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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC, Plaintiff, vs. Electronic Payment Systems, LLC, Defendant.	No. CV10-1060 PHX DGC **ORDER**

Defendant Electronic Payment Systems, LLC ("EPS") has moved for partial summary judgment. Doc. 40. Plaintiff TSYS Acquiring Solutions, LLC ("TSYS") opposes the motion. Doc. 51. The parties have fully briefed the motion, and the Court heard oral argument on November 4, 2010. For reasons stated below, the Court will grant the motion.

I. Background.

EPS contracted for TSYS to provide credit card payment processing services for EPS customers. As part of the parties' contract, TSYS agreed to install an exclusive 1-800 number on the point-of-sale terminals of EPS's merchant customers. EPS sought the exclusive number because it would permit EPS to move its merchant portfolio to another payment processing vendor if problems arose with TSYS, a need that was material to EPS's decision to procure services from TSYS. Disagreements between the parties ultimately led to arbitration. EPS claimed in the arbitration that TSYS had promised to provide it with the exclusive 1-800 number and sought to recover the number in the arbitration proceeding. The arbitrator – retired Arizona Supreme Court Justice Robert Corcoran – agreed and ordered

"TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS' merchants to a processor." Doc. 41-2 at 40. The arbitrator also awarded EPS more than $2,600,000 in damages. *Id.*

On January 26, 2009, TSYS sought to vacate the arbitrator's award *in toto* by filing a complaint in this Court that was assigned to Judge James A. Teilborg. *See TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC,* No. CV-09-0155-PHX-JAT. The Court will refer to the action before Judge Teilborg as "*TSYS I*." Despite the fact that it sought to have the arbitration agreement vacated in its entirety, TSYS focused its arguments before Judge Teilborg primarily on the damages award. On May 4, 2010, Judge Teilborg entered an Amended Judgment that confirmed the arbitrator's award, granted summary judgment for EPS, and dismissed TSYS's complaint. The judgment included the arbitrator's order for "TSYS to provide EPS with immediate and continuous ownership, control, and access to the toll-free 1-800 number that connects EPS' merchants to a processor." Doc. 41-24 at 27.

TSYS filed a motion under Rules 59 and 60 asking Judge Teilborg for permission to file a supplemental or amended complaint. The motion focused on the 1-800 portion of the order and argued that TSYS and EPS disagreed on its meaning. TSYS argued that it could satisfy the order by providing EPS with any 1-800 number, regardless of whether it connected any EPS merchants to a processor. EPS claimed that it was entitled to the actual 1-800 number that connected its merchants to a processor. TSYS noted in its motion that there were, in fact, several 1-800 numbers that had been assigned to EPS merchants, that other TSYS clients had also been assigned to these numbers, and that "by turning control of these . . . numbers over to [EPS], [TSYS] would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise." *TSYS I*, 2010 WL 1781015 at *5 (D. Ariz. May 4, 2010). Judge Teilborg denied the motion to inject these new arguments in the case, noting that they could have been raised before the arbitrator and earlier in the case before Judge Teilborg and therefore did not constitute newly discovered evidence. *Id.* Judge Teilborg also concluded that requiring TSYS to comply with the order to surrender the numbers to EPS would not be manifestly unjust. *Id.*

Ten days later, on May 14, 2010, TSYS filed this action to enjoin enforcement of the arbitrator's award and Judge Teilborg's order. TSYS makes arguments in this case which Judge Teilborg declined to entertain in TSYS's motion under Rules 59 and 60. TSYS asserts that the 1-800 number awarded to EPS by the arbitrator does not exist, and that EPS's merchants in fact are connected to TSYS through seven 1-800 numbers that are shared with hundreds of thousands of non-EPS merchants. TSYS argues that giving EPS control over these numbers will put these third parties at risk and will cause TSYS to be in breach of its other client contracts.

EPS's motion for summary judgment asserts that the TSYS complaint in this action is barred by *res judicata*. The Court agrees.

