Case No. 59837

In the Supreme Court of Nevada

PRINCIPAL INVESTMENTS, INC. d/b/a RAPID CASH; GRANITE FINANCIAL SERVICES, INC. d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; and ADVANCE GROUP, INC. d/b/a RAPID CASH,

Appellants,

vs.

CASSANDRA HARRISON; EUGENE VARCADOS CONCEPION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A624982

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INTRODUCTION

Borrowers accurately display the district court's reason for depriving Rapid Cash of its contractual right to arbitrate. The answering brief lays bare the results-oriented approach that purports to rely on an (incorrect) application of waiver doctrines but actually hangs on the assumption that Rapid Cash conspired to commit a fraud on the court and, therefore, does not deserve arbitration.

Truly, every member of the bar, every officer of the court, should be offended by On Scene's unforgivable and destructive conduct. But the district court has taken that understandable indignation too far. It presumed that Rapid Cash colluded in that wrong. And it seems to have predetermined that it must preside over this case itself—instead of honoring the contractual right to arbitrate or the jurisdiction of the justice court—and to conduct the case through an inappropriate class action.

Now on appeal, borrowers invite this Court also to assume the worst of Rapid Cash, its role in the On Scene mess, its intentions and good faith. They anticipate that this Court will turn its head from the law-be-damned approach below. This Court must instead apply the law correctly and dispassionately. It must compel arbitration pursuant to the parties' contractual agreements.

ARGUMENT

There is no legal justification for disregarding the arbitration agreements in this case. Perhaps in an attempt to gloss over the legal deficiencies in their arguments, borrowers have consistently expressed outrage and indignance at On Scene's behavior, and they attempt to project that outrage onto Rapid Cash.

But borrowers are not entitled to a presumption that their allegations against Rapid Cash are true; instead, Rapid Cash is entitled to a presumption that this dispute is arbitrable. Nevertheless, the district court denied arbitration based, at least in part, on an assumption that borrowers' claims against Rapid Cash had merit. This was inappropriate, and the court should have limited its inquiry to whether borrowers' claims fell within the scope of the arbitration agreements.

Rapid Cash has not waived its right to arbitrate its claims against any of its borrowers, and there is certainly no basis for concluding that it has waived its right to arbitrate against a sweeping class. Rapid Cash's option, under the contract, to bring a small claims action is commercially reasonable and consistent with due process. Rapid Cash is not acting inconsistently with its right to arbitrate. Rapid Cash's preference to bring collection actions in small claims court and to arbitrate complex legal claims is not an abuse of the court system—it is common sense.

Borrowers' claims are within the scope of the arbitration agreements. The parties agreed to arbitrate any claims arising out of Rapid Cash's efforts to collect a debt, which describes the entire factual background of borrowers' case.

Nevada public policy does not preclude arbitration in this case and, under the FAA, it *cannot*. As the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and *Marmet Health Care Center, Inc. v. Brown* make clear, state public policy is not a valid basis for disregarding an agreement to arbitrate where the FAA controls. While borrowers try to avoid this legal principle by characterizing the district court's public policy ruling as a quasi-waiver ruling, there was no waiver of arbitration. No independent public policy precludes arbitration.

PART ONE:
WAIVER ISSUES

I.

RAPID CASH DID NOT WAIVE ITS RIGHT TO ARBITRATE

Rapid Cash did not waive its right to arbitrate borrowers' claims by initiating collection actions in the justice court. Borrowers' claims are legally and factually distinct from the claims that Rapid Cash raised in those small claims actions.

A. Waiver is Limited to the Scope of Claims Actually Litigated

A party does not waive its right to arbitrate a claim simply by litigating a separate claim, because the scope of any waiver is limited to the specific claims actually litigated. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 254 (4th Cir. 2001) (holding that an employer's commencement of three separate lawsuits against an employee did not waive the employer's right to arbitrate the employee's retaliation claim based on those suits); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999) (holding that "a party only invokes the judicial process to the extent it litigates a specific claim [that] it subsequently seeks to arbitrate").

Under this principle, Rapid Cash did not waive its right to arbitrate claims separate from the breach of contract actions that it raised in small claims court. *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997) ("[O]nly prior litigation of the *same legal and factual issues* as those the party now wants to arbitrate results in a waiver of the right to arbitrate.") (emphasis added). Rapid Cash is not seeking to arbitrate the same claims that it has previously litigated. Rapid Cash instituted simple collection claims against borrowers in the justice court. The borrowers in this case have brought separate claims in the district court against Rapid Cash that are different from and beyond the scope of those breach of contract actions.

