UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER W. HESSE, et al., Plaintiffs, v. SPRINT SPECTRUM, L.P., et al., Defendants.	CASE NO. C06-0592JLR ORDER REGARDING DISCOVERY PRIOR TO MOTION TO COMPEL ARBITRATION AND FOR RELIEF FROM DEADLINE

I. INTRODUCTION

Before the court is Plaintiffs' motion for an order permitting limited discovery and an extension of time in the briefing schedule (Dkt. # 256) with regard to Defendant Sprint Spectrum, L.P., d/b/a Sprint PCS's ("Sprint PCS") pending motion to compel arbitration, de-certify the class, and dismiss the action (Dkt. # 253). Having reviewed the motion, all papers filed in support and opposition thereto, and being fully advised, the court GRANTS in part and DENIES in part Plaintiffs' motion (Dkt. # 256). In addition, the court STRIKES Sprint PCS's motion to compel arbitration from the calendar without

prejudice to re-filing following the limited discovery permitted by the court as described below.

II. BACKGROUND

This is a class action by current and former Sprint PCS subscribers in Washington State. In this action, Plaintiffs challenge Sprint PCS's alleged practice of billing its customers an added charge for its Washington State business and occupation ("B&O") taxes. (*See generally* Consol. Compl. (Dkt. # 118).) Plaintiffs allege this practice violates Washington's statutory prohibition on treating B&O taxes as taxes on consumers. (*See id.* ¶ 2.1 (citing RCW 82.04.500).)

Plaintiffs Christopher W. Hesse and Nathaniel Olson filed separate lawsuits in King County Superior Court for the State of Washington in 2006. (*See* Notice of Removal (Dkt. # 1); Show Cause Order (Dkt. # 24).) Defendants removed both cases to federal court, and they were consolidated in the present action. (*See* Notice of Removal; Min. Ord. re: Consol. (Dkt. # 33).) Plaintiffs seek a declaratory judgment and injunction against Sprint PCS's alleged practice, along with damages under Washington's Consumer Protection Act, RCW ch. 19.86, and restitution for unjust enrichment. (*See generally* Consol. Compl.)

Over the next five years, the parties litigated a number of issues, but never an issue concerning arbitration. In 2007, the court granted Plaintiffs' motion for class certification (Dkt. # 117). Defendants moved to dismiss all claims predicated on the B&O tax as preempted by the Federal Communications Act ("FCA") (Dkt. # 138). Defendants later moved for summary judgment of the remaining claims based on a class settlement in

Kansas (Dkt. # 176). Each of these defenses was rejected on appeal. *See Hesse v. Sprint Specturm, L.P.*, 598 F.3d 581 (9th Cir. 2010).

On remand, Sprint PCS moved for summary judgment again on the merits (Dkt. # 216), which Plaintiffs opposed (Dkt. # 231). The court then stayed the action pending a decision from the Washington Supreme Court on a materially similar case against Cingular Wireless. (Order (Dkt. # 243).) Never, during all these years of litigation, did Defendants assert that Plaintiffs' claims were subject to arbitration.

On April 27, 2011, the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, --- U.S. ---, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act ("FAA") preempted California's *Discover Bank* rule,[1] which had held that an arbitration agreement in a consumer contract setting could be found to be unconscionable because it included a universal class action waiver. On September 14, 2011, Sprint PCS moved the court to lift the stay in this matter to permit Sprint PCS to file a motion to compel arbitration in light of the change wrought in the law by the Supreme Court's decision in *Concepcion* (Dkt. # 244). The court lifted the stay for this limited purpose (Dkt. # 252), and Sprint PCS filed its motion to compel arbitration, de-certify the class, and dismiss the action (Dkt. # 253).