II. Legal Standards.

A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

In making their respective arguments regarding the res judicata effect of Judge Teilborg's decision in *TSYS I*, both TSYS and EPS rely on federal res judicata principles. These principles do not apply. *TSYS I* was brought under federal diversity jurisdiction. *See TSYS I*, Doc. 1; *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004) ("It is well established that even when a petition is brought under the Federal Arbitration Act (FAA), a petitioner seeking to confirm or vacate an arbitration award in federal court must establish an independent basis for federal jurisdiction."). When seeking to determine the res judicata effect of a judgment entered in a diversity-jurisdiction case, courts apply the law of the state where the court which entered the judgment sits. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001). Judge Teilborg sits in Arizona, and the res

judicata effect of his judgment must therefore be determined under Arizona law. *Id*.

Under Arizona law, "[t]he doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities was, or might have been, determined in the former action." *Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999). Arizona law does not follow the transaction test applied in the federal cases cited by the parties. Rather, in Arizona, "[t]wo causes of action which arise out of the same transaction or occurrence are not the same for purposes of res judicata if proof of different or additional facts will be required to establish them." *E.C. Garcia & Co. v. Arizona State Dept. of Revenue*, 875 P.2d 169, 179 (Ariz. App. 1993) (citing *Rousselle v. Jewett*, 421 P.2d 529 (Ariz. 1966)).[1]

III. Applying *Res Judicata* to This Case.

Arizona law establishes four general requirements for res judicata: (1) the same claim was adjudicated previously, (2) by a "judgment on the merits," (3) issued by "a court of competent jurisdiction," (4) against the same parties or their privies. *See Hall*, 977 P.2d at 779. Only the first two elements are in dispute here.

A. Same Claim.

In Arizona, two claims are not identical if "different or additional facts will be required to establish them." *E.C. Garcia & Co.*, 875 P.2d at 179 (citing *Rousselle*, 421 P.2d at 529). In this case, there is only one claim at issue: EPS's right to an exclusive 1-800 number that connects EPS merchants to a credit card processing provider. TSYS does not dispute that the arbitrator found EPS was entitled to obtain such a number from TSYS, nor that both the arbitrator and Judge Teilborg ordered TSYS to provide EPS with immediate

[1] The Court notes that the result would be the same in this case even if federal res judicata law were applied. The Court concludes *infra* that Arizona res judicata principles bar TSYS from asserting defenses that could have been asserted before the arbitrator and Judge Teilborg. Federal law would support the same conclusion. *See Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009) (holding that res judicata applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose" (internal quotation marks and citation omitted)).

ownership, control, and access to the number.

TSYS instead argues that it is asking this Court only to "interpret" what the arbitrator and Judge Teilborg meant when they ordered TSYS to give EPS the number. But in rendering this "interpretation," TSYS asks the Court to consider the following facts that were in existence at the time of the arbitration and *TSYS I* but were never presented to the arbitrator or Judge Teilborg: (1) the complex nature of the debit/credit card processing system; (2) that there are seven 1-800 numbers that connect EPS's merchants to a processor; (3) that those same seven numbers are also being used to process transactions for over 515,000 non-EPS merchants; (4) that the numbers are controlled by organizations regulated under federal law, not by TSYS; (5) that TSYS installed proprietary software on the credit card machines of EPS merchants – information that will be compromised if EPS is given control of the toll free numbers; and (6) that data security will be compromised for non-EPS merchants and millions of debit and credit card holders if EPS is given control of the numbers. Doc. 51 at 13.