B. Borrowers' Authorities on Waiver Are Limited to Cases Where a Party Sought Arbitration of Claims that had Already Been Litigated

Borrowers can cite no decision holding that a party waives its right to arbitrate future claims by litigating a separate, prior claim. Instead, borrowers' authorities hold that, where a party extensively litigates a claim and then subsequently seeks to arbitrate that *same claim*, that party may have waived its right to arbitration. But Rapid Cash is not seeking to arbitrate any claim that it has previously litigated; it is seeking arbitration of borrowers' entirely new claims.

Borrowers rely heavily on three cases: *Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 110 P.3d 481 (2005); *United States v. Park Place Associates, Ltd.*, 563 F.3d 907 (9th Cir. 2009); and *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1988). None of these cases support borrowers' waiver argument.

1. There is No Waiver Under Nevada Gold

Nevada Gold's holding is not as broad as borrowers imply. *Nevada Gold* holds only that, if a party seeks to arbitrate the very same claims that it has had "vigorously litigate[d]" right up until the eve of trial, then the party seeking arbitration has waived arbitration. 121 Nev. at 91, 110 P.3d at 485.

In that case, after receiving several unfavorable pre-trial decisions, one of the parties finally moved to arbitrate the same claims that it had been litigating for years. *Id.* This Court found waiver because the party had voluntarily litigated *the*

very same claims that it sought to arbitrate until the very "brink" of trial. *Id.* The Court's rationale centered around not allowing a party to have two "bites at the apple" where an agreement to arbitrate is at issue:

> If plaintiff's demand for arbitration were to be upheld, there would be nothing to keep any litigant with an arbitration clause from testing the judicial waters, and to do so for as long as he liked, even to the point where the case has arrived on the brink of resolution, and then nullifying all that has gone before by demanding arbitration.

Id. (quoting *Uwaydah v. Van Wert County Hosp.*, 246 F. Supp. 2d 808 (N.D. Ohio 2002).

Rapid Cash seeks to arbitrate claims separate from those litigated in the justice court actions. The waiver rationale in *Nevada Gold* centers on the premise that a party demanding arbitration cannot prejudice the opposing party by relitigating issues after it has "test[ed] the judicial waters" in litigation. *Id.* But Rapid Cash is not attempting to *relitigate* anything or to "nullify[] all that has gone before" by seeking arbitration. *Id.*

2. Van Ness *Does Not Support Borrowers' Argument*

Borrowers also rely on *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1988). They cite this case for the proposition that "when a defendant makes a 'conscious decision to continue to seek judicial judgment on the

merits of arbitrable claims,' it has then waived the right to compel arbitration." (RAB at 23, quoting *Van Ness*, 862 F.2d at 759).

Van Ness simply stands for the same limited proposition as *Nevada Gold*; that a party may waive arbitration rights if it extensively and voluntarily litigates the *same claims* that it subsequently seeks to arbitrate. *Van Ness*, 862 F.2d at 758. The defendants in *Van Ness* were accused of participating in a scheme to defraud potential condominium buyers, and the plaintiffs had asserted various state and federal claims arising from this allegation. *Id.* at 756. The defendants voluntarily litigated those *exact same claims* until the very eve of trial, whereupon they finally demanded arbitration. *Id.* at 757. The Ninth Circuit held that defendants had waived the right to arbitrate *those claims* under the extreme circumstances presented. *Id.*

Van Ness certainly does not support borrowers' apparent position that a party who initiates litigation on one claim waives its right to arbitrate a different claim against those or other parties. Although Rapid Cash did bring breach of contract actions in justice court—as was its right under the agreements—it is not seeking arbitration of those claims. Rapid Cash is seeking arbitration of the entirely separate claims that borrowers brought. *Van Ness* says nothing about this issue.

3. **Park Place *Supports Rapid Cash's Position***

Borrowers cherry-pick language from *United States v. Park Place Assoc.* for its waiver position. (RAB at 21, citing *Park Place Assoc*., 563 F.3d at 921). But *Park Place* demonstrates that this is not an appropriate case for waiver, and that the arbitrator should decide the waiver issue.