In response, Plaintiffs filed the present motion seeking limited discovery with regard to the issue of arbitration and an extension of time to respond to Sprint PCS's motion to compel arbitration. (Mot. (Dkt. # 256).) Specifically, Plaintiffs seek discovery

[1] *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *overruled Concepcion*, --- U.S. ---, 131 S.Ct. 1740.

with regard to two issues: (1) whether an agreement to arbitrate was formed (*id.* at 5-6; Reply (Dkt. # 258) at 3-4), and (2) whether the alleged arbitration agreement will preclude Plaintiffs from enforcing their statutory rights (Mot. at 6-8; Reply at 4-5).

III. ANALYSIS

Although discovery in this matter has been closed, the court finds that Plaintiffs' motion seeking additional discovery concerning Defendants' motion to compel arbitration is timely. Defendants did not move to compel arbitration until November 16, 2011, more than five years following the filing of the complaint. (*See* Mot. to Compel Arb. (Dkt. # 253).) Defendants assert that it would have been futile for them to move to compel arbitration prior to the Supreme Court's decision in *Concepcion*, --- U.S. ---, 131 S .Ct. 1740, which fundamentally changed the jurisprudence in the Ninth Circuit governing arbitration agreements. (Mot. to Compel Arb. at 1.) The court agrees with this assessment, but the fact that Defendants did not move to compel arbitration until recently means that Plaintiffs previously had no reason to seek or conduct discovery with regard to arbitration issues. *Laguna v. Coverall N. Am., Inc.*, No. 09cv2131 (BGS), 2011 WL 3176469, at *3 (S.D. Cal. July 26, 2011) ("Defendants filed the motions to compel arbitration well into the case, and should have known that as a result, Plaintiffs might need to conduct limited discovery to investigate the enforceability of the arbitration clause."). Now that the need has arisen, Plaintiffs must be afforded an opportunity to gather appropriate evidence. *See id.* (granting plaintiff's request to reopen discovery when motion for discovery was filed in good faith soon after defendants filed motions to compel arbitration); *Plows v. Rockwell Collins, Inc.*, No. SACV 10-01936 DOC

(MANx), 2011 WL 3501872, at *5 (C.D. Cal. Aug. 9, 2011). Nevertheless, the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Accordingly, Plaintiffs are entitled to only limited discovery concerning those factual issues specifically implicated by Defendants' motion to compel arbitration.

Plaintiffs assert that they are entitled to discovery concerning whether Plaintiffs entered into an agreement to arbitrate. (Mot. at 5-6; Reply at 4.) The Ninth Circuit Court of Appeals has held that "[t]he FAA provides for discovery and a full trial only if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.'" *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (quoting 9 U.S.C. § 4)). "[T]he making of the arbitration agreement is in issue if the plaintiff alleges that the arbitration clause was fraudulently induced, that one party had overwhelming bargaining power, or that the agreement does not exist." *Hibler v. BCI Coca-Cola Bottling Co. of L.A.*, No. 11-CV-298 JLS (NLS), 2011 WL 4102224, at *1 (S.D. Cal. Sept. 14, 2011) (citing *Granite Rock Co. v. Int'l Broth. of Teamsters*, --- U.S. ---, 130 S. Ct. 2847, 2856 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006); *Nagrampa v. MailCoups, Inc*., 469 F.3d 1257, 1269-70 (9th Cir. 2006)).

Plaintiffs assert that they need this discovery because "whether the [arbitration] clause was agreed to" is in dispute. (Mot. at 5-6.) The court, however, disagrees. The argument that the formation of the arbitration agreement is in dispute has been foreclosed by Plaintiffs' prior admissions. In an earlier motion for partial summary judgment, Plaintiffs expressly stated that their "relationship" with "Sprint is governed by the Terms

