IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TINA WILLIS and GARY WILLIS,

Plaintiffs,

v.

NATIONWIDE DEBT SETTLEMENT GROUP, an Arizona Limited Liability Company; GLOBAL CLIENT SOLUTIONS, LLC, an Oklahoma Limited Liability Company; and DEBT CARE USA,

Defendants.

3:11-CV-430-BR

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Defendant Debt Care USA's Supplemental Motion (#86) to Compel Arbitration in addition to Debt Care's original Motion (#31) to Compel Arbitration or to dismiss. For the reasons that follow, the Court concludes Plaintiffs should be, and, therefore, are, equitably estopped from precluding arbitration of their claims against Debt Care. Accordingly, the Court **GRANTS** Debt Care's Motions (#86, #31) and orders arbitration of Plaintiffs' claims against Debt Care.

FACTUAL BACKGROUND

The following facts are drawn from the Court's Opinion and

Order (#90) issued on March 30, 2012; from the pleadings; and from the parties' briefs and supporting materials related to Debt Care's initial and Supplemental Motion to Compel Arbitration. These facts are provided as context for the pending Motion only.

As noted in the record, Plaintiffs had accumulated substantial unsecured debts by early 2010 and had difficulty satisfying those debts due to financial circumstances. After Plaintiffs found Defendant Nationwide Debt Settlement Group's website advertising a debt-negotiation service and spoke to a Nationwide representative by telephone, Nationwide sent marketing materials to Plaintiffs describing its debt-negotiation program. In Nationwide's program, a consumer contributes monthly payments into a dedicated Special Purpose Account (SPA) administered by Global Client Solutions to be used to negotiate and to settle outstanding debts. According to Plaintiffs, Nationwide encouraged its customers to stop paying their unsecured creditors while Nationwide negotiated those debts on the customer's behalf.

Pursuant to an agreement between Nationwide and Debt Care, Nationwide served as a "front-end marketing company" to attract and to enroll customers into its debt-settlement program. Nationwide obtained completed agreements with customers and provided the agreements and other necessary information to Debt Care. Debt Care served as the "back-end-services" provider for the clients enrolled by Nationwide and was responsible for

sending "welcome packages" to new clients, contacting clients initially and following up on its negotiation progress, answering customer-service calls, and negotiating with creditors to resolve outstanding debts.

On or about January 19, 2010, Plaintiffs received a six-page packet from Nationwide that included Nationwide's Debt Negotiation Program Services Agreement (Nationwide Services Agreement), which contained the following arbitration provision:

> **8. <u>Binding Arbitration</u>**: Client agrees that any claim or dispute by either Client or Nationwide Debt Settlement Group against the other, or against employees, agents, officers of the other arising from or relating in any way to this Agreement, shall be resolved by binding arbitration. All parties agree that the American Arbitration Association ("AAA") under the code of Procedure shall conduct the arbitration in effect at the time the claim is filed. If the AAA is unable, or unwilling to act as an arbitrator, another independent arbitration organization shall be substituted. **Client understands that the results of this arbitration clause is that claims cannot be litigated in court, including claims that could have been tried before a jury as class actions or as private attorney general civil actions.** Client expressly waives any right of entitlement to file any claim against Nationwide Debt Settlement Group as a class action. The location of any arbitration shall be in San Joaquin County, California. In the event of any arbitration proceeding arising out of, or relating to this Agreement, the Client's responsibility for the costs of the processing will be limited to $1,000.00.

Emphasis in original.

On or about January 21, 2010, Plaintiffs received an email from Debt Care advising they had been approved for Debt Care's settlement program. Soon thereafter Plaintiffs received a six-page welcome packet from Debt Care describing its role as the customer contact and debt-negotiator.

Plaintiffs also received a welcome letter from Global dated January 26, 2010, advising Plaintiffs that Global was "the processor for all activity related to your new [SPA]." The letter included a copy of the Account Agreement and Disclosure Statement (Global Agreement), which listed "all applicable fees" and disclosed "the rules and regulations of [Plaintiffs'] account." Among the rules and regulations in the two-page Global Agreement are the following clauses regarding "Arbitration and Application of Law" and "Limitation of Liability":

> **Arbitration and Application of Law**: In the event of a dispute or claim relating in any way to this Agreement or our services you agree that such dispute shall be resolved by binding arbitration in Tulsa, Oklahoma utilizing a qualified independent arbitrator of Global's choosing. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction.
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> **Limitation of Liability**: Under no circumstances shall Global or the Bank ever be liable for any special, incidental, consequential, exemplary or punitive damages. IN NO EVENT SHALL THE LIABILITY OF GLOBAL OR THE BANK UNDER THIS AGREEMENT EXCEED THE AMOUNT OF FEES YOU HAVE PAID UNDER THIS AGREEMENT.

