital for wrongful death. Id. at 478. Christus Spohn "substantially litigated" the case during the fourteen-month period before it filed a motion to compel arbitration. Id. at 480-81 (describing how the hospital engaged in "voluminous discovery," filed a motion to designate the criminal defendant as a third party defendant, and filed an original third party petition, while three trial dates were rescheduled). During the fourteen-month period before the hospital sought to compel arbitration, the hospital filed a motion for contempt in the criminal proceeding based on alleged discovery abuse in the civil case by counsel for the deceased's family. Id. at 481. The court of appeals explained that, "[w]hile we ordinarily would not consider actions in a separate cause as indicative of waiver," the motion for contempt expressly stated that Christus Spohn planned to use the criminal court's contempt finding to prevent the use of the criminal defendant's statement in the civil matter. Id. at 481. The court "construe[d] Spohn's actions in this separate lawsuit as part of its strategic plan of defense in the underlying matter that would be inconsistent with a right to arbitrate." Id.

(emphasis added). The court of appeals concluded that "Spohn's third-party petition, motion for contempt, and attempt to impose sanctions constitute specific and deliberate actions that are inconsistent with the right to arbitrate and suggest that Spohn was attempting to achieve a satisfactory result through the judicial process." Id. at 481-82. Based on this combination of facts and circumstances, the court held that Christus Spohn had substantially invoked the judicial process and waived its right to enforce arbitration. Id. at 482.

A Nevada court has addressed waiver of arbitration in a factual scenario that is substantially similar, if not identical, to the scenario presented here. The Nevada Supreme Court has held that a payday loan company that obtained default judgments against its borrowers waived its right to arbitration under the loan contracts in a separate lawsuit. Principal Invs., Inc. v. Harrison, –––Nev. ––––, 366 P.3d 688, 697-98 (2016). In that case, during a seven-year period, Rapid Cash filed more than *358 16,000 individual collection actions in justice of the peace court in Clark County, Nevada against its borrowers seeking repayment of the loans. Id. at 690. Relying on affidavits of service by its process server, Rapid Cash obtained thousands of default judgments. Id. at 690-91. The borrowers filed a class-action lawsuit against Rapid Cash alleging fraud upon the court through false affidavits of service, abuse of process, negligence, civil conspiracy and violation of fair debt collection laws. Id. at 691. Rapid Cash moved to compel

arbitration under the provision contained in the loan agreements, but the trial court denied the motion based on waiver due to the collection actions in justice court. Id. at 691-92. Acknowledging that FAA waiver law requires "prior litigation of the same legal and factual issues as those the party now wants to arbitrate," the Nevada Supreme Court affirmed the finding of waiver, reasoning the class-action claims "arise out of, and are integrally related to, the litigation Rapid Cash conducted in justice court." Id. at 697. The court stated that if the default judgments that Rapid Cash obtained were unenforceable as the product of fraud or criminal misconduct, it would be "unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside ... and otherwise to remediate its improper entry." Id. at 697-98.

Harrison is not directly on point, but is instructive because there "the named plaintiffs' claims all concern[ed], at their core, the validity of the default judgments," and in our situation the Borrowing Parties' malicious prosecution claims similarly "arise out of, and are integrally related to" the criminal bad check charges instigated by Cash Biz. See id. at 698. Waiver of the right to arbitration under the FAA does not require that the party litigate the identical claims in order to invoke the judicial process, but rather a "specific claim it subsequently wants to arbitrate." Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 328 (5th Cir. 1999) (emphasis added). Here, Cash Biz initiated a

process that invited the Harris County district attorney to address issues that are at stake in the underlying lawsuit. The Borrowing Parties' malicious prosecution claim contains elements of a plaintiff's innocence.3 The Borrowing Parties' innocence and the absence of probable cause were litigated in the prior criminal proceedings. Their other claims for fraud and violations of the DTPA and Finance Code similarly involve litigation in the criminal proceedings of defensive issues based on Cash Biz misrepresenting the conditions for the loans the process of collection, and threatening them to achieve repayment. Cash Biz invoked the criminal judicial process to litigate a "specific claim [it] subsequently wants to arbitrate," to wit: the specific issue of non-payment from which all of the Borrowing Parties' causes of action derive.