& Conditions of Service, which sets forth the general terms, and a 'service plan,' which sets forth the specific rates and features of the plan." (Pl. Resp to Mot. for S.J. (Dkt. # 185) at 1; *see also* Pl. Mot for Part. S.J. (Dkt. # 175) at 2; *id.* at 6 (admitting that "[t]he Terms & Conditions agreement . . . governs the relationship between Plaintiffs and Sprint . . . ."); *see* November 1, 2011 Terms & Conditions (Dkt. # 175-2) Ex. 1 at SPRINT-PCS-HO 000025) ("Your agreement ("Agreement") with Sprint Specturm L.P. . . . is made up of these Terms and Conditions ("Terms") and the Service Plan that we agree to provide you."); August 1, 2002 Terms & Conditions (Dkt. # 175-2) Ex. 3 at SPRINT-PCS-HO 000047 (same).)[2] The arbitration clauses relied upon by Sprint PCS in its motion to compel arbitration are contained within the Terms & Conditions applicable to the time periods of Plaintiffs' relationship with Sprint PCS. (*See* Mot. to Compel Arb. (Dkt. # 253) at 3-4, 6-7; Brenner Decl. (Dkt. # 177) Ex. 6 at SPRINT-PCS HO 000118; Skok Decl. (Dkt. # 245) Ex. A at 1, 9.) Because Plaintiffs have already admitted that their relationship with Sprint PCS is governed by the Terms & Conditions, the court finds that no further discovery with regard to this issue is required.[3]

Plaintiffs also assert that they need to conduct discovery regarding when the agreements were formed. (Mot. at 5.) The court, however, finds that this avenue of

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[2] Plaintiffs' admissions also foreclose their arguments that they are not bound by the Terms & Conditions because they were not "necessarily" given copies of the Terms & Conditions or were not asked to sign them. (*See* Mot. at 6, n.3.)

[3] In addition, the court notes that Plaintiffs have both received and utilized copies of the various applicable Terms and Conditions in this litigation. (*See* Moore Decl. (Dkt. # 175-2) Exs. 1, 3; Pl. Mot for Part. S.J. at 3, n.3; *see also* Brenner Decl. Exs. 2-11; Stok Decl. Exs. A, B.)

discovery is also foreclosed because there is no factual issue to resolve. There is no dispute that Mr. Hesse became a Sprint PCS customer on December 12, 2011 (*see* Consol. Compl. ¶ 2.1; 2d Straub Decl.(Dkt. # 72) ¶ 6), and that Mr. Olson became a Sprint PCS customer on May 22, 2002 (*see* Consol. Compl. ¶ 2.1; 2d Straub Decl. ¶ 5).[4] Plaintiffs have admitted that Mr. Hesse cancelled his service with Sprint in February 2006, and Mr. Olson terminated his service in late 2010. (Pl. Resp. to Renewed S.J. at 4.) The class period is from March 16, 2002 to the present. (*See* Dkt. ## 160, 171.) Accordingly, the court finds that there is no factual dispute concerning when the contracts at issue here were formed, or the time period defining the Terms of Service at issue, and thus no need for discovery on this topic. When Plaintiffs cannot show how allowing additional discovery would bear on the outcome of the pending motion, the court acts within its discretion in denying such a request. *See Panatronic USA v. AT&T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002).

Finally, Plaintiffs assert that they need discovery regarding the alleged unconscionability of the arbitration clauses – specifically whether they will be able to effectively vindicate their statutory rights in the arbitral forum. (*See* Mot. at 7-8; Reply at 4-6.) In *Green Tree Financial Corporation – Alabama v. Randolph*, 531 U.S. 70 (2000), the Supreme Court stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights

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[4] (*See also* Pl. Resp. to Renewed S.J. (Dkt. # 231) at 3 ("Named Plaintiff Christopher Hesse began subscribing to Sprint in December 2001, and Nathaniel Olson began subscribing in May 2002.").)