After commencement of the lawsuit in *Park Place*, the defendant immediately moved to compel arbitration. *Park Place Assoc*., 563 F.3d at 916. Arbitration was not immediately granted, and extensive litigation and discovery commenced. *Id.* at 916-18. The case was, however, eventually submitted to arbitration, and the arbitrator was permitted to determine whether prior litigation constituted a waiver. *Id.* at 918. The arbitrator found no waiver, and an appeal followed. *Id.*

The Ninth Circuit affirmed, holding that: (1) the arbitrator could determine waiver; and (2) the arbitrator correctly determined that there was no waiver. The court began by observing that "any party arguing waiver of arbitration bears a heavy burden of proof." *Id.* at 921 (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025 (11th Cir.1982)). The court found no waiver because the party demanding to arbitrate the claims at issue had consistently sought arbitration of the particular claims at issue. *Id.* The court also upheld the arbitrator's waiver finding, reviewing only for manifest disregard of the law. *Id.*

Park Place proves Rapid Cash's point. Where a party consistently seeks arbitration of particular claims, there is no waiver. In any event, the arbitration shall decide any possible waiver issues. This case should be resolved in the same manner.

C. Rapid Cash Did Not Waive Arbitration of Borrowers' Claims by Bringing Collection Actions

Borrowers' argue that Rapid Cash waived its right to arbitrate borrowers' complex claims against Rapid Cash because the lender opted to pursue simple collection matters in justice court.

Borrowers' argument misses the mark. Rapid Cash's collection actions were consistent both with the arbitration agreements at issue and with the aims of arbitration as a whole. They were certainly not an abuse of the court system.

1. Litigating Some Claims and Arbitrating Others is Consistent with the Agreement

As Rapid Cash explained at length in its Opening Brief, borrowers' loan contracts do not require Rapid Cash to arbitrate small claims collection actions in order to maintain the right to arbitrate any other claims. (AOB at 32-34.) In fact, the contracts expressly contemplate that a collection action will not constitute a waiver of the right to arbitrate other claims between the parties:

> …even if the parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in the lawsuit, and *nothing in that litigation shall constitute a waiver* of any rights under this Arbitration Provision.

(6 App. 1252, 1256, 1272; *accord* 6 App. 1300.) Thus, Rapid Cash's institution of collection actions in small claims court was consistent with the plain language of all of the borrowers' arbitration agreements.

2. Arbitration of Simple, Small, Straightforward Collection Claims Does Not Foster Judicial Economy

There is nothing nefarious or exploitative in Rapid Cash's election to pursue routine collection action in the justice court while exercising its right to arbitrate other claims. As a practical matter, arbitrating simple collection actions would be grossly inefficient (although a borrower-defendant could always move to compel arbitration in such a case, if he or she elected to do so).

Public policy favors arbitration of disputes to foster judicial economy. *I.A.M. Nat. Pension Fund Ben. Plan C. v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). In appropriate cases, arbitration reduces the burden on an overtaxed court system by providing an alternative forum for parties to adjudicate their disputes. *See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 27 (1983); *In re Consol. Rail Corp.*, 867 F. Supp. 25, 31 (D.D.C. 1994). In complex cases, arbitration can further advance judicial economy by allowing an arbitrator with specialized expertise to adjudicate the case. *S. Pac. Transp. Co. v. Young*, 890 F.2d 777, 781 (5th Cir. 1989). The dispute resolution process is placed in the hands of the arbitrator, and the court's role is limited to confirming the

award and entering a binding judgment. *Sungard Energy Sys. Inc. v. Gas Transmission Nw. Corp.*, 551 F. Supp. 2d 608, 611 (S.D. Tex. 2008).

These benefits are not present, however, where the dispute can be adjudicated in a single step through a proceeding that does not call for any special expertise. In such simple cases, arbitration actually *complicates* matters by adding additional steps to resolving the dispute between the parties.

3. Rapid Cash's Collection Actions Would Not have Benefitted from Arbitration, and Rapid Cash Sensibly Brought them in Justice Court

Rapid Cash's collection actions against its borrowers are examples of claims that would be needlessly complicated by arbitration. The issues in those collection actions are simply stated: (1) Does a contract exist between Rapid Cash and the borrower? (2) If so, how much money does the borrower owe under the contract? The evidence relevant to these issues would almost certainly be limited to the contract itself, any payment records, and testimony from the borrower. The amount in controversy is small; often less than $1,000. In most cases, a defaulting customer does not have a substantive defense if he or she simply failed to pay. If the customer does wish to assert a defense, then the issues can be fully and fairly resolved in a short justice court proceeding that will yield a final judgment.

Arbitrating these claims, on the other hand, would create needless procedural complications that would benefit neither the parties nor the court

system. The issues would remain limited to the existence of a contract and the extent of liability, but the parties would have additional burdens of going through the demand process, retaining an arbitrator, and adjudicating the claims through a proceeding more complex than a simple small claims action. And, if Rapid Cash prevailed at arbitration, it would ultimately have to bring a *court proceeding* to confirm the arbitration award and obtain a binding judgment. This confirmation proceeding would likely be at least as burdensome on the court system and the parties as a small claims proceeding to adjudicate the case and obtain a judgment in a single stroke.