I believe the record here shows that Cash Biz substantially invoked the judicial process by deliberately engaging in a series of overt acts in court that evidence a desire to resolve the same arbitrable dispute through litigation rather than arbitration. See *359 Tuscan Builders, LP v. 1437 SH6 L.L.C., 438 S.W.3d 717, 721 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (op. on reh'g) (quoting Haddock v. Quinn, 287 S.W.3d 158, 177 (Tex. App.—Fort Worth 2009, pet. denied)). Therefore, I would hold that, by filing the criminal "bad check" complaints against the Borrowing Parties, seeking repayment or some other form of satisfaction, Cash Biz waived its contractual right to

arbitrate the malicious prosecution claims arising out of the criminal proceedings.

As to the class-action prohibition, it is not an independent agreement, but is included within the arbitration agreement in the Loan Contracts. Therefore its applicability depends on the applicability of the arbitration agreement. I would therefore hold that the class-action prohibition was similarly waived by Cash Biz's invocation of the judicial process.

All Citations

539 S.W.3d 342

FOOTNOTES

1

Because the majority opinion does not reach the second-prong issue of prejudice, I also omit that analysis; however, I believe the Borrowing Parties proved that they suffered actual prejudice.

2

The majority agrees that the list of criminal cases in the Harris County Justice of the Peace Court showing Cash Biz as "complainant" in all the cases against the Borrowing Parties, as well as multiple other borrowers, "impliedly reveals" that no criminal prosecution would have been initiated without Cash Biz's complaints.

3

The elements of a malicious prosecution claim are: (1) the commencement of a criminal prosecution against the plaintiff; (2) causation (initiation or procurement) of the action by the defendant; (3) termination of the prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the absence of probable cause for the proceedings; (6) malice in filing the charge; and (7) damage to the plaintiff. Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997); Davis v. Prosperity Bank, 383 S.W.3d 795, 802 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

APPENDIX D

United States Court of Appeals,

Fifth Circuit

Lucinda VINE; Kristy Pond, Plaintiffs-Appellees

v.

PLS FINANCIAL SERVICES, INCORPORATED; PLS Loan Store of Texas, Incorporated, Defendants-Appellants

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No. 16-50847

[Filed May 19, 2017]

Synopsis

Background: Borrowers commenced class action against lender for its allegedly unfair and deceptive practices, and lender moved to enforce arbitration clause in parties' loan agreement. The United States District Court for the Western District of Texas, No. 3:16-CV-31, Philip R. Martinez, J., 226 F.Supp.3d 719, denied motion, and lender appealed.

Holdings: The Court of Appeals held that:

[1] district court, and not arbitrator, was in best position to decide whether party had waived right to enforce arbitration clause by its conduct before the district court;

[2] language in arbitration agreement, requiring arbitration of "any claim or attempt to set aside this Arbitration Provision," did not clearly and unmistakably indicate that issue of whether party had waived its right to compel arbitration by its conduct before district court was to be decided by arbitrator; and

[3] by allegedly submitting false worthless check affidavits to the district attorney immediately upon borrowers' default, despite having previously advised borrowers that their postdated checks would not be cashed but would be used only to verify accounts, lender invoked the judicial process and waived right to enforce arbitration clause.

Affirmed.

*801 Appeals from the United States District Court for the Western District of Texas, USDC No. 3:16-CV-31

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Before BARKSDALE, GRAVES, and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM:*

Appellants PLS Financial Services, Inc., and PLS Loan Store of Texas, Inc. (collectively "PLS"), appeal the district court's denial of its motion to dismiss and to compel arbitration. Because PLS substantially invoked the judicial process to the detriment or prejudice of Appellees Lucinda Vine and Kristy Pond when it submitted false worthless check affidavits, we AFFIRM the judgment of the district court.

BACKGROUND

PLS's business is to provide short-term loans to customers. To obtain loans, PLS customers must present blank or post-dated checks for the amount borrowed plus a finance charge and a credit-access-business fee. They must also sign PLS's Loan Disclosure, Promissory Note and Security Agreement and a Credit Services Agreement (the "Agreement"), which requires arbitration of all "disputes." The Agreement states:

For purposes of this Waiver of Jury Trial and Arbitration Provision ... the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating directly or indirectly to signing of this Arbitration Provision, the validity and scope of this Arbitration
Provision, the validity and scope of this Arbitration

Provision and any claim or attempt to set aside this Arbitration Provision....

