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Clearwater REI, LLC v. Boling Appellant's Reply Brief Dckt. 40809

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLEARWATER REI, LLC, BARTON COLE COCHRAN, CHAD JAMES HANSEN, RONALD D. MEYER, CHRISTOPHER J. BENAK, AND ROB RUEBEL Plaintiffs – Counterdefendants - Respondents, vs. MARK BOLING, Defendant – Counter-Claimant – Appellant	Supreme Court Docket No. 40809-2013 (Ida County Case No. CV OC 1208669)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of Idaho

In and For the County of Ida

HONORABLE DEBORAH BAIL, DISTRICT JUDGE, PRESIDING

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RESPONSE TO RESTATEMENT OF THE ISSUES ON APPEAL

Counterdefendants' restatement of the issues on appeal in Respondents' Brief ("ROB") fails to address, respond to or argue whether Boling's statutory tort claims fall within the scope of the arbitration clause of the subscription agreement (Issue No. One in Appellant's Brief ("AOB") at p. 22), which is therefore conceded by Counterdefendants in this appeal.

Counterdefendants' first restatement of the issues on appeal is unduly narrow in scope to Idaho contract law and only presents one of the five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory. See AOB at p. 27.

Counterdefendants' second restatement of the issue on appeal misapplies waiver by estoppel and misconstrues Idaho law of judicial estoppel for purposes of seeking arbitration, which was developed in AOB at pp. 34-39.

Counterdefendants' second restatement of the issue on appeal also unduly restricts the relevant facts upon which judicial estoppel is to be analyzed in this appeal.

RESPONSE TO ATTORNEY FEES ON APPEAL

Counterdefendants are not entitled to attorney fees because the ROB provides no factual support that this case "was brought, pursued or defended frivolously, unreasonably or without foundation" or that Boling's arguments on appeal are "unsupported by any authority" or "contrary to prior decisions rendered by this Court."

ARGUMENT

A. Five theories exist in Idaho to compel a non-signatory party to arbitration.

Counterdefendants acknowledge that in *Arthur Andersen v. Carlisle,* 556 U.S. 624, 631-32 (2009) "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," ROB at p. 6. These "traditional principles" basically mirror the five theories quoted in the *Thomson-CSF* case.

Moreover, subsequent to the *Carlisle* case, this Court in *Wattenbarger v. A.G. Edwards & Sons, Inc.,* 150 Idaho 308, 316, 246 P.3d 961, 969 n. 1 (Dec. 2010), reiterated that the applicable state and federal legal principles of arbitration law are one and the same. Thus, this Court recognizes that the five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory (See AOB at p. 28) is applicable for the state of Idaho as federal legal principles that are indistinguishable from Idaho's own arbitration principles.

1. Counterdefendants are bound by the arbitration clause based on their close relationship with the Company and intertwined facts with the Agreement.

Counterdefendants do not dispute in ROB that they had a "preexisting relationship" as agents for the Company in the formation, distribution, maintenance and performance of the 2008 Note Program. Instead, Counterdefendants inappropriately

rely upon *General Motors Acceptance Corp.* v. *Turner Ins. Agency, Inc.,* 96 Idaho 691, 696-697 (1975) as authority that an agent by making a contract only on behalf of a disclosed principal, whom he was power to bind, does not thereby become liable for its non-performance. ROB at p. 7. However, in the instant case Boling is not seeking liability against the Counterdefendants for the Agreement's non-performance, e.g. breach of contract claim. But rather Boling is seeking enforcement of the arbitration clause against Counterdefendants to assert claims based on Counterdefendants' own alleged tortuous activities intertwined with the Agreement.

Since both Boling and the Company agreed to the arbitration clause in the Agreement, a mutuality of remedy exists for that contractual term.[1] Boling may arbitrate any claims asserted against the Company based on the Counterdefendants' conduct made in the course and scope of their agency relationship. [2]

Boling, as a willing signatory, seeking to arbitrate with Counterdefendants, as a non-signatory that is unwilling, must establish at least one of the five theories described

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[1] "[I]f there were no mutuality of remedy requirement, the seller--which is usually the offeree in the real estate sales context--would have absolutely no incentive to initial the arbitration provision and thereby bind itself to arbitrate disputes." *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.,* 68 Cal.App.4th 83, 91, fn. 6 (1998).