In short, Rapid Cash does not bring its collection actions in justice court to exploit its non-paying customers. Rather, Rapid Cash brings collection actions in justice court because doing so makes sense and because arbitration would be wasteful for claims so small and so simple.

4. Rapid Cash is Justified in Demanding Arbitration on Borrowers' Claims that Present Issues Far More Complex than the Collection Actions

Unlike the straightforward collection actions that Rapid Cash asserted in justice court, the claims that borrowers brought in the district court are fact-intensive, legally complex, and would benefit from an arbiter with unique expertise. In short, they are the types of claims that would benefit from arbitration. It is understandable that Rapid Cash is seeking to arbitrate them.

Borrowers' position seems to be that arbitration must be "all or nothing." That is, Rapid Cash must either arbitrate every single claim under its agreements—whether it makes sense to do so or not—or it may not arbitrate any of them. In other words, borrowers argue that Rapid Cash has acted inconsistently with its right to arbitrate by litigating claims that would not benefit from arbitration. This is a strained and wasteful perception of the law of waiver.

II.

THE ARBITRATOR, NOT THE DISTRICT COURT, MUST RULE ON WAIVER

Under the FAA, a court's role is generally limited to determining whether the parties have, in fact, entered into an enforceable agreement to arbitrate. If the parties have, then all remaining questions within the arbitration clause's scope—including procedural questions—are within the arbitrator's authority. Waiver is a procedural question that is within the scope of the parties' agreement to arbitrate, and the arbitrator must determine it.

A. Waiver is a Procedural Question for the Arbitrator and Not an Enforceability Question for the Court

In their answering brief, borrowers urge the Court to view waiver as a challenge to the enforceability of an arbitration agreement, as opposed to a question of whether a claim is procedurally arbitrable under that agreement. (RAB 13.)

1. Procedural Issues Are for the Arbitrator Under the FAA

Borrowers make this distinction in an attempt to avoid the Supreme Court's holding that procedural questions (such as waiver) are for the arbitrator (and not the court) to decide:

> "'[P]rocedural' questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for an arbitrator, to decide. [citation omitted]. So, too, ***the presumption is that the arbitrator should decide "allegation[s] of waiver,*** delay, or a like defense to arbitrability."

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964), and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1982)) (emphasis added). The *Howsam* Court's rationale was essentially that the court may appropriately determine whether a valid arbitration agreement exists in the first place. *Id.* If it does, then the arbitrator determines how it applies (for example, the extent of any arguable waiver). *Id.*

2. Waiver is a Procedural Issue and Not an Issue of Enforceability

Howsam expressly states that waiver is a procedural issue for the arbitrator to decide. *Id.* Many courts apply the case in this straightforward manner. *See, e.g.*, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393-94 (2d Cir. 2011); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871-72 (8th Cir. 2004); *Klay v.*

United Healthgroup, Inc., 376 F.3d 1092, 1109-10 (11th Cir. 2004); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004).[1]

a. VIEWING WAIVER AS PROCEDURAL MAKES MORE SENSE THAN VIEWING IT AS AN ENFORCEABILITY QUESTION

This Court should adopt the sensible view embodied in *Howsam* and regard waiver as a procedural issue for the arbitrator to decide. Waiver does not pertain to whether the parties entered into an enforceable arbitration agreement in the first instance; the facts relevant to waiver necessarily occur after contract formation. *See Klay*, 376 F.3d at 1109. Rather, waiver considers whether post-contract conduct may *estop* a party from arbitrating one or more claims within the scope of an enforceable arbitration agreement. *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 415 F. Supp. 2d 887, 890 (N.D. Ill. 2006), *aff'd*, 466 F.3d 577 (7th Cir. 2006).

In short, waiver does not concern whether the agreement to arbitrate is *substantively* enforceable in the first place, but to what extent a party may *procedurally* invoke it.[2] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc.*, 47 A.3d 1, 9 (N.J. Super. Ct. App. Div. 2012).

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[1] *See also GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, 773 F. Supp. 2d 490, 506 (M.D. Pa. 2011)*; Feldman v. Empire Today, LLC*, 2011 U.S. Dist. LEXIS 44574, at *4-6 (N.D. Ill. Apr. 26, 2011); *Josko v. New World Sys. Corp.*, 2006 U.S. Dist. LEXIS 64681, at *25-28 (D.N.J. Aug. 29, 2006).