In February 2010 Plaintiffs began depositing approximately $1,150 each month into their SPA. By October 7, 2010, Plaintiffs had deposited a total of more than $10,000. Debt Care successfully negotiated at least one debt reduction on behalf of Plaintiffs.

PROCEDURAL BACKGROUND

On April 5, 2011, Plaintiffs filed their class-action Complaint on behalf of themselves and others similarly situated against Defendants for alleged violations of federal and state laws that regulate businesses providing debt-negotiation services. Plaintiffs allege Defendants have committed numerous violations of Oregon's Debt Management Services Providers (DMSP) law, Oregon Revised Statutes §§ 697.602-842; the federal Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679-1679j; and Oregon's Unlawful Trade Practices Act (UTPA), Oregon Revised Statutes §§ 646.605-638.

On June 17, 2011, Global filed its Motion (#18) to Dismiss based on the Court's lack of personal jurisdiction, Plaintiffs' failure to state a claim, and the unconstitutionality of the Oregon DMSP as applied to Global. In the alternative, Global filed a Motion (#22) to Compel Arbitration.

On July 29, 2011, Debt Care filed its original Motion (#31) to Compel Arbitration or Motion to Dismiss. Debt Care moved to

compel arbitration of Plaintiffs' First and Third Claims alleging violations of the Oregon DMSP and UTPA based on the arbitration clause in the Nationwide Services Agreement to arbitrate any dispute in San Joaquin County, California, and to waive any class-action claim. In the alternative, Debt Care moved to dismiss Plaintiff's Complaint based on improper venue and failure to state a claim.

On January 31, 2012, the Court issued an Order (#70) in which the Court denied as premature (with leave to renew) those portions of Defendants' Motions (#18, #31) seeking to dismiss Plaintiffs' Complaint. The Court took under advisement those portions of Debt Care and Global's Motions (#22, #31) that required resolution of Plaintiffs' contention that any arbitration provision is procedurally and substantively unconscionable. The Court also deferred Debt Care's Motion (#31) to Compel Arbitration pending further discovery into the relationship between Nationwide and Debt Care to determine whether Debt Care, a nonsignatory to the arbitration clause in the Nationwide Services Agreement, could invoke that clause against Plaintiffs. On March 16, 2012, after the parties completed their limited discovery, Debt Care filed its Supplemental Motion to Compel Arbitration.

On March 30, 2012, the Court issued its Opinion and Order (#90) in which it modified the arbitration provisions in the

Nationwide Services Agreement and the Global Agreement and concluded the arbitration clauses at issue are enforceable as modified.

Nationwide did not file an appearance in this matter, and, therefore, on April 3, 2012, the Court granted Plaintiffs' Motion for Entry of Default against Nationwide.

STANDARDS

The Federal Arbitration Act was enacted to "advance the federal policy favoring arbitration agreements." *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1217 (9th Cir. 2008). The FAA provides arbitration agreements generally "shall be valid, irrevocable, and enforceable." *Id.* *See also* 9 U.S.C. § 2. The court must "rigorously enforce" arbitration agreements and "must order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999)(citing *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985)). As the Supreme Court recently held in *AT&T Mobility, Inc. v. Concepcion*:

> We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra*, at 24, 103 S. Ct. 927, and the "fundamental principle that arbitration is a matter of contract," *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. ----, ----, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010). In line with these principles, courts must place arbitration agreements on an equal footing

> with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed.2d 488 (1989).

131 S. Ct. 1740, 1745-46 (2011).

Accordingly, a court's task on a motion to compel arbitration is to "determine (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute at issue." *Lowden*, 512 F.3d at 1217 (citation omitted). *See also Simula*, 175 F.3d at 720.