[2] When contracting parties agree to arbitrate all disputes "under or with respect to" a contract (as they did in the instant case), they generally intend to include disputes about their agents' actions because "[a]s a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." *In re Merrill Lynch Trust Co. FSB,* 235 S.W.3d 185, 189 (Tex., 2007).

in *Thomson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.1995).[3]

This Court previously stated in *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 142 Idaho 235 (2005) that "a nonsignatory can be bound to an arbitration agreement under ordinary principles of contract and agency," citing the *Thomson-CSF* case. See AOB at pp. 28 and 30; See also *Mance v. Mercedes-Benz USA*, 901 F.Supp.2d 1147, 1155 (N.D. Cal. 2012) (citations omitted).

This Court further cites in *Dan Wiebold* the case of *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. Inc.*, 129 Cal.App.4th 759 (2005) as an example of the arbitration principles under the *Thomson-CSF* case. AOB at p. 28. Although the *Westra* case involves the enforcement of arbitration by a non-signatory, the *Westra* court states "[a] nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory." (citations omitted) *Westra* at p. 765. Thus, with establishing one of the five theories described in *Thomson–CSF* case, an arbitration clause can be

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[3] The federal courts have identified five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Boucher v. Alliance Title Co., Inc.*, 127 Cal.App.4th 262, 268 (2005), quoting *Thomson-CSF, S.A. v. American Arbitration Ass'n.*, 64 F.3d 773, 776 (2nd Cir. 1995).

enforced by or against a non-signatory under Idaho law.[4]

In the instant case, the district court ruled "[t]o the extent that the named individuals were acting in the course and scope of their agency for their principal, their actions as agents bind their principal but do not convert the agents to parties to the contract." [R 576, lines 5-7] However, the district court failed to express any analysis, finding or ruling regarding enforcing the arbitration clause against the non-signatory Counterdefendants under the theories of agency or equitable estoppel described in *Thomson–CSF* case.

Counterdefendants have a close relationship with the Company, as owners, officers and agents. AOB at pp. 30-32.[5] Also, the operative facts against the Counterdefendants are inherently inseparable, "intimately founded in and intertwined with the underlying contract obligations" while acting in the course and scope of their agency relationship in the formation, distribution, performance and maintenance of the Agreement and 2008 Note Program.[6] AOB at pp. 34-38. This "close relationship" and intertwined facts provide a sufficient nexus to justify enforcing the arbitration clause against the non-signatory Counterdefendants.

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[4] Counterdefendants fail to mention or respond to the *Dan Wiebold* and *Westra* cases in ROB.

[5] The Company is solely owned by the Manager, Counterdefendant Clearwater REI, LLC. [R 401]

[6] Under the **doctrine of equitable estoppel**, claims against the non-signatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause. *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.*, 186 Cal.App.4th 696, 715 (2010) – citing *Goldman v. KPMG, LLP,* 173 Cal.App.4th 209, 217-218 (2009).

Furthermore, it is equitable to compel arbitration against the non-signatory Counterdefendants, as agents for and along with the Company. Counterdefendants' alleged actionable conduct is attributable to and may create liability for the Company, which if arbitrated in a complete proceeding with all interested parties eliminates the risk of inconsistent rulings.[7]

Counterdefendants' reliance on the case of *Elgohary v. Herrera*, 2013 Tex. App. LEXIS 2116, *12-13 (Tex. App. Mar. 5, 2013) lacks a focus to the issues in this case. The issue on appeal presented in the *Elgohary* case is "who properly decides the issue of arbitrability against a non-signatory—the trial court or the arbitrator." *Elgohary* at *1. Counterdefendants cite "[i]f the party resisting arbitration is not a signatory to the contract, his status as an agent of the signatory entity will not bind him to the arbitration provision. ROB at pp. 9-10. This citation is made in the context of *Elgohary*'s issue on appeal, i.e. who decides the issue of arbitrability. *Elgohary* holds that the court should decide the issue of arbitrability and then remands the case back to the trial court to "conduct an independent review to determine whether arbitration could nonetheless be compelled because of either successor liability under the contract or under any of the six theories for compelling a non-signatory to arbitrate set forth in *In re Merrill Lynch,* 235 S.W.3d at 191. Absent such an independent review of arbitrability by the trial court, its

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[7] At oral argument the district court stated "an agent acting in the scope of his or her agency binds his or her principal, and if the principal has an agreement to arbitrate, then the acts of the agents will be evaluated in the context of the arbitration." [RT 22:10-14]

action in denying the application to confirm and vacating the arbitration award against Herrera was premature." *Elgohary* at *7.

Thus, Counterdefendants' reliance on the *Elgohary* case and the ordinary agency principles in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002) is misplaced because these cases look to whether the parties agreed to arbitrate a dispute and never thereafter reviewed the facts under the five theories described in *Thomson–CSF* for binding non-signatories to arbitration agreements under theories that arise out of common law principles of contract and agency law.

Counterdefendants also wrongfully criticize Boling's reliance on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 757-758 (11th Cir. 1993) – re equitable estoppel and claims intertwined with contractual obligations, as being bad law after the *Carlisle* case. ROB at pp. 11-12. As discussed *supra*, 1) the *Carlisle* case did not eliminate "traditional principles" of state law to allow a contract to be enforced by or against nonparties to the contract, and 2) this Court continues to acknowledge the five theories described in *Thomson–CSF* for binding non-signatories to arbitration agreements.

Finally, Counterdefendants incorrectly rely upon New Mexico's 3-part version of waiver by estoppel (a different principle) in the case of *THI of NM at Hobbs Ctr., LLC v. Patton*, 2012 WL 112216 (D.N.M. 2012) at *10 to assert that Boling has not complied with the equitable estoppel principle in Idaho for binding a non-signatory to an agreement to arbitrate. ROB at p. 18-19. The *Hobbs* court later identifies the

equitable estoppel principal of collusion in *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 2011 WL 5545420 (10th Cir. 2011) at *6 (unpublished opinion) as instructive in determining whether a non-signatory is bound by an agreement to arbitrate.[8] *Hobbs* at *14-15. In the instant case, waiver by estoppel is not the issue and Counterdefendants' reliance thereon is inapposite.

2. Counterdefendants are bound by the arbitration clause based on a third-party beneficiary relationship with the Company.

Counterdefendants' actionable conduct has a "significant relationship" to the formation and performance of the Agreement between the Company and Boling, whereby Counterdefendants were intended direct economic benefit derived from the Agreement as disclosed therein. See AOB at p. 33.

Boling executed the Agreement with the disclosed "significant relationship" and economic benefits between the Company and Counterdefendants.

Having taken their intended fruits of the Agreement with Boling in the form of fees, employment compensation and use of the loan proceeds for projects by other Clearwater entities owned or operated by the Counterdefendants, an intended direct benefit was conferred on the non-signatory Counterdefendants as a result of the Agreement, making the non-signatory Counterdefendants a third party beneficiary of

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[8] "[A]llegations of collusion will support estoppel only when they establish that the claims against the nonsignatory are intimately founded in and intertwined with the obligations imposed by the contract containing the arbitration clause." *Hobbs* at *14 citing *Medtronic,* 2011 WL5545420, at *6.

the Agreement and arbitration clause therein.[9]

B. Boling has Not Waived his Right to Compel Arbitration

1. No waiver of right to arbitrate exists.

The party seeking the "heavy burden" to prove a waiver of the right to arbitration must show: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." (underline added) *Bauscher v. Brookstone Securities, Inc.*, 2012 WL 3100383 at *5 (D. Idaho, 2012) (citing *Fisher v. A.G. Becker Paribas Inc.,* 791 F.2d 691, 694 (9th Cir.1986) These requirements are set forth in the conjunctive, so all requirements must be met before a waiver of right to arbitrate is established.

Counterdefendants did not set forth in their opposition to Boling's Motion to Compel Arbitration or in ROB any prejudice that existed under the third requirement. Counterdefendants do not establish that volumes of discovery were produced in this case. Moreover, the burden of participating in discovery is *inadequate* to show prejudice. *See*, *Bauscher* at *6. Thus, a waiver of right to arbitrate is not established.

2. No judicial estoppel exists.

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[9] "In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made. (Citation omitted). *Just's v. Arrington Constr. Co.,* 99 Idaho 462, 464 (1978) (finding intent to benefit third party class of merchant's within a local improvement district was evident on the face of the contract)

Judicial estoppel is the concept "that a litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." *Heinze v. Bauer*, 145 Idaho 232, 235 (2008) (citing *Loomis v. Church*, 76 Idaho 87, 93–94 (1954).

In general, there are three elements for a court to consider in evaluating whether to apply judicial estoppel against a party: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir.2008). These requirements are set forth in the conjunctive, so all requirements must be met before judicial estoppel is established.

Any purported inconsistent position(s) set forth in Boling's Opposition to Petition to Stay Arbitration does not establish any waiver, *supra*, or judicial estoppel because 1) no sworn statements were made, 2) the district court did not rule in favor of Boling, and 3) the district court makes no mention of or relies on such position(s) in ruling on the matter. See R 278-279. Also, Boling has not derived an unfair advantage or impose an unfair detriment on Counterdefendants, based on similar grounds, *supra*, that no prejudice under a waiver of right to arbitrate theory exists.

C. Counterdefendants Are Not Entitled to Attorney Fees on Appeal.

Counterdefendants are not entitled to attorney fees on appeal because 1) the lawsuit was not "brought, pursued or defended frivolously, unreasonably or without foundation." and 2) Boling's arguments on appeal are not deemed to be frivolous as "unsupported by any authority" or "contrary to prior decisions rendered by this Court."

On September 12, 2012, Plaintiffs/Counterdefendants' Motion to Dismiss and Motion to Stay Arbitration were heard by the district court. At that time, the Motion to Dismiss was denied. [R 303, ¶ 39] Boling had successfully defended his counterclaims from dismissal, thereby establishing their merits at the pleading stage.

On February 6, 2013, at the time of oral argument on the underlying Motion to Compel Arbitration, the district court invited Boling to accept a Rule 54 (B) certification of the issue on appeal.

> "THE COURT: I don't see that you have an agreement between these parties to arbitrate. And while I have no question that to the extent that in the agreement you appropriately have, that you already have that does require arbitration, there is certainly no question that a company can be bound by its officers and agents, but then you are still talking about the principal being the person or entity compelled to arbitrate.
>
> So I simply don't think there is an adequate basis to require arbitration. I would be willing to consider giving you a 54(B) certificate if you wish to raise that issue on appeal." [RT 10:8-20] * * *

> "But I will give you a 54(B) certificate if you desire so that you can pursue these issues, because it's obvious that it is a **threshold issue**, and as you frame it, it seems to me that **it would make some sense to allow you the option to pursue it with the record that you now have, which is a better record, to pursue these issues on appeal if you would desire to do so**." [RT 23:12-19]
>
> (emphasis added)

The district court expressly acknowledges Boling as having a threshold issue with a better record to pursue on appeal. Additionally, the substantive points and authorities in Appellant's Brief and Appellant's Reply Brief further speak to the non-frivolous nature of the appeal.

Consequently, Boling has established that his case is not frivolous, unreasonable or unfounded and that this appeal presents a threshold issue supported by credible legal authority. As such, Counterdefendants are not entitled to attorney fees on appeal.

CONCLUSION

Boling seeks to conserve judicial resources and ensure consistent substantive rulings on his claims by compelling arbitration of Counterdefendants along with the Company. Boling submitted in support of his motion to compel arbitration admissible evidence, including newly discovered evidence in discovery on a new and different motion that warrants a different conclusion to the district court's 10/16/12 ruling [R 278-279] and 2/7/13 ruling [R 575-577]. Based on the foregoing, Boling respectfully requests that this Court reverse the district court's 2/7/13 ruling [R 575-577] with

direction to compel arbitration against Counterdefendants, and each of them, based on Boling's initial demand for arbitration filed with the AAA on February 15, 2012. Furthermore, Boling requests that Counterdefendants are not entitled to attorney fees on appeal.

Respectfully submitted.

Dated: August 9, 2013

Mark Boling

MARK BOLING,
Appellant, in pro se

CERTIFICATE OF SERVICE

I hereby certify on August 9, 2013, I served the following document(s) in this action:

APPELLANT'S REPLY BRIEF

by sending two true copies thereof by ELECTRONIC SERVICE pursuant to *I.R.C.P*, Rule 5 (b) (E), *I.A.R*, Rule 20 and agreement between the parties addressed to the party(s) served as follows:

Rebecca A. Rainey – rar@raineylawoffice.com
Attorney for Plaintiffs – Counterdefendants – Respondents Clearwater REI, LLC, Barton Cole Cochran, Chad James Hansen, Ronald D. Meyer, Christopher J. Benak and Rob Ruebel.

The transmission of said document(s) to each party served was reported as complete and without error within a reasonable time after said transmission.

Dated: August 9, 2013

Mark Boling

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