[2] This distinction becomes more clear by evaluating the waiver cases cited in Rapid Cash's brief. (AOB 29-30.) By litigating some claims but not others, a party may waive its right to arbitrate *those claims*, but not every conceivable claim that it may have. *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997); *Fidelity*

(continued)

b. *COX V. OCEAN VIEW* IS NOT PERSUASIVE AUTHORITY FOR BORROWERS' POSITION

Borrowers cite *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114 (9th Cir. 2008) for the proposition that *Howsam* does not mean what it says, and that waiver is an issue for the court to decide. In a 2-to-1 decision, the *Cox* court disregarded the clear language in *Howsam* stating that waiver is a matter for the arbitrator to decide and concluded that waiver is an enforceability issue for the court.

But Judge O'Scannlain's dissent in *Cox* embodies the correct reading of *Howsam* and the proper conception of how waiver fits into the arbitrability analysis. A court's role in evaluating a demand for arbitration is limited to determining whether the arbitration clause itself is valid. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). It is "absolutely clear that once the legal decision is made by the court that an arbitration clause is valid, all remaining issues are for the arbitrator." *Ocean View*, 533 F.3d at 1127 (O'Scannlain, J., dissenting) (citing, *inter alia*, *Buckeye*, 546 U.S. at 449, and *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1293-94 (9th Cir. 2006) (en banc)).

Nat'l Corp. v. Blakely, 305 F. Supp. 2d 639, 642 (S.D. Miss. 2003); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 251 (4th Cir. 2001). It is more sensible to say that arbitration of those claims has been waived as a procedural matter than to reform the contract by reducing the scope of its enforceability. After all, a court generally may not rewrite an agreement to arbitrate. *In re Checking Account Overdraft Litig.*, 674 F.3d 1252, 1256 (11th Cir. 2012).

These "remaining issues" include waiver, which is consistent with the Supreme Court's decision in *Howsam*. *See id.*

c. TREATING WAIVER AS A PROCEDURAL QUESTION FOSTERS JUDICIAL ECONOMY

And, more practically speaking, allowing arbitrators to decide waiver fosters judicial economy. George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 43 (2012). Regardless of whether an arbitrator or a court decides waiver, there is always a danger that the parties will begin in the wrong forum—they may begin by attempting to arbitrate waived claims or to litigate unwaived claims. *See id.* Allowing the arbitrator to rule on waiver makes errors less costly because an arbitrator can rule on waiver more quickly and cheaply than a court can. *See id.*, *accord D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553-54, 96 P.3d 1159, 1162 (2004) (noting that strong public policy favors arbitration because it "avoids the higher costs and longer time periods associated with traditional litigation").

B. The Parties Clearly and Unmistakably Agreed to Allow the Arbitrator to Rule Upon Waiver

Borrowers argue that the parties did not "clearly and unmistakably" agree to arbitrate disputes regarding arbitrability because the magic word "arbitrability" does not appear in the definition of arbitrable claims. Borrowers rely heavily on *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), as well as two

Fourth Circuit cases, arguing that these cases require extreme precision in the wording used to express the parties' intent to arbitrate arbitrability.

While *First Options* does stand for the general proposition that parties must "clearly and unmistakably" agree to arbitrate arbitrability in order to place the issue before the arbitrator, that case did not involve any express language placing arbitrability in the hands of the arbitrator.

Borrowers' Fourth Circuit cases, on the other hand, are exceptions to the general rule, and authority from other circuits demonstrates that the standard is not as high as borrowers indicate. For example, in *Momot v. Mastro*, the Ninth Circuit held that a clause granting the arbitrator authority to determine "the validity or application of any of the provisions of" the arbitration clause clearly and unmistakably showed that the parties intended to arbitrate arbitrability. 652 F.3d 982, 988 (9th Cir. 2011). Even more broadly, the Second Circuit has held that language submitting to arbitration "all disputes … concerning or arising out of" a contract was sufficient to delegate arbitrability to be decided by the arbitrator. *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003); *see also Global Gold Min., LLC v. Robinson*, 533 F. Supp. 2d 442, 445 (S.D.N.Y. 2008) ("[W]hen parties agree to arbitrate 'any and all controversies,' such as is the case here, the question of arbitrability is itself arbitrable.").

The contract language here clearly and unmistakably indicates that the parties intended to arbitrate arbitrability. The arbitration clauses for Harrison, Varcados, and Dungan vest the arbitrator with the authority to resolve "any claim, dispute or controversy … [regarding] the validity, enforceability, or scope" of the arbitration provisions. (6 App. 1293). Quintino's arbitration provision similarly vests the arbitrator with the authority to determine "the validity, scope and/or applicability" of the arbitration agreement. (6 App. 1300.) Both provisions are similar to the one in *Momot*, which called for arbitration of disputes regarding "the validity or application" of the arbitration agreement. 652 F.3d at 982.