Vine and Pond allege that during the loan application process, PLS asked them for blank or post-dated checks, but assured them that the checks would not be cashed and would only be used to verify checking accounts. However, PLS cashed the checks as soon as Vine and Pond defaulted on their loans, and then submitted worthless check affidavits to local district attorneys' offices when the checks bounced. According to Vine and Pond, PLS's actions were part of a regular strategy whereby PLS submitted false worthless check affidavits to achieve repayment of the loans and to avoid arbitrating any collection actions. In addition, Vine and Pond allege that PLS knew that its submission of false worthless check affidavits *802 violated Texas law. See Tex. Fin. Code §§ 393.201(c) and 292.301.

Soon after submission of the worthless check affidavits, Vine and Pond received letters from their local district attorneys' offices, notifying them that they would need to pay restitution to PLS and statutory fees or face criminal proceedings on theft by check charges.

On January 26, 2016, Vine and Pond initiated the present class action against PLS on behalf of themselves and all similarly-situated plaintiffs, alleging: (1) malicious prosecution; (2) Texas Deceptive Trade Practices Act violations; (3) fraud; and (4) Texas Finance Code § 392.301 violations.

On March 23, 2016, PLS moved to dismiss the proceedings and compel Vine and Pond to arbitrate their claims pursuant to the Agreement. On June 6, 2016, the district court denied PLS's motion to dismiss, stating that, even if Plaintiffs had agreed to arbitration, PLS had waived its right to compel them to do so by submitting the worthless check affidavits. PLS appeals from the district court's denial of their motion to dismiss and to compel arbitration.

STANDARD OF REVIEW

"We review the issue of whether a party's conduct amounts to a waiver of arbitration de novo." Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999). A motion to compel arbitration is generally treated as a motion to dismiss. See Suburban Leisure Ctr., Inc. v. AMF Bowling Prods., Inc., 468 F.3d 523, 525 (8th Cir. 2006). Consequently, we accept Vine and Pond's well-pleaded facts as true and view them in the light most favorable to them. Id.

DISCUSSION

PLS makes three arguments on appeal. It contends that the district court erred by: (1) deciding whether PLS waived its right to compel arbitration by participating in litigation conduct; (2) ignoring the parties' express agreement to arbitrate all disputes, including any litigation-conduct waiver claims; and (3) concluding that PLS waived its right to arbitrate by submitting worthless check affidavits. None of these arguments are persuasive.

I.

[1]First, the district court did not err by deciding the litigation-conduct waiver. In Tristar Fin. Ins. Agency v. Equicredit Corp. of Am., 97 Fed.Appx. 462, 464 (5th Cir. 2004), we recognized that when "waiver ... depends on the conduct of the parties before the district court," "the court, not the arbitrator, is in the best position to decide whether the conduct amounts to a waiver under applicable law." Here, the district court's waiver decision depended on the conduct of PLS—a party to the litigation. Consequently, the district court was "in the best position" to decide the litigation-conduct waiver. Id.

PLS contends that the Supreme Court's decision in BG Group, PLC v. Republic of Argentina, ––– U.S. ––––, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014), abrogates any persuasive effect of our Tristar decision. In BG Group, the Supreme Court stated that courts should decide issues "such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." BG Group, 134 S.Ct. at 1206 (quotations omitted). But arbitrators should decide questions "about the meaning and application of particular procedural preconditions for the use of arbitration." Id. at 1207. Because BG Group defines "claims 'of waiver, delay, or a like defense to arbitrability' *803 " as procedural, PLS argues that litigation-conduct waiver should be decided by an arbitrator, and not a court. See id. at 1202 (quoting

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). PLS notes that in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting Moses H. Cone Memorial Hospital, 460 U.S. at 25, 103 S.Ct. 927), the Supreme Court also stated that "claims 'of waiver, delay, or a like defense to arbitrability' " are procedural and thus arbitrator-committed.

Despite the surface appeal of this argument, a careful reading of BG Group and Howsam demonstrates that it is misguided. When confronted with the identical language in Howsam, the Third Circuit stated:

Properly considered within the context of the entire opinion ... we believe it becomes clear that the Court was referring only to waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration ... and not to claims of waiver based on active litigation in court.

See Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 219 (3d Cir. 2007). Unlike other types of waiver, litigation-conduct waiver "implicates courts' authority to control judicial procedures or to resolve issues ... arising from judicial conduct." Id. (emphasis in the original). Consequently, because "parties would expect the court to decide [litigation-conduct waiver] itself," the Third Circuit was unconvinced that the Supreme Court had meant for arbitrators, and not courts, to presumptively decide litigation-conduct waiver.