Contrary to TSYS's adamant argument, the Court's consideration of these facts would not constitute an "interpretation" of what the arbitrator and Judge Teilborg meant in their orders. The Court could not determine what these judges meant by examining facts and evidence they never considered. More importantly, the plain import of these facts is that TSYS cannot, or should not be required to, "provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor" as ordered by the arbitrator and Judge Teilborg. This is not a matter of interpretation; it is a matter of defense. TSYS is arguing that the relief sought by EPS and ordered by the arbitrator and Judge Teilborg is impractical, impossible, or inequitable. Impossibility of performance or its variant, commercial frustration, can be a defense to a breach of contract claim or to a specific performance remedy. *See, e.g., 7200 Scottsdale Road Gen. Partners v. Kuhn Farm Mach.*, 909 P.2d 408, 346-47 (Ariz. App. 1995); *Marshick v. Marshick*, 545 P.2d 436, 439-40 (Ariz. App. 1976). Thus, it is a defense, not an interpretation, that TSYS really seeks to assert in this case.

In Arizona, "a judgment in favor of a plaintiff is *res judicata* as against the defendant on every defense raised *or which he could have raised* as a defense against the complaint." *In re Kopely,* 767 P.2d 1181, 1183 (Ariz. App. 1988) (emphasis added); *accord Pettit v. Pettit*, 189 P.3d 1102, 1106 (Ariz. App. 2008) (father barred by res judicata from asserting paternity defense he could have asserted, but failed to assert, in marriage dissolution proceeding); *see also Hall*, 977 P.2d at 779 (res judicata applies when "the matter now in issue between the same parties or their privities was, or might have been, determined in the former action"). TSYS seeks to assert an impossibility defense in this declaratory judgment action – in the guise of "interpreting" the orders of the arbitrator and Judge Teilborg – that plainly could have been asserted in the arbitration and *TSYS I*.

In sum, the "same claim" requirement of res judicata is satisfied. This case concerns the same claim that was at issue in the arbitration and *TSYS I* – EPS's right to an exclusive 1-800 number that connects its merchants to a processor. TSYS is barred from raising defenses to that claim that could have been asserted in the prior proceedings.

B. Final Judgment on the Merits.

TSYS also argues that there was no final judgment on the matter it seeks to litigate here. Doc. 51 at 16. TSYS cites to *In re Kopely*, 767 P.2d at 1183, for the proposition that a judgment is not res judicata if the court "expressly states that it is not deciding an issue which was raised and could have been decided." Doc. 51 at 16. TSYS argues that Judge Teilborg expressly stated that he did not decide the issue asserted here, and that res judicata therefore cannot bar its adjudication in this case. The Court disagrees.

When TSYS filed this action, EPS filed a motion asking Judge Teilborg to transfer this case to him. Judge Teilborg declined, noting that EPS had not satisfied the requirements of Local Rule of Civil Procedure 42.1. Judge Teilborg also provided this explanation as to why transferring the case to him would not serve the purposes of judicial economy:

> In any event, the Court does not find that the interests of judicial economy are best served by transferring the declaratory relief action to the undersigned. The original action involved only whether the arbitration award should be vacated. Although the 1-800 number issue was raised in a post-judgment motion, the Court did not have occasion to substantively resolve the issue, as

> the Court was presented only with the issue of whether Rules 59 or 60 permitted an amended or supplemental complaint. Because the 1-800 number issue presents a different legal analysis than vacatur of the arbitration award, the Court does not believe that the interests of judicial economy are best served by transferring the declaratory judgment action to the undersigned.

TSYS I, Doc. 79 at 2.

This statement by Judge Teilborg does not fall within the *Kopely* exception to res judicata. As *Kopely* explained: "If a trial court or an appellate court expressly states that it is not deciding an issue *which was raised and could have been decided*, the presumption cannot prevail, and the judgment is not *res judicata* as to the undecided issue." 767 P.2d at 1183 (emphasis added). As noted above, TSYS's impossibility defense was never raised before the arbitrator or Judge Teilborg issued their orders. TSYS sought to inject the defense into Judge Teilborg's case subsequently through the motion under Rules 59 and 60, but Judge Teilborg rejected the attempt. His ruling on the motion is worth quoting at some length, because it reinforces the Court's application of res judicata in this case:

> [TSYS] asserts that the newly discovered evidence – namely, the disagreement between the parties concerning the meaning of the award of the 1-800 number – did not come to light until October 2009. The Court disagrees. The arbitrator issued his award in January 2009. It is clear from the face of the award what the arbitrator ordered: that [TSYS] turn over control of the numbers that connect [EPS's] customers to a processor. [TSYS] focuses on the word *the*, but misses the thrust of the arbitrator's finding and conclusion; namely, that [EPS] is to be awarded control over its merchants in the event [EPS] decides not to retain [TSYS's] services. It was not the goal of the arbitrator, as mentioned throughout his award, to award [EPS] a single telephone number; rather, [EPS] was seeking ownership and control of the numbers its merchants use. . . .
>
> [TSYS] may disagree with the award issued by the arbitrator, but attaching a new interpretation to the award hardly constitutes new evidence within the meaning of a Rule 59(e) motion. At most, the parties have discovered a new disagreement, but not new evidence within the meaning of a Rule 59(e) motion. Moreover, the Court fails to see why this issue was not raised with [TSYS's] original filing in January 2009; or at the very least, upon receiving [EPS's] February 2009 letter. The Court finds that [TSYS] failed to present newly discovered or previously unavailable evidence such that Rule 59(e) relief is appropriate.

TSYS I, 2010 WL 1781015 at *5 (D. Ariz. May 4, 2010) (emphasis in original).

Judge Teilborg provided the following explanation in response to TSYS's argument that it should be allowed to inject the impossibility defense into the case to avoid manifest

injustice:

> [TSYS] argues that not granting it leave to file a supplemental complaint would work a manifest injustice, as the . . . numbers that [EPS's] merchants use to connect to a processor are also used by other merchants besides [EPS's] customers. Hence, [TSYS] asserts, by turning control of these . . . numbers over to [EPS], [TSYS] would incur substantial costs, be subjected to potential breach of contract claims, and the risk of potential security threats would arise. Again, it is not clear why these arguments and evidence in support were not raised both before the arbitrator and in [TSYS's] initial complaint to this Court. In essence, [TSYS] asks the Court to reconsider and re-weigh – should the Court allow a Rule 15 amendment – the consequences of the arbitrator's award concerning the 1-800 number issue. . . . Even if [TSYS] is subjected to substantial costs, breach of contract claims, and potential security threats as it asserts, such results are the natural consequences of the arbitrator's award. In the arbitration context, the Court cannot grant the type of relief [TSYS] is ultimately seeking merely because the award will work a hardship for [TSYS]. [TSYS's] complaints resulting from the arbitration award do not constitute manifest injustice within the meaning of Rule 59(e).

Id. (emphasis added).

In summary, Judge Teilborg denied TSYS's post-judgment motion because TSYS sought to inject a new issue into the case – the impossibility defense – that could have been raised earlier but was not. When Judge Teilborg subsequently declined to transfer the instant case to him, and explained in the process that the issues in this case had not been considered substantively by him, he was referring to the fact that TSYS failed to raise the issues in his case and sought to inject them only in the post-judgment motion. This clearly is not the exception to res judicata discussed in *Kopely* – where a court expressly states that it is not deciding an issue "which was raised and could have been decided." 767 P.2d at 1183. To the contrary, TSYS's impossibility defense was not raised in a timely manner before Judge Teilborg and he therefore never addressed it.

In sum, a final judgment was entered by the arbitrator and Judge Teilborg on EPS's claim for the 1-800 number. Under Arizona law, res judicata bars TSYS from now raising a defense to the claim that it could have raised in the arbitration proceeding and *TSYS I*.

C. The Applicability of Res Judicata.

In addition to arguing that res judicata, if applied, would not bar its claim, TSYS also contends that res judicata does not apply here because "[c]ourts consistently consider declaratory judgment actions to interpret or clarify judgments," and that "res judicata does

not bar a party from seeking declaratory relief to interpret a court's confirmation of an arbitration award." Doc. 51 at 7-8. This argument fails because, as explained above, TSYS does not seek an interpretation of the arbitrator's or Judge Teilborg's orders. TSYS seeks to present evidence never presented to the arbitrator and Judge Teilborg to show that their judgments cannot or should not be enforced.

In addition, the legal authority cited by TSYS does not support its position. TSYS cites cases from states other than Arizona, chief among them *Sandler v. Casale*, 178 Cal. Rptr. 265, 268 (App. 1981), and *Int'l Bhd. of Elec. Workers, Local Union 1547 v. City of Ketchikan*, 805 P.2d 340, 343 (Alaska 1991). These cases apply California and Alaska law, respectively, and involve declaratory judgments to clarify terms in arbitration decisions, not to collaterally attack those decisions and the judicial judgments that confirm them. Therefore, they are not controlling in this case.

TSYS has cited no case for the proposition that, under Arizona law, a court judgment that confirms an arbitration award would fall outside res judicata's reach within the context of a declaratory action. In fact, case law suggests that Arizona courts apply res judicata in declaratory suits that seek to collaterally attack prior judgments. *See Shattuck v. Shattuck*, 192 P.2d 229, 235 (Ariz. 1948) ("[Arizona's declaratory judgment statute] does not expressly or by implication authorize a court to entertain a proceeding to determine any questions of the construction or validity of a judgment or decree of a court of competent jurisdiction, or to declare the rights or legal relations of interested parties thereunder"), *disapproved of on other grounds by Marvin Johnson, P.C. v. Myers*, 907 P.2d 67 (Ariz. 1995); *accord Schwamm v. Superior Court In and For Pima County*, 421 P.2d 913, 914 (Ariz. App. 1966) (interpreting, *inter alia*, *Shattuck* as being rooted in "the general principle that persons who have had an opportunity to litigate a matter should not be permitted to relitigate the same matter in a different action").

IV. The Propriety of a Declaratory Action in this Context.

The Court would be justified in dismissing TSYS's claim even if TSYS sought merely to clarify Judge Teilborg's order. The Federal Declaratory Judgment Act ("FDJA") states that "[i]n a case of actual controversy within its jurisdiction [with noted exceptions] . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). In a diversity case, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), the United States Supreme Court concluded that the FDJA "created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." The Court added that "a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close." *Id.* Factors to consider when exercising discretion to dismiss include the futility of the action, the existence of parallel proceedings that permit the "ventilation" of the issues, avoiding duplicative litigation, avoiding forum shopping and procedural fencing, and other considerations of "practicality and wise judicial administration."[2] *Wilton*, 515 U.S. at 288; *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942); *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 802-04 (9th Cir. 2002); *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 & n.5 (9th Cir. 1998) (en banc).

In this case, parallel proceedings are being conducted before Judge Teilborg to enforce his judgment (*TSYS I*, Doc. 63), and TSYS can raise the present considerations in that proceeding as a means of arguing that it is not violating the judgment. Thus, this Court

[2] Though the Supreme Court referred to the existence of parallel state proceedings in *Wilton*, 515 U.S. at 290, the existence of parallel federal proceedings in the same district would have the same "parallel litigation" effect in light of judicial economy concerns noted in *Wilton*. Moreover, Ninth Circuit law permits a district court to dismiss a declaratory claim even if parallel state proceedings do not exist. *E.g.*, *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002). *Wilton* also noted that it was not "delineat[ing] the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law." *Wilton*, 515 U.S. at 290.

would dismiss TSYS's declaratory judgment request even it is was limited to interpreting Judge Teilborg's order.

IT IS ORDERED:

1. EPS's motion for summary judgment (Doc. 40) is **granted**.

2. The Rule 16 Case Management Conference current set for **November 12, 2010 at 4:00 p.m.** is **vacated** and **reset** to **December 21, 2010 at 4:30 p.m.** to address EPS's remaining counterclaims.

DATED this 9th day of November, 2010.

David G. Campbell
United States District Judge