DISCUSSION

Debt Care moves to compel Plaintiffs to arbitrate their claims against Debt Care on two grounds: (1) Debt Care is an agent of Nationwide and, therefore, is expressly entitled to invoke the arbitration clause in the Nationwide Services Agreement against Plaintiffs and (2) Plaintiffs, in any event, should be estopped from precluding arbitration of their claims against Debt Care under that arbitration clause.

When determining whether a nonsignatory such as Debt Care may enforce an arbitration clause against a signatory, the court applies general legal principles such as incorporation by reference, assumption, agency, veil-piercing, and estoppel. *See*

Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045 (9th Cir. 2009).

I. Agency.

A. Actual Agency.

Debt Care asserts it is an agent of Nationwide and, therefore, contends Plaintiffs' claims against Debt Care must be arbitrated pursuant to the Nationwide Services Agreement as recently modified by the Court.

The parties agree Oregon law requires mutual assent between Nationwide and Debt Care to create an actual agency relationship. *See Hampton Tree Farms, Inc. v. Jewett,* 320 Or. 599, 617 (1995). In determining whether an agency relationship exists, the Oregon Supreme Court has held:

> [T]he principal's "control" over what the agent shall or shall not do is necessary for an agency relationship, but it is not, on its own, sufficient to create such a relationship. Agency does not result, for example, when an individual (or entity) simply agrees to provide services for another, even if the other person—through contract—is able to establish general standards for performance and in that way "control" the individual. That individual simply may be a contractor performing services for another, and not an "agent" at all. Instead, "[t]he power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." *Id*. (emphasis added).
>
> Even the ability to control in detail another's actions does not alone create an agency relationship; to qualify as an agent,

> one must also agree to act "on [another's] behalf." Thus, for example, a subordinate employee is not the agent of a supervisor simply because the supervisor has full control over the employee's work activities. Instead, both the subordinate and the supervisor are agents of their common employer, on whose behalf they have agreed to work. *See Restatement (Third) of Agency* at § 1.01 comment g (giving examples). In sum, to be an "agent"—using the well-defined legal meaning of that term—two requirements must be met: (1) the individual must be subject to another's control; and (2) the individual must "act on behalf of" the other person.

Vaughn v. First Transit, Inc., 346 Or. 128, 136 (2009).

Debt Care relies on the Declaration (#87) of Teton Wilson, Chief Financial Officer of Nationwide, and on the deposition testimony of Adam Hungerford, President of Debt Care, to support its argument that it was an actual agent of Nationwide and performed services consistent with the Nationwide Services Agreement at the direction and under control of Nationwide. Teton and Hungerford both attest Nationwide appointed Debt Care as its agent to perform "back-end" debt-negotiation services for Nationwide's clients, presumably including Plaintiffs. Debt Care contends this relationship is reflected in the Nationwide Services Agreement in paragraph 2, which provides: "The purpose of this Agreement is to give [Nationwide] and *its assigned agent*, & employees, the exclusive right to communicate with [Plaintiffs'] creditors for the purpose of negotiating debts for an amount less than owed." Emphasis added. The Court notes the

identity of Nationwide's "assigned agent" is not reflected in the Agreement, and Debt Care has not produced any documentary evidence that it is the "assigned agent."

Instead Debt Care relies on an unsigned form of a marketing agreement submitted as Exhibit B to the Second Declaration (#52) of Adam Hungerford. Hungerford attests the agreement reflects the terms of the business relationship between Nationwide and Debt Care at the time of Plaintiffs' enrollment in the debt-negotiation program through Nationwide. Article II of that unexecuted agreement provides:

> [Debt Care] and [Marketing Company] acknowledge and agree that [Marketing Company] is an independent contractor that is providing marketing services to [Debt Care], and nothing herein shall be understood to have created a partnership, joint venture, ownership or other joint relationship or undertaking among the Parties. [Marketing Company], its agents and employees, are not agents or employees of [Debt Care] for any purpose, and [Marketing Company] and any such agents and employees shall have no power or authority, expressed or implied, to represent or otherwise create or assume any obligation on behalf of, or binding upon [Debt Care]. It is understood by and among the Parties that this Agreement creates an exclusive relationship for [Marketing Company] to market for [Debt Care] only, however [Debt Care] can have unlimited marketing affiliates or agreements without prior notice, rights to [Marketing Company]. All costs related to the operations of either Party shall remain the responsibility of that Party and neither Party shall be responsible for any of the other Party's costs without express prior written approval of the other Party.