The majority of our sister circuits agree. See Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 14 (1st Cir. 2005) ("We hold that the Supreme Court ... did not intend to disturb the traditional rule that waiver by conduct, at least due to litigation-related activity, is presumptively an issue for the court."); Grigsby & Assocs., Inc. v. M. Sec. Inv., 664 F.3d 1350, 1353 (11th Cir. 2011) (same); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393 (6th Cir. 2008) (same); Martin v. Yasuda, 829 F.3d 1118, 1122-23 (9th Cir. 2016) (same). But see Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir. 2003) (holding that all waiver challenges should be committed to an arbitrator). We note that a majority of the decisions addressing litigation-conduct waiver pre-date BG Group, but the logic of those decisions interpreting Howsam is equally applicable to BG Group. Consequently, the district court did not err.

II.

[2]Second, the parties' express agreement does not address litigation-conduct waiver. As a preliminary matter, PLS waived this issue by raising it for the first time in its motion to reconsider. See LeClerc v. Webb, 419 F.3d 405, 412 n.13 (5th Cir. 2005) ("A motion for reconsideration may not be used to ... introduce new arguments."). However, even if PLS had not waived the issue, we would reach the same conclusion.

While the language of an arbitration agreement can displace the presumption that a court should decide an issue, "[a]n issue that is presumptively

for the court to decide will be referred to the arbitrator for determination only where the parties' arbitration agreement contains 'clear and unmistakable evidence' of such an intent." See Ehleiter, 482 F.3d at 221 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

Here, we do not find "clear and unmistakable evidence" that the parties intended *804 to arbitrate litigation-conduct waiver. Id. Though the parties' agreement requires arbitration of "any claim or attempt to set aside this Arbitration Provision," it does not explicitly mention litigation-conduct waiver. See Principal Investments, Inc. v. Cassandra Harrison, 132 Nev. Adv. Op. 2, 366 P.3d 688, 696 (2016) ("Had Rapid Cash intended to delegate litigation-conduct waiver to the arbitrator, rather than the court, the agreements could and should have been written to say that explicitly."). Furthermore, we "cannot interpret the Agreement's silence regarding who decides the waiver issue here 'as giving the arbitrators that power for doing so ... [would] force [an] unwilling part[y] to arbitrate a matter he reasonably would have thought a judge, not an arbitrator, would decide.' " Ehleiter, 482 F.3d at 222 (quoting First Options, 514 U.S. at 945, 115 S.Ct. 1920). Because the Agreement does not contain "clear and unmistakable evidence" of an intent to arbitrate the instant litigation-conduct waiver issue, the district court did not err. Id. at 221.

III.

[3]Third, the district court correctly found that Vine and Pond plausibly alleged that PLS waived arbitration when it submitted false worthless check affidavits. “The question of what constitutes a waiver of the right of arbitration depends on the facts of each case.” Tenneco Resins, Inc. v. Davy Int’l AG, 770 F.2d 416, 420 (5th Cir. 1985). “Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.” Subway Equipment Leasing Corp., 169 F.3d at 326 (quoting Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986)).

A.

A party substantially invokes the judicial process when it “engage[s] in some overt act in court that evinces a desire to resolve the arbitration dispute through litigation.” Id. “We use the term [invoke] to describe the act of implementing or enforcing the judicial process, not the act of calling upon for support or assistance, as say, one would invoke a spirit or the elements.” Id.

As the district court noted, whether PLS sufficiently implemented the criminal justice system to its own benefit such that its conduct constitutes a substantial invocation of the judicial process is a matter of first impression before this Court. On this narrow issue, we find no guidance from any of our sister circuits.

Here, Vine and Pond allege that PLS systematically engaged in a strategy of submitting worthless check affidavits that falsely stated that borrowers had committed theft by check. In addition, Vine and Pond claim that PLS submitted these false affidavits solely to achieve repayment of loans and to avoid arbitrating any collection actions. According to Vine and Pond, PLS also knew that the affidavits violated Texas law. Texas law does not permit a lender to "threaten or pursue criminal charges against a consumer related to a check ... in the absence of forgery, fraud, theft, or other criminal conduct." See Tex. Fin. Code § 393.201(c); see also Tex. Fin. Code § 392.301.

Documents incorporated by reference into Vine and Pond's complaint also show the mechanics of PLS's alleged course of conduct.1 One of the affidavits submitted *805 by PLS and a letter received by a borrower from her local district attorney's office show that the district attorney's office sent out the letter the day after it stamped the corresponding PLS affidavit as "received." This comparison plausibly suggests that when the local district attorney's office sent out its letter requesting restitution, it relied solely on PLS's representations that the customer had committed theft by check. These documents also suggest that the district attorney's office may not have exercised robust discretion in reviewing PLS's affidavits before initiating criminal proceedings against PLS customers. As the district court noted,

If what Plaintiffs allege is true, Defendants conduct is merely a pretext to obtain a favorable ruling, which Defendants can then use in either defending or prosecuting a lawsuit brought by or against Plaintiffs in an arbitration proceeding.

Moreover, if true, PLS's conduct is inconsistent with a right to arbitrate.

In determining whether PLS's alleged actions are consistent with a right to arbitrate, three state-court decisions are instructive. In Principal Investments, 366 P.3d at 690–91, the Nevada Supreme Court found that Defendant Rapid Cash waived its right to arbitrate when it secured thousands of default judgments against the named plaintiffs and other borrowers by submitting false affidavits prepared by its process server. The court explained: "By initiating a collection action in justice court, Rapid Cash waived its right to arbitrate to the extent of inviting its borrower to appear and defend on the merits of that claim." Id. at 697. It also stated:

If the judgment Rapid Cash obtained was the project of fraud or criminal misconduct and is unenforceable for that reason, it would be unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside, to enjoin its enforcement, and otherwise to remediate its improper entry.

Id. at 697–98.

The Texas Court of Appeals decision in In re Christus Spohn Health Sys. Corp., 231 S.W.3d 475

(Tex. App.—Corpus Christi 2007, no pet.), is also instructive here. Christus Spohn was a premises liability case arising out of a murder in a hospital parking lot. When the murder victim's husband filed a civil lawsuit against the hospital, the hospital moved to compel arbitration. Id. at 481. However, the court denied the hospital's motion because the hospital had sought an order of contempt against the husband's counsel during the criminal proceedings. Id. The court explained that while "ordinarily [it] would not consider actions in a separate cause as indicative of waiver," the hospital's actions were "part of its strategic plan of defense in the underlying matter that would be inconsistent with a right to arbitrate." Id.

As in Christus Spohn, PLS allegedly submitted the false worthless check affidavits as "part of its strategic plan of defense in the underlying matter" to achieve loan repayment. See Christus Spohn, 231 S.W.3d at 481. As in Principal Investments, PLS allegedly derived benefit by engaging the criminal justice system through improper conduct. If it is true that PLS's submission of worthless check affidavits was fraudulent, "it would be unfairly prejudicial to [Vine, Pond, and similarly situated borrowers] to require arbitration of claims ... to remediate [the] improper entry" of the affidavits. See Principal Investments, 366 P.3d at 690. Thus, Vine and Pond have plausibly alleged that PLS waived its right to arbitrate when it submitted false worthless check affidavits.

*806 Nevertheless, PLS argues that we should follow the Texas Court of Appeals decision in Cash Biz, LP v. Henry et al., 2016 WL 4013794 (Tex. App.—San Antonio 2016, pet. filed). In Cash Biz, the court found that Defendant Cash Biz did not waive its right to arbitrate when it "contacted the applicable local district attorneys and submitted information necessary to make a criminal complaint." Cash Biz, 2016 WL 4013794, at *2. The court stated that "courts consistently evaluate a party's conduct after suit is filed to determine whether it waived its right to arbitration. Here, the parties focus on Cash Biz's conduct in a separate proceeding before the underlying litigation was filed by the Borrowing Parties." Id. at *8 (emphasis in the original). The court also reasoned that "[i]n Texas, the filing of criminal charges and initiation of criminal process is the discretion of the prosecuting attorney." Id. Consequently, the preliminary act of "filing of suit or initiation of litigation is not 'substantial invocation of judicial process.' " Id. (quoting G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 512 (Tex. 2015)).

However, despite the obvious factual similarities between Cash Biz and this case, we decline to follow Cash Biz for the following reasons: As the dissent in Cash Biz aptly noted, here, "we are presented with the unique situation of a civil lawsuit and a criminal proceeding, both of which arise out of the same civil debt." Cash Biz, 2016 WL 4013794, at *10 (Martinez, J., dissenting).