in the arbitral forum." *Id.* at 90. Numerous courts have required discovery on such issues prior to ruling on a motion to compel arbitration. *See, e.g.*, *Newton v. Clearwire Corp.*, No. 2:11-CV-00783-WBS-DAD, 2011 WL 4458971, at *6-*8 (E.D. Cal. Sept. 23, 2011) (permitting limited pre-arbitration discovery regarding unconscionability); *Plows*, 2011 WL 3501872, at *5 (permitting four months to conduct discovery on the enforceability of the arbitration agreement); *Laguna*, 2011 WL 3176469, at *7 (permitting limited discovery, narrowly tailored to determining whether arbitration clause is enforceable under state law); *Hamby v. Power Toyota Irvine*, 798 F. Supp. 2d 1163, 1164-65 (S.D. Cal. 2011) (permitting limited pre-arbitration discovery on issue of unconscionability); *Larsen v. J.P. Morgan Chase Bank, N.A.*, Nos. 10-12936, 10-12937, 2011 WL 3794755, at *1 (11th Cir. Aug. 26, 2011) (vacating district court order which denied a motion to stay pending arbitration and remanding with instructions to reconsider in light of the Supreme Court's decision in *Concepcion* and that "discovery is to be limited to issues bearing significantly on the arbitrability of this dispute until the question of arbitrability has been decided."). Accordingly, Plaintiffs' motion for discovery is granted with respect to the narrow issue of whether the arbitration clauses at issue would permit Plaintiffs to vindicate their statutory rights.

The court, nevertheless, recognizes that there are potentially substantive issues with respect to Plaintiffs' reliance on *Green Tree*. First, Plaintiffs are asserting state, and not federal, statutory rights. "[I]t is not clear that *Green Tree*'s solicitude for the vindication of rights applies to rights arising under state law. . . ." *Kaltwasser v. AT&T Mobility, LLC*, --- F. Supp. 2d ---, 2011 WL 4381748, at *5 (W.D. Wash. Sept. 20, 2011).

Further, "even assuming that *Green Tree* applies to state law claims, the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion*." *Id.* Indeed, another court within this district has concluded that "[i]f *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims." *Id.* at *6.

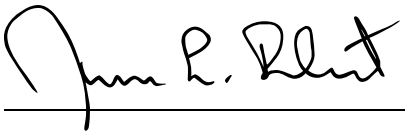
Although the court notes the foregoing issues, it declines, in the context of this motion to compel discovery, to make any substantive rulings concerning the continued viability of *Green Tree* following the Supreme Court's ruling in *Concepcion* or its applicability to this dispute. The court prefers instead to consider such issues (if required) in the context of Defendants' motion to compel arbitration (Dkt. # 253) and upon a complete record following the ordered discovery. The court, however, cautions the parties that the present order compelling limited discovery is by no means a license for Plaintiffs to embark on a fishing expedition, and in light of the court's comments above should be narrowly construed. The court's role at this juncture "is strictly limited to determining arbitrability and enforcing agreements to arbitrate." *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (internal quotation marks omitted).

IV. CONCLUSION

Based on the foregoing, the court GRANTS in part and DENIES in part Plaintiffs' motion for discovery (Dkt. # 256) concerning Defendants' motion to compel arbitration. Plaintiffs may conduct discovery on the narrow issue described above. Plaintiffs shall

have sixty (60) days in which to conduct the referenced discovery from the date of this order. Plaintiffs' discovery shall be limited to ten interrogatories, ten requests for production of documents, and one Federal Rule of Civil Procedure 30(b)(6) deposition. *See* Fed. R. Civ. P. 26(b), 26(c) (providing the court with the authority and discretion to limit the frequency and extent of discovery). The court encourages the parties to work cooperatively to complete the ordered discovery as expeditiously as possible, and to consider utilizing the procedures set forth in Local Rule CR 7(i) with regard to any disputes that may arise concerning the discovery permitted by this order. *See* W.D. Wash. Local Rules CR 7(i). Finally, the court STRIKES Defendants' pending motion to compel arbitration (Dkt. # 253), but without prejudice to re-filing within 21 days following the close of this limited 60-day discovery period.

Dated this 9th day of January, 2012.



JAMES L. ROBART
United States District Judge