PART TWO:

SUBSTANTIVE ARBITRATION AND POLICY ISSUES

III.

PUBLIC POLICY CANNOT JUSTIFY A DENIAL OF ARBITRATION

The district court had no defensible public policy justification for denying arbitration in this case, and borrowers concede as much. (RAB 31.) Even if the district court did have some public policy rationale in mind, it could not survive the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*,

131 S.Ct. 1740 (2011) , and *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012).

A. Borrowers Concede that Public Policy Cannot Support the District Court's Ruling

In a heading at the beginning of the "public policy" portion of borrowers' answering brief , borrowers flatly concede that "the district court did not deny Rapid Cash's motion to compel arbitration on public policy grounds…." (RAB at 31, capitalization omitted.) Borrowers go on to characterize the district court's public "policy rationale" as essentially equating to the waiver finding. (*Id.* at 33.) As such, borrowers concede that the district court did not articulate a public policy to justify the denial of arbitration.

B. The District Court Could Not Have Had Any Valid Public Policy Basis for Denying Arbitration

Even assuming that the district court had some public policy basis in mind when it denied arbitration, that policy could not survive the United States Supreme Court's decisions in *Concepcion*, 131 S.Ct. at 1740, and *Marmet*, 132 S.Ct. at 1201.

1. Borrowers Insist there is No Public Policy Rationale, other than Waiver, for the District Court Denial of Arbitration

While Rapid Cash in its opening brief was careful to consider any possible public policies sustaining the district court's denial of arbitration,[3] borrowers insist there is no policy rationale, other than waiver, supporting the order. (RAB at 32.) Borrowers conclude that the district court's references to public policy in its order were nothing other than a restatement of Nevada's law of waiver. (RAB at 32.)

2. The District Court Could Not Deny Arbitration Based Upon its Assessment of the "Unique" Conduct Alleged

Borrowers contend that *Concepcion* and *Marmet* do not apply to this case because the district court's public policy finding "was triggered organically by

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[3] The district court's November 30, 2011 order denying arbitration of the amended complaint included an express reference to "the public policy of the State of Nevada," although the district court never articulated the precise contours of its public policy holding, or how that holding may differ from the law of waiver:

> The decision by the United States Supreme Court in the [*Concepcion*] case would not have countenanced the arbitration provision in this case being applied to these particular circumstances where Rapid Cash has utilized the Justice Court system repeatedly with the filing of false affidavits of service, securing of default judgments, and garnishing of wages. ***To do so would violate the public policy of the State of Nevada.***

(4 App. 892:15-19) (emphasis added).

Rapid Cash's own unique and egregious conduct…."[4] (RAB at 35.) This is no justification to deny arbitration.

The purpose of the FAA is to prevent courts from denying arbitration on a subjective assessment of which claims should be arbitrated and which should not. *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1057-58 (9th Cir. 2013) (en banc). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

A district court cannot deny arbitration because it finds the defendant's alleged conduct to be "unique." *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012). This is so whether the district court bases its decision on waiver, public policy or some other legal theory. *See Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1286 (D. Colo. 2011) (noting that the FAA prohibits courts from applying any generally applicable state law in a manner that disfavors arbitration). In all instances, the FAA requires courts simply to enforce arbitration agreements by their terms. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2306 (2013); *Dean Witter*, 470 U.S. at 218.

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[4] As stated previously, this remark more accurately refers to *On Scene's* "own unique and egregious conduct."

C. The District Court Erred in Basing its Policy Determination on a Prejudgment of the Merits of Borrowers' Claims

The district court's public policy determination rests on the court's assumption that the allegations against Rapid Cash were true, that Rapid Cash *conspired* to enter defaults in cases where it *knew* process had not been served. (RAB at 33.) For purposes of Rapid Cash's motion to compel arbitration, however, borrowers are not entitled to a presumption that their allegations are true or even to have inference drawn in their favor.

To begin with, in determining whether an arbitration provision has been waived or whether claims are arbitrable, the court should refrain from prejudging the merits of the claims at all. *See, e.g.*, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986); *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 118 (S.C. 2001).

Where some preliminary assessment of the merits may be necessary, however, it is the party who advocates for enforcement of arbitration that is entitled to presumptions in its favor. "Any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements." *Fisher v. A.G. Becker Paribas Inc*., 791 F.2d 691, 694 (9th Cir. 1986) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983)). "[T]he facts must be viewed in light of the strong federal policy supporting international arbitration

agreements." *Id*. (quoting *Shinto Shipping Co. v. Fibrex & Shipping Co., Inc*., 572 F.2d 1328, 1330 (9th Cir. 1978)). So, here, as "the party opposing arbitration," it was the borrowers who bore the "heavy burden of showing" waiver. *Wheeling Hosp. Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012) (discussing both waiver and default of right to compel arbitration).

The district court should *not* have assumed that Rapid Cash conspired with On Scene, that it is culpable of fraud and abuse of process, etc. The court should not have prejudged the merits at all. But even if judicial speculation was necessary, in this procedural posture, the only justifiable assumption in that procedural posture is that Rapid Cash was, itself, a victim of its unscrupulous vendor.

IV.

IT APPEARS THE DISTRICT COURT DENIED ARBITRATION AS A MEANS TO CERTIFY A CLASS ACTION

The borrowers' introduction to their answering brief is remarkably candid. Borrowers contend that denying arbitration is a necessary means to enable a class action:

> This appeal is the second of two actions pending in the Nevada Supreme Court by which Rapid Cash seeks to strip its economically disadvantaged customers of the only vehicle that can fairly and logically achieve that goal: a class action in the district court to set aside the void default judgments that Rapid Cash obtained….

(RAB at xv.) And, in light of the manifest weakness of the district court's waiver analysis (see above), along with borrowers' insistence that that analysis was the sole basis of the court's decision, it appears that the district court likely denied arbitration as a necessary step toward class certification. (The impropriety of the court's subsequent class certification is the subject of a pending writ proceeding (Case No. 61581).)

By finding that Rapid Cash had waived the arbitration provision, the court not only kept the matter in the district court, *it effectively dispatched a class-action waiver* that was included in that arbitration clause:

> **5. NO CLASS ACTIONS OR SIMILAR PROCEEDINGS; SPECIAL FEATURES OF ARBITRATION. IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT T0: …(C) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; … OR (E) JOIN OR CONSOLIDATE CLAIMS INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON…**
>
> * * *
>
> **Important Notices**
> **BY SIGNING THIS AGREEMENT OR APPLYING FOR A LOAN:**
>
> * * *
>
> - **YOU WILL NOT BE ABLE TO BRING, JOIN OR PARTICIPATE IN ANY CLASS ACTION LAWSUIT AGAINST US**

(1 App. 198.)[5]

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[5] One of the borrowers (Concepcion Quintero) signed an older version of a loan agreement, which similarly precluded class actions in the arbitration clause:

(continued)

Having paved the way to certify a class action by denying arbitration, only *nine days later*,[6] the court then ordered class notices to be mailed. The court seemed to be attracted to class certification for at least three reasons, aside from keeping the matter in the district court. First, certification provides a mechanism to compel Rapid Cash to provide a list of all potential claimants to borrowers' counsel. (2 App. 353.) Second, the court believes that class certification would *shift the burden of proof onto Rapid Cash* to prove that any particular borrower had, in fact, been served—as opposed to requiring the borrower to say under oath that he had not been served. (2 App. 330-331). Third, the district court also believes that a class action relieves the fact-finder of even having to determine whether any particular individual was or was not served on a case-by-case basis. (2 App. 352.)

> You and We Agree to Arbitrate . If you and we are not able to resolve a Claim in mediation, then you and we agree that such Claim will be resolved by neutral, binding individual (and not class) arbitration.
>
> * * *
>
> The arbitrator will not conduct class arbitration, and will not allow you to act as a representative, private attorney general or in any other representative capacity.

(1 App. 198.)

[6] The court heard and denied the motion to compel on October 12, 2010. (2 App. 231.) The court heard the motion to certify the class on October 21, 2010 (2 App. 321) and granted provisional class status (2 App. 350).

Put bluntly, the district court may have regarded class certification as an end that justified any means. That certainly would explain the court's denial of arbitration despite the superficial waiver analysis. Yet, as presumptions and inferences must fall in favor of arbitration, such an outcome-oriented approach would be inexcusable, no matter how understandable the court's intention. The court may not deprive a defendant of its contractual right to arbitrate because the court prefers a class action.

V.

BORROWERS' CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENTS

The loan contracts between borrowers and Rapid Cash contain agreements to arbitrate any claim "***that arises from or relates in any way to*** Services [borrowers] request or [Rapid Cash] provides … [and Rapid Cash's] ***collection of any amounts [borrowers] owe***." (6 App. 1258.) Despite the clarity and breadth of that clause, however, borrowers contend that these claims fall outside of it because the claims are independent of the loan contracts and Rapid Cash's procurement of default judgments was unforeseeable. (RAB at xviii and 36.)

Borrowers rely on *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009), for the proposition that claims are not arbitrable if they do not bear a significant relationship to the contract containing an arbitration provision. *Jones* is distinguishable from this case, however, because the conduct there was unrelated

to the arbitration agreement. *Id.* at 229. In *Jones*, the plaintiff sued her employer alleging she was sexually assaulted by co-workers in housing provided by the employer. *Id.* While the arbitration agreement between the plaintiff and employer encompassed all claims "arising in the workplace," the Fifth Circuit held that many of the employee's claims were not arbitrable because they, did not "arise in the workplace"—the assault was unrelated to the employment relationship that gave rise to the agreement. *Id.* at 236-37. The only causal link between the assault and the plaintiffs' employment was that the employee was in the employer's housing when the assault took place. *Id.* at 237. In other words, because the assault could have occurred whether the plaintiff was an employee or not, plaintiff's claims were beyond the scope of her arbitration agreement.

This case is unlike *Jones*. The relationship between (1) the borrowers' loan contracts and (2) Rapid Cash's efforts to collect upon default of those contracts, even if done in an allegedly tortious manner, is not an attenuated connection of happenstance. These claims are arbitrable.

PART THREE:

JURISDICTIONAL ISSUES

VI.

BORROWERS MISUNDERSTAND THE RELEVANCE OF THE JUSTICE COURT'S JURISDICTION OVER THE DEFAULT JUDGMENTS

In the opening brief, Rapid Cash pointed out a logical implication of the borrowers' contention that their claims in this case are the same as the claims that Rapid Cash elected to pursue in the justice court, which contention is the basis of their waiver argument. If the claims were the same, then exclusive jurisdiction would lie in the justice court to set the judgments aside. (AOB at 49-57.) Either (1) the past and present claims are distinct, which renders the new claims arbitrable, or (2) the claims are the same, which entails the justice court's jurisdiction over its own judgments. In either scenario, the district court would be the improper forum for these claims.

Borrowers seek to dodge that point entirely by arguing that this Court lacks appellate jurisdiction, at the moment, to dismiss their claims due to the district court's lack of subject matter jurisdiction. (RAB at 43.) But that cavalier argument that the procedural posture enables them to hold conflicting positions—at least until the appeal from the final judgment (NRCP 54(b))—misses the mark. The point is that the district court's refusal to dismiss the claims for borrowers to

pursue their remedy in the justice court *demonstrates the district court's recognition that the claims are separate and distinct* from the prior justice court actions. And, given that recognition, it is wrong to deny arbitration on the basis of waiver.

VII.

THE ENTIRETY OF THE DISTRICT COURT'S DECISIONS REGARDING ARBITRATION IS BEFORE THIS COURT

To their credit, borrowers do not deny that all aspects of the district court's decisions regarding arbitration are properly before this Court. Yet certain assertions in their counterstatement of jurisdiction and their statement of the facts seemed designed to imply otherwise. Let there be no mistake.

When Rapid Cash petitioned for *en banc* reconsideration of its writ petition challenging the district court's first denial of arbitration, borrowers opposed that petition by arguing that no reconsideration was necessary because Rapid Cash "will obtain appellate review of the merits [of the district court's denial of arbitration] in its second appeal." (See Case No. 57371, Doc. 12-08710 at 5:24.)[7] This Court then ruled in borrowers' favor, denying *en banc* reconsideration and

[7] *See also* "The Class's Answer To Rapid Cash's Petition for *En Banc* Reconsideration" at 2:20:24 ("[T]he flat denial of [Rapid Cash's] petition for mandamus will not have a 'harsh result' or cause [Rapid Cash] to suffer 'injustice' because [Rapid Cash] will obtain appellate review on the merits in [the present appeal].").

agreeing with borrowers that Rapid Cash "may challenge the district court's relevant decision declining to compel arbitration in Docket No. 59837 [this appeal]." (See Case No. 57371, Doc. 12-29699 at 3.) Having obtained that favorable result, borrowers cannot argue that appellate review should be limited. *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007) (explaining that a party who has successfully asserted a position in one judicial proceeding cannot later assert an inconsistent position in a subsequent judicial proceeding).

CONCLUSION

The district court erred by denying each of Rapid Cash's motions to compel arbitration. This Court should order the parties to arbitration.

DATED this 9th day of August 2013.

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CERTIFICATE OF COMPLIANCE

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of August 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 9th day of August 2013, Electronic service of the foregoing APPELLANTS' REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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