With their Response, Plaintiffs provide a copy of an executed marketing agreement (Marketing Agreement) between Debt Care and Teton Wilson (as owner of Nationwide), which includes the same language in Article II as set out above. In particular, Plaintiffs contend the language of Article II undermines the Hungerford's testimony and the Wilson's Declaration as to the nature of the relationship between Nationwide and Debt Care because, as noted, the Marketing Agreement does not explicitly appoint Debt Care as the agent of Nationwide, and the express terms of Article II appear to disclaim any relationship between Debt Care and Nationwide other than as specifically set out in the Agreement:

> [N]othing herein shall be understood to have created a partnership, joint venture, ownership or other joint relationship or undertaking among the Parties.

In addition, Plaintiffs contend the language of Article II would be nonsensical if Debt Care and Nationwide had, in fact, established an agency relationship in the Marketing Agreement because, according to Plaintiffs, Article II would then have to read: "[Nationwide], its agents [Debt Care] and employees, are not agents or employees of [Debt Care] for any purpose, and [Nationwide] and any such agents [Debt Care] and employees shall have no power or authority, expressed or implied, to represent or otherwise create or assume any obligation on behalf of, or binding upon [Debt Care]."

Ultimately Plaintiffs characterize the relationship between Nationwide and Debt Care under the Marketing Agreement merely as an arm's-length business relationship in which Debt Care and Nationwide agreed to perform different services for their mutual benefit rather than a relationship of principal and agent.

Although Debt Care contends the language of Article II does not necessarily preclude an agency relationship between Nationwide and Debt Care, the Court notes that language is, at best, confusing as to whether an actual agency relationship existed.

Debt Care also implies there may have been some other oral or written agreement between the parties in which Nationwide appointed Debt Care as its agent to perform services under the Marketing Agreement on Nationwide's behalf. In particular, both Hungerford and Wilson attest they understood Debt Care was the agent of Nationwide in the performance of Debt Care's "back-end" services. The Marketing Agreement, however, provides in paragraph 1 of Article VIII:

> Neither the terms of this Agreement nor the rights and duties of the Parties contained herein may be superseded, modified or otherwise changed, except by a subsequent written instrument which is signed by both Parties and which expressly states that it is the intent of the Parties in executing the subsequent Agreement to supersede, modify or otherwise change the terms of the Agreement as executed.

Finally, Debt Care emphasizes Hungerford's testimony that

Nationwide actually controlled Debt Care's performance of services under the Marketing Agreement.

Such control alone, however, is insufficient to establish that Debt Care performed such services on behalf of Nationwide. *See Vaughn*, 346 Or. at 136 ("Agency does not result . . . when an individual (or entity) simply agrees to provide services for another, even if the other person—through contract—is able to establish general standards for performance and in that way 'control' the individual. That individual simply may be a contractor performing services for another, and not an 'agent' at all."). In the end, nothing in the Marketing Agreement establishes the relationship is anything more than a contract for services between Nationwide and Debt Care.

Although Debt Care offers several "practical" reasons for the particular wording of the Marketing Agreement to support its position that an agency relationship existed, the Court concludes neither the terms of the Agreement nor the record as a whole are sufficient to support a factual finding that the asserted actual agency relationship existed.

B. Apparent Agency.

Alternatively, Debt Care maintains it was the apparent agent of Nationwide. Apparent agency is based on the reasonable reliance of a third party who perceives that a principal-agent relationship exists rather than on an actual agency relationship.

Even if Debt Care was Nationwide's apparent agent, it is unclear why such apparent agency would permit Debt Care to invoke against Plaintiffs the arbitration clause that is limited to Nationwide's agents. Because apparent agency is not an actual agency relationship and is only a means for a third party to bind a principal by the actions of an apparent agent, the Court does not find any basis to conclude the existence of any apparent agency between Nationwide and Debt Care is sufficient to permit Debt Care to invoke against Plaintiffs the arbitration clause available to Nationwide, its putative principal.

In summary, the Court is not persuaded on this record that Debt Care was either the actual or apparent agent of Nationwide for purposes of invoking against the Plaintiffs the arbitration clause in the Nationwide Services Agreement.