Moreover, it is alleged that the criminal proceedings were an integral component of PLS's litigation strategy to collect on outstanding debt. If PLS attempted to "game the system" by initiating theft by check proceedings in place of submitting collection actions to an arbitrator, PLS should not be allowed "a second bite at the apple through arbitration" to resolve related issues. See Cargill Ferrous Int'l v. SEA PHX. MV, 325 F.3d 695, 701 (5th Cir. 2003) ("Under the facts of this case, it is clear Serene is not gaming the system by seeking a win at trial, and in the case of loss, anticipating a second bite at the apple through arbitration.").

In addition, we also agree with the Cash Biz dissent that the majority in that case did not sufficiently consider the critical role that the Defendant played in the criminal proceedings as the complainant. See Cash Biz, 2016 WL 4013794, at *10 (Martinez, J., dissenting) ("[W]hile the formal parties in a criminal proceeding are the defendant and the State of Texas, the victim or complaintant [sic] has a personal interest in the prosecution and thus plays a unique role in criminal proceedings."). Here, Vine and Pond allege that PLS had a great "personal interest in the prosecution" as it constituted a means to achieve repayment of its loans while avoiding arbitration. Furthermore, documents incorporated by reference into Vine and Pond's complaint arguably show that PLS drove all theft by check criminal proceedings when it submitted the worthless check affidavits to local district attorneys' offices. In other words, had PLS

not submitted the worthless check affidavits, "no criminal prosecution would have occurred." See id. at *9 (Martinez, J., dissenting).

Therefore, by allegedly submitting false worthless check affidavits, PLS "invoke[d] the judicial process to the extent it litigate[d] a specific claim it subsequently [sought] to arbitrate." See Subway Equip. Leasing Corp., 169 F.3d at 328. As the district court made clear, "Defendants have initiated a process that invites Texas district attorneys' offices to address issues that are at stake in the instant action." Most obviously, all claims involve whether PLS misled or threatened Vine, Pond, and the class of PLS customers they purport to *807 represent in order to obtain outstanding debt owed to PLS.

B.

Vine and Pond have also demonstrated detriment or prejudice from PLS's submission of worthless check affidavits. "Prejudice in the context of arbitration waiver refers to delay, expense, and damage to a party's legal position." Nicholas v. KBR, Inc., 565 F.3d 904, 910 (5th Cir. 2009). Here, Vine and Pond would have borne the costs of defending against any theft by check prosecution. In addition, they would have suffered the preclusive effect of a conviction in any subsequent litigation. Consequently, they have sufficiently shown detriment or prejudice. See Subway Equip. Leasing Corp., 169 F.3d at 327.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

Although I agree with the majority that the district court did not err by deciding litigation-conduct waiver, I would hold that PLS's conduct did not amount to waiver of arbitration. I believe the question is close, due largely to the unique procedural nature of theft-by-check cases—especially here, where there is evidence that PLS not only intended to force repayment of these loans by submitting worthless check affidavits, but in fact achieved that result. However, my read of our law in Subway Equipment is that more is required for a party to have "substantially invoke[d] the judicial process." Subway Equipment Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999).

To the extent it applies, my read of Texas law is the same. See Cash Biz, LP v. Henry, No. 04-15-00469-CV, 2016 WL 4013794, at *6 (Tex. App.—San Antonio July 27, 2016, pet. filed) ("To waive arbitration, the party must engage in some overt act in court that evince[s] a desire to resolve the arbitrable dispute through litigation rather than arbitration." (internal quotation marks and citations omitted)). Furthermore, even accepting its legal framework, I view the Nevada Supreme Court's decision in Harrison as distinguishable due

to the particularly overt and affirmative steps taken by the lender in that case, namely, "fil[ing] ... individual collection actions in justice court" and "secur[ing] thousands of default judgments against ... borrowers who failed to appear and defend the collection lawsuits." Principal Invs., Inc. v. Harrison, 132 Nev. Adv. Op. 2, 366 P.3d 688, 690–91 (2016).

I share the majority's discomfort that PLS may be gaming the system through its submission of the worthless check affidavits, which is inconsistent with the company's current pro-arbitration stance. As Appellees note, attempting to secure repayment through the local district attorney's office not only provides PLS with two bites at the apple, but also allows it to avoid potential costs associated with arbitration, such as arbitrator and attorney's fees. Nevertheless, I believe our law requires something more than the actions alleged here.

Accordingly, I respectfully dissent.

All Citations

689 Fed.Appx. 800

Footnotes

*

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1

In ruling on motions to dismiss, courts may examine documents incorporated into the complaint by reference. See Lormand v. US Unwired, Inc., 565 F.3d 228, 251 (5th Cir. 2009).