II. Equitable Estoppel.

Even if it is not Nationwide's agent, Debt Care contends Plaintiffs should be estopped from precluding arbitration of their claims against Debt Care because Plaintiffs, nevertheless, agreed to arbitrate "any claim or dispute . . . arising from or relating in any way to" the Nationwide Services Agreement. There does not appear to be any dispute that Plaintiffs' claims against Debt Care arise under the Nationwide Services Agreement. Thus, the question is whether, under these circumstances, Debt Care, as a nonsignatory to an arbitration clause, can enforce against

Plaintiffs the Nationwide clause to compel arbitration of Plaintiffs' claims.

Relying on equitable estoppel to justify enforcement of arbitration clauses between signatories and nonsignatories, the Ninth Circuit has examined the following three types of relationships: (1) a nonsignatory to an arbitration clause may be compelled to arbitrate claims when the nonsignatory knowingly obtains some benefit from the agreement containing the arbitration clause; (2) a signatory may be compelled to arbitrate claims brought by a nonsignatory when the entities involved have a close relationship, the alleged wrongs closely relate to the nonsignatory's contractual obligations, and the claims are intertwined with the nonsignatory's contractual obligations; and (3) a signatory may be compelled to arbitrate its claims against a nonsignatory when such claims are "intertwined with the contract providing for arbitration" and "a relationship among the parties . . . justifies a conclusion that the party which agreed to arbitrate . . . should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." *Mundi*, 555 F.3d at 1046 (quoting *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359-62 (2d Cir. 2008)).

Although the Ninth Circuit has expressly applied equitable estoppel in the first and second scenarios, the Court is not

aware of an instance in which the Ninth Circuit has applied equitable estoppel in the third type such as here where Plaintiffs, who are signatories to the arbitration agreement, brought claims against Debt Care, a nonsignatory, who, in turn, seeks to invoke the arbitration clause against Plaintiffs. *See id.* The Court notes in *Mundi* the Ninth Circuit did not apply equitable estoppel as in the third scenario because the court concluded the claims asserted by the signatory were not, in fact, intertwined with the contract providing for arbitration. *Id.* at 1046-47 (citing cases from the Second, Fourth, and Eleventh Circuits recognizing the third type of equitable estoppel).

Here Plaintiffs repeat their contention that Debt Care may not compel arbitration under that provision because the language of the arbitration clause in the Nationwide Services Agreement only requires arbitration of claims against Nationwide and its agents, officers, and employees. Because Debt Care has not established its agency relationship with Nationwide, Plaintiffs' maintain the arbitration of Plaintiffs' claims against Debt Care falls outside of the plain language of the arbitration clause in the Nationwide Services Agreement.

Mundi and similar cases, however, stand for the proposition that equity, as noted, may justify a nonsignatory's enforcement of an arbitration clause beyond its express terms when the asserted claims against signatories and nonsignatories are

intertwined with the agreement that contains the plaintiff's agreement to arbitrate.

Here the claims Plaintiffs assert against Nationwide, Debt Care, and Global clearly relate to and arise from the services performed for Plaintiffs by Defendants pursuant to the Nationwide Services Agreement and the Global Agreement, both of which include arbitration clauses that the Court has determined are enforceable as modified in the Court's March 30, 2012, Opinion and Order (subject to resolution of the factual disputes involving contract formation set for trial on July 9, 2012). According to Plaintiffs' Complaint, Defendants are a group of entities who perform certain aspects of the debt-negotiation program marketed by Nationwide and enrolled in by Plaintiffs. Plaintiffs assert Defendants committed the various violations of federal and state law in concert pursuant to the relevant agreements with Plaintiffs. Thus, by Plaintiff's own allegations, their claims are necessarily intertwined with the Nationwide Services Agreement that provides for arbitration.

In summary, because Defendants are related entities for purposes of performing services for Plaintiffs under the contracts at issue, the Court does not find any reason why, in the exercise of the Court's discretion, Plaintiffs should not be equitably estopped from precluding arbitration of their claims against Debt Care. Accordingly, the Court concludes Plaintiffs

should be, and, therefore, are, equitably estopped from precluding arbitration of their claims against Debt Care.

CONCLUSION

For these reasons, the Court **GRANTS** Debt Care's Supplemental Motion (#86) to Compel Arbitration in addition to Debt Care's original Motion (#31) to Compel Arbitration under the Nationwide Services Agreement as modified by the Court.

IT IS SO ORDERED.

DATED this 22nd day of May, 2012.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge