UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

8-6-2013

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

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Clearwater REI, LLC v. Boling Respondent's Brief Dckt. 40809" (2013). *Idaho Supreme Court Records & Briefs*. 896.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/896

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law.

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-Counterclaimant-Appellant.

Supreme Court No. 40809-2013
District Court No. CV-OC-12-08669

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT.

HONORABLE DEBORAH BAIL, DISTRICT JUDGE PRESIDING.

Mark Boling
21986 Cayuga Lane
Lake Forest, California 92630
Tel: (949) 588-9222
Fax: (949) 588-7078

Appellant/Defendant, in pro se

Rebecca A. Rainey ISB No. 7525
RAINEY LAW OFFICE
910 W. Main Street, Ste. 258
Boise, Idaho 83702
Tel: (208) 258-2061
Fax: (208) 473-2952

Attorneys for Respondents/Plaintiffs

FILED - COPY
AUG - 6 2013
Supreme Court Court of Appeals
Entered on ATS by

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

A. Nature of the Case

The present action asks this Court to confirm that a signatory to an arbitration agreement cannot compel non-signatories to arbitrate disputes against their will unless there is a basis under ordinary principles of agency or contract law for doing so. Appellant Mark Boling ("Boling") filed a demand for arbitration against Clearwater 2008 Note Program, LLC, an entity with whom he had an agreement containing an arbitration clause. Clearwater 2008 Note Program, LLC is not a party to the present litigation because it is a party to the agreement containing the arbitration clause. In his demand for arbitration, however, Boling also named all counter-defendants, none of whom are parties to the agreement between Clearwater 2008 Note Program, LLC and Boling.

While any of the counter-defendants could have voluntarily consented to join in the arbitration, each of them elected to exercise their right to defend themselves in a traditional judicial forum. None of them have ever undertaken any actions that would constitute a waiver of that right and Boling cannot establish, under ordinary principals of agency or contract law, that they should be compelled to arbitration against their will. Because the non-signatories have the right to litigate Boling's claims against them in the judicial forum, the district court correctly stayed the arbitration. The counter-defendants respectfully request that this Court affirm the district court's order.

B. Concise Statement of the Factual and Procedural History

The facts relevant to the present appeal are largely undisputed. Boling entered into a subscription agreement with Clearwater 2008 Note Program, LLC. R. 000009-000015. The subscription agreement contained an arbitration clause. R. 000012. The subscription agreement was signed by Clearwater 2008 Note Program, LLC, by and through its manager, Clearwater REI, LLC, by and through its manager, Barton Cole Cochran. R. 000014. The Subscription

Agreement incorporated by reference a Private Placement Memorandum (the "PPM"). R. 000010. The PPM fully disclosed to Boling the nature of the investment Boling was making in Clearwater 2008 Note Program, LLC, as well as the nature of the relationship between Clearwater 2008 Note Program, LLC and each counter-defendant (other than Rob Ruebel, who is not mentioned in the PPM). *See, e.g.* R. 000086-89. The only connection between counter-defendant Rob Ruebel and Boling that appears in the record is that Mr. Ruebel's contact information is included on a cover letter enclosing information related to the Clearwater 2008 Note Program, LLC that was sent to Boling. R. 000123.

On or about February 15, 2012, Boling filed a demand for arbitration against Clearwater 2008 Note Program, LLC and the counter-defendants. R. 000017-19. The counter-defendants objected to the demand for arbitration and filed a petition to stay arbitration as to them, on the grounds that they were non-signatories to the arbitration agreement. R. 00005-00020. In response to the petition to stay arbitration, Boling filed an answer (R. 000022-000025) and, under separate pleading, filed substantive counterclaims against the counter-defendants alleging violations of the Idaho Consumer Protection Act (R. 000026-000223). Counter-defendants moved to dismiss Boling's substantive counterclaims on the grounds they were improperly filed in response to a petition to stay arbitration. Boling strenuously urged the district court to allow him to keep his counterclaims in place, representing in writing three times in his opposition to the motion to stay arbitration that he would agree to the stay if he were allowed to pursue his counterclaims:

> However, had Boling attempted to compel arbitration with the courts, which he does <u>not</u> intend to do <u>if</u> the Court allows Boling's counterclaims to be prosecuted in this lawsuit, Boling would have prevailed and plaintiffs would not be entitled to their costs and possible attorney fees herein.

R. 000252-253 (Opposition to Motion to Stay Arbitration at 16-17) (emphasis original).

> If the Court allows Boling's counterclaims to be prosecuted in this lawsuit, which all Plaintiffs/Counter-Defendants have been served with the counterclaims and discovery is pending, then Defendant Boling accepts Plaintiffs' objection to arbitrate and decision not to arbitrate claims against Plaintiffs/Counter-Defendants. Judicial intervention in this lawsuit is Boling's preferred method to resolve his ICPA claims because 1) it allows Boling the right to judicial discovery of information exclusively in Plaintiffs/Counter-Defendants' possession, which is denied by arbitration, 2) none of the proposed arbitrators have any experience in handling unique ICPA claims or issues, and 3) for judicial economy, the prosecution of the counterclaims is significantly advance at this time.

R. 000253 (Opposition to Motion to Stay Arbitration at 17, n.3) (emphasis original).

> Additionally, if the Court allows Boling's counterclaims to be prosecuted in this lawsuit, which all Plaintiffs/Counter-Defendants have been served with the counterclaims and discovery is pending, Boling, as the prevailing party, accepts Plaintiffs' objection to arbitrate and decision not to arbitrate claims against Plaintiffs/Counter-Defendants.

R. 000260 (Opposition to Motion to Stay Arbitration at 24) (emphasis original). The district court granted the motion to stay arbitration and found that it had jurisdiction to allow Boling's substantive counterclaims be prosecuted in that action. R. 000278-79. Counter-defendants answered Boling's counterclaims. R. 000280-94. After having repeatedly advising the district court that he would not seek arbitration if he were allowed to maintain his substantive counterclaims, Boling changed his position and moved to compel the counter-defendants to arbitration. R. 000507-540. After full briefing and hearing on the motion, the district court denied Boling's motion to compel, stayed arbitration as to the counter-defendants, and certified the decision as a final judgment. R. 000575-576. Boling timely appealed. R. 000578.

II. RESTATEMENT OF THE ISSUES ON APPEAL

1. Under Idaho contract law, can a counter-defendant who is not a signatory to the agreement containing the arbitration clause and who is not seeking any direct benefits

arising from the agreement containing the arbitration clause be compelled to arbitrate a dispute against his will?

2. Under Idaho law of judicial estoppel, does a party waive his right to compel arbitration when he represents to a court that he will not oppose a petition to stay arbitration if the court allows him to pursue substantive counterclaims and the court grants to him the requested relief?

III. ATTORNEY'S FEES ON APPEAL

Counter-defendants seek attorney's fees on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41.

IV. ARGUMENT

The district court correctly denied Boling's motion to compel arbitration against the counter-defendants and this Court should affirm that decision. The district court's decision was correct because none of the counter-defendants signed the agreement containing the arbitration provision and Boling failed to establish any theory under Idaho agency or contract law whereby that agreement can be enforced against any of the counter-defendants.

Moreover, Boling expressly waived his right to seek an order compelling arbitration. By informing the district court that he would not oppose the motion to stay if he was allowed to pursue his substantive claims as counterclaims to the petition to stay arbitration. Thereafter, Boling engaged in discovery substantially invoking the litigation machinery. After undertaking these actions and gaining advantages which Boling admits would not have been available to him in the arbitration context, Boling then changed course and sought an order compelling arbitration. Boling should be judicially estopped from taking a position different than that which he initially took in the litigation. And, because Boling has changed course without a good faith basis for doing so, Boling should be made to pay the counter-defendants' legal fees for pursuing this frivolous appeal.

A. Boling cannot compel the non-signatory counter-defendants to arbitration.

By this appeal, Boling seeks an order compelling the non-signatory counter-defendants to defend in arbitration claims that Boling has brought against them. Boling's demand to compel these non-signatories into arbitration invokes the first portion of a two part test used to determine whether a matter can be submitted to arbitration. Because Boling cannot satisfy the threshold of this two part test, an order compelling arbitration would be improper.

When deciding a motion to compel or stay arbitration, a court must address two questions: first, whether the parties have entered into a valid arbitration agreement and, if so, whether the dispute at issue is subject to that arbitration agreement. *Mason v. State Farm Mut. Auto. Ins. Co.*, 145 Idaho 197, 200, 177 P.3d 944, 947 n.1 (2007) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). Both portions of this test are questions of law which are to be resolved by a court under state law contract principles. *Id.*

> [C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement.

Granite Rock Co. v. Int'l Bd. Of Teamsters, 130 S.Ct. 2847, 2857-58 (2010). Arbitration agreements are to be on the same footing as other contracts, but not more so. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002). In this matter, it is undisputed that none of the counter-defendants are parties to the agreement containing the arbitration clause. Because they are not parties to that agreement, the arbitration clause contained within that agreement cannot be enforced against them unless Boling establishes some other theory under ordinary principles of state agency or contract law where the agreement could be enforced against them.

Where a party seeks to enforce an arbitration provision against a person who is not a party to the contract containing the arbitration provision, the enforcing party must establish that some principle of state agency or contract law would otherwise allow the contract to be enforced against that non-signatory. *Arthur Anderson v. Carlisle*, 556 U.S. 624, 631-32 (2009) (abrogating any authority suggesting that there is a body of federal substantive law of arbitration that governs whether non-parties can be compelled to arbitrate and making it clear that the issue is to be resolved by state contract law). "'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....'" *Id.* at 631.

Boling appears to acknowledge that, in order for any of the counter-defendants to be compelled into arbitration, he must establish some theory under ordinary principles of agency or contract law that would allow Boling to enforce the agreement against that particular person or entity. Boling asks this Court to enforce the arbitration agreement on one of three separate theories: agency, third-party beneficiary, and an "inextricably intertwined" version of estoppel. App. Br. 28-29. However, under Idaho law and the facts of this case, none of these theories give Boling the right to enforce the contract against any of the counter-defendants: The counter-defendants agency relationship with Clearwater 2008 Note Program, LLC was fully disclosed; none of the counter-defendants are properly characterized as third-party beneficiaries; and Idaho law does not recognize the version of "inextricably intertwined" estoppel advanced by Boling. For these reasons, Boling has failed to prove any theory under ordinary principles of agency or contract law that would allow the agreement to be enforced against the non-signatory counter-defendants and this Court should affirm the decision denying his motion to compel arbitration.

1. An arbitration agreement cannot be enforced against an agent against his will.

Black letter law regarding whether a contract can be enforced by or against an agent is well settled, simple, and straightforward:

> A person making a contract with another as an agent for a disclosed principal does not become a party to the contract. A principal is "disclosed" if, at the time of making the contract in question, the other party to it has notice that the agent is acting for a principal and of the principal's identity.
>
> * * *
>
> We conclude, consistent with well established agency principles, 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.
>
> > One who makes a contract only on account of another ordinarily does not himself contemplate responsibility for its performance. His function is performed if he causes a contract to be made between his principal and the third person. He guarantees neither the honesty nor the solvency of the principal.

General Motors Acceptance Corp. v. Turner Ins. Agency, Inc., 96 Idaho 691, 696-697, 535 P.2d 664, 669-670 (1975) (citations omitted). It is undisputed that each of the counter-defendants' relationship with Clearwater 2008 Note Program, LLC was fully disclosed to Boling at the time he entered into the subscription agreement. Because each of the non-signatory counter-defendants—to the extent they acted as an agent for Clearwater 2008 Note Program, LLC—acted as a disclosed agent the arbitration clause contained within the subscription agreement cannot be enforced against them.

a. Mutuality of Remedy does not support Boling's request to enforce an arbitration clause against a non-signatory counter-defendant.

Because ordinary principles of agency law do not support Boling's premise, he asks this Court to get more creative. He cites authority where a non-signatory agent was entitled to enforce an arbitration agreement and then argues that the doctrine of mutuality of remedy dictates that if a non-signatory agent can agree to arbitrate a dispute against a signatory, then a signatory should also be able to force a non-signatory agent to arbitrate a dispute against his will. App. Br. at 30. This argument runs directly counter to the fundamental principal of arbitration law, which provides that a party cannot be compelled to arbitrate a dispute which he has not agreed to arbitrate; Boling has failed to present any authority that supports this proposition.

Boling's passing reference to mutuality of remedy as a legal basis to compel a non-signatory agent into arbitration is not supported by adequate legal authority. *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.*, the authority upon which Boling relies, considers whether both parties to an agreement containing an arbitration clause must be bound to the arbitration clause in order for arbitration to be binding. 68 Cal. App. 4th 83, 91 fn. 6 (1998). Under the facts of *Hock*, which involved a form real-estate purchase and sales agreement, a California court held that both principals to the agreement were required to agree to the arbitration clause in order for it to be binding against the principals. *Id.* Requiring mutuality of remedy between the principals is materially different than requiring that a disclosed agent be bound by the same agreement(s) that bind the principals. Boling has offered no authority to support his invitation to this Court to make that curious leap.

In an additional effort to support his proposed twist on agency law, Boling presents a footnote citation to the cases of *Rowe v. Exline*, 153 Cal. App. 4th 1276, 1285 (2007) and *Harris v. Superior Court*, 188 Cal. App. 3d 475, 477-79 (1986) for the proposition that "a non-signatory

who is the agent can even be *compelled* to arbitrate against his will." App. Br. at 30 n.10. While Boling accurately represented *Rowe*'s summation of *Harris*, *Rowe*'s summation of *Harris* is inaccurate. In *Harris* the non-signatory doctor was compelled to arbitrate against his will because he was found to be a third-party beneficiary of the specific arbitration clause at issue: to wit, the arbitration clause specifically "requir[ed] arbitration of [patients]' claims against 'employees or other contracting health professional's' of [the medical group]." *Harris*, 188 Cal. App. 3d at 479.[1] As additional support for its holding, the *Harris* Court further noted that the intended third-party beneficiary had accepted benefits under the agreement containing the arbitration clause. *Id.* The two facts critical to the *Harris* decision were (i) that the arbitration clause specifically contemplated conferring arbitration as a benefit to an express class of third-party beneficiaries and (ii) the non-signatory doctor had accepted benefits under that agreement. *Rowe*'s suggestion that the non-signatory doctor was compelled to arbitrate against his will simply because he was an employee/agent fails to fully appreciate the facts critical to the *Harris* decision.

Those cases that have considered the logical consequence of mutuality of remedy as a basis for compelling arbitration against a non-signatory have squarely rejected the idea. For example, *In re. Merrill Lynch Trust Co. FSB,* 235 S.W.3d 185, 189 (Tex. 2007), which is the authority cited by Boling for the proposition that an arbitration agreement can be enforced by a non-signatory agent, has been distinguished on the converse proposition: i.e., a non-signatory cannot be compelled to arbitrate against his will.

> Elgohary, nonetheless, cites *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006) (orig. proceeding) and *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185, 189 (Tex. 2007) (orig.

[1] *Accord Rath v. Managed Health Network, Inc.*, 123 Idaho 30, 30-31, 844 P.2d 12, 12 (1992) (holding that where the arbitration provision specifically applied to only the parties to the agreement, the non-signatory third-party beneficiaries could not be forced to arbitrate against their will).

> proceeding), for the proposition that agents and representatives of parties to contracts containing arbitration clauses are also bound to arbitrate. However, both *Roe* and *DK Joint Venture* distinguished these cases, noting that in *Roe* and *Merrill Lynch*, the party resisting arbitration was, in fact, a signatory to the contract and a non-signatory was seeking to compel arbitration. See *DK Joint Venture*, 649 F.3d at 315 (citing *Roe*, 318 S.W.2d at 520). "*In re Vesta* stands for the proposition that a signatory plaintiff cannot avoid its agreement to arbitrate dispute simply by bringing . . . claims against the [nonsignatory] officers, agents, or affiliates of the other signatory to the contract." *Roe*, 318 S.W.2d at 520. Both *Roe* and *DK Joint Venture* hold that "it matters whether the party resisting arbitration is a signatory or not." *DK Venture*, 649 F.3d at 317. If 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. *Id.*

Elgohary v. Herrera, 2013 Tex. App. LEXIS 2116, *12-13 (Tex. App. Mar. 5, 2013) (emphasis added). The principal advanced by *Elgohary* is well reasoned and makes good sense. It is fair and equitable to require that a signatory arbitrate disputes against a non-signatory disclosed agent where the non-signatory disclosed agent has agreed to that forum. The same rationale does not apply in the converse. It is not fair and equitable to force a non-signatory disclosed agent into arbitration where the non-signatory disclosed agent has not agreed to it.

Under ordinary agency principals, the signatory's previous agreements by and between himself and the principal cannot be superimposed on a disclosed agent. Because a court could not re-write the contract to superimpose any other terms of the agreement on the disclosed agent, it makes little sense to allow a court to superimpose an arbitration clause on the disclosed agent. Arbitration agreements are to be on the same footing as other contracts, but not more so. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002).

Because mutuality of remedy does not provide a basis under principals of ordinary agency law to enforce an agreement against a non-signatory disclosed agent, this Court should

reject Boling's invitation to compel arbitration against the non-signatory counter-defendants on such grounds.

b. Casting his claims as statutory torts does not relieve Boling of first showing that the agreement could be enforced against the non-signatory agents.

As a final attempt to make his agency theory stick, Boling relies on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) for the proposition that, because his claims against the counter-defendants sound in a statutory tort, he can enforce the arbitration agreement against them without first demonstrating that the contract containing the arbitration agreement applies to them. App. Br. at 32. On this point, Boling's logic is fundamentally flawed as Boling relies on the part of *Sunkist* which discusses the scope of the arbitration provision (which is still good law), and ignores that part of *Sunkist* that considers whether a signatory is equitably estopped from denying a non-signatory's standing to enforce the arbitration clause (which was abrogated by the Supreme Court of the United States in *Carlisle*).

The part of *Sunkist* which is arguably relevant to the present appeal is whether Sunkist, a signatory, was estopped from contesting counter-defendant/non-signatory Del Monte's efforts to enforce the arbitration provision against Sunkist. *Sunkist*, 10 F.3d at 757. This speaks to the first part of the two part inquiry that a court must make when determining whether to compel arbitration. *Mason*, 145 Idaho at 200, 177 P.3d at 947 n.1 (two part inquiry involves (i) determining whether the parties have agreed to arbitrate and (ii) whether dispute fits within the scope of the arbitration clause) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). Without making clear whether it was relying on ordinary principals of state contract law, the *Sunkist* Court found that non-signatory Del-Monte could enforce the arbitration agreement against signatory Sunkist. *Id.* Because it did not make it clear whether its decision

was based on principles of state contract law, this portion of the decision was overruled by the Supreme Court of the United States's decision in *Arthur Anderson v. Carlisle:*

> However, the Supreme Court's 2009 decision in *Carlisle*, which postdates all of those decisions of this Court, clarifies that state law governs that question, and to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by *Carlisle*.

Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1171 (11th Cir. 2011). Because the issue before this Court is whether there is an arbitration agreement that Boling can enforce against the non-signatory counter-defendants, the only portion of *Sunkist* which is even arguably relevant to the issue before this Court is no longer good law.

The portion of *Sunkist* upon which Boling relies (App. Br. 32) speaks to the second question to be answered by a court when deciding whether to compel arbitration: whether the dispute at issue falls within the scope of the arbitration clause. *Sunkist,* 10 F.3d at 757-58 ("Therefore, the focus of our inquiry should be on the nature of the underlying claims asserted by Sunkist against Del Monte to determine whether those claims fall within the scope of the arbitration clause contained in the license agreement."). This issue would not come before this Court unless and until this Court first determined that Boling can compel non-signatory counter-defendants to arbitration. Accordingly, Boling's reliance on *Sunkist* is misplaced, logically flawed, and should be disregarded by this Court.

2. Third-party beneficiary law does not provide a basis for compelling the non-signatory counter-defendants to arbitration.

a. An arbitration agreement cannot be enforced against an alleged third-party beneficiary that is not seeking any benefits under the contract.

In addition to agency theories, Boling also argues that the arbitration agreement should be enforced against the non-signatory counter-defendants because they are third-party beneficiaries to the agreement containing the arbitration clause. App. Br. at 29 and 33-34. Assuming, for

purposes of the present section only, that any of the counter-defendants could properly be characterized as third-party beneficiaries of the subscription agreement, the arbitration clause still cannot be enforced against them under ordinary principals of contract law because a third-party beneficiary must comply with the terms of the contract only where that third-party beneficiary is attempting to recover benefits due to it under that contract.

A third-party beneficiary may enforce an arbitration agreement (*Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (citing *E.I. DuPont de Nemours & Co. v. Rhone PoulencFiber & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir. 2001))), but a third-party beneficiary "cannot be *bound* to a contract it did not sign or otherwise assent to." *Id.* at 1102 (emphasis original) (citing *Motorsport Eng'g, Inc. v. Maserati SPA,* 316 F.3d 26, 29 (1st Cir. 2002) and *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985))). A third-party beneficiary is found to have "otherwise assented" to an agreement when that third-party beneficiary attempts to enforce his rights as a third-party beneficiary under the agreement. *Lewis v. CEDU Educational Servs., Inc.*,135 Idaho 139, 143, 15 P.3d 1147, 1151 (2000); *see also Bantz v. Bongard,* 124 Idaho 780, 785, 864 P.2d 618, 623 (1993) ("noting that an additional insured [i.e., third-party beneficiary] must comply with the obligations of a policy in order to benefit therefrom"). In this case, none of the counter-defendants are attempting to assert any rights arising under the contract that contains the arbitration provision. Because the non-signatory counter-defendants are not asserting any rights under the agreement, they have not "otherwise assented" to the agreement, and they cannot be bound by such agreement.

b. Boling has not established any facts that would characterize any of the counter-defendants as third-party beneficiaries.

The reason that the non-signatory counter-defendants are not asserting any rights under the agreement is that they are not third-party beneficiaries of the portions of the agreement at

issue in this case. Under Idaho law, in order to establish that someone is a third-party beneficiary, the at-issue provision in the agreement must expressly reflect the intent to benefit the third-party. *Partout v. Harper*, 145 Idaho 683, 687, 183 P.3d 771, 775 (2008). "The third-party must show the contract was made primarily for his benefit; it is not sufficient that the third-party is a mere incidental beneficiary to the contract." *Id.* (citations omitted). "The intent to benefit the third-party must be expressed in the contract itself." *Id.* (citations omitted). An "indirect reference to a third-party does not make the third-party a beneficiary of the [contract]." *Rajagopalan v. Noteworld, LLC*, 2013 U.S. App. LEXIS 10055, *7 (9th Cir. May 20, 2013) (quoting *Tooley v. Stevenson Co-Ply, Inc.*, 106 Wn.2d 626, 724 P.2d 368, 371 (Wash. 1986) (applying Washington law regarding third-party beneficiaries)).

An express reference to a third-party beneficiary was found in the case of *Harris v. Superior Court*, where the at-issue arbitration provision expressly identified employees as third-party beneficiaries in that the arbitration clause specifically "requir[ed] arbitration of [patients]' claims against 'employees or other contracting health professional's' of [the medical group]." *Harris*, 188 Cal. App. 3d at 479.[2] There is nothing so bold in the arbitration provision before this Court today. Rather, the arbitration provision that Boling seeks to enforce against the non-signatory counter-defendants does not make any direct or indirect reference to third-party beneficiaries. Accordingly, the non-signatory counter-defendants are not properly characterized as third-party beneficiaries of the agreement.

Boling's claims that the counter-defendants are third-party beneficiaries to the contract rest on the same factual allegations that make them agents of the Clearwater 2008 Note Program, LLC: i.e., indirect references that describe how the funds raised by Clearwater 2008 Note

[2] *Accord Rath v. Managed Health Network, Inc.*, 123 Idaho 30, 30-31, 844 P.2d 12, 12 (1992) (holding that where the arbitration provision specifically referenced the parties to the agreement, non-signatory third-party beneficiary could not be forced to arbitrate against her will).

Program, LLC will be managed and used. Specifically, Boling cites to a provision of the PPM which establishes that certain persons and entities are paid: "The Company, the Manager and their Affiliates are entitled to receive certain significant fees and other significant compensation, payments, and reimbursements from the sale of the Notes." App. Br. at 33 n.13. Boling has not claimed that he invested in the Clearwater 2008 Note Program, LLC with the specific intent of providing benefits to the counter-defendants.Boling has not cited any authority for the proposition that receiving management fees, salaries, or other reimbursements gives rise to third-party beneficiary status.

Boling also cites to the PPM which states that "Most, if not all, of the loans to be made by the Company with the proceeds of this Offering will be made to Affiliates of the Company and the Manager." App. Br. at 33 n.13. Boling has not claimed that he made the investment with the intent to provide this type of benefit to the counter-defendants. Boling has not provided any authority for the proposition that the recipient of loans made by the Clearwater 2008 Note Program, LLC gives rise to third-party beneficiary status. Boling has also not provided any evidence that any of the non-signatory counter-defendants ever received loans made by the Clearwater 2008 Note Program, LLC. Under Idaho law, the theoretic possibility that one or more of the counter-defendants could have applied for and been given a loan from the Clearwater 2008 Note Program, LLC is insufficient to establish third-party beneficiary status.

As a final attempt to establish third-party beneficiary status, Boling notes that counter-defendant RE Capital, LLC (which is currently in bankruptcy) is the guarantor of the Notes. From that, Boling argues that RE Capital, LLC's members, counter-defendants Meyer and Benak, are third-party beneficiaries. Boling cites no authority to support the proposition that the guarantor of a Note is a third-party beneficiary of that Note, nor has he cited any authority for

the more novel proposition that the owner/managers of a bankrupt guarantor are third-party beneficiaries of the underlying obligation.

In sum, Boling has failed to establish that any of the counter-defendants were third-party beneficiaries of the agreement. Accordingly, this Court should affirm the District Court's order denying Boling's motion to compel arbitration on the grounds that none of the non-signatory counter-defendants are third-party beneficiaries.

3. Ordinary principles of contract law do not support the inextricably intertwined version of equitable estoppel advanced by Boling.

Boling's third basis for attempting to compel the non-signatory counter-defendants to arbitration is that "counterdefendants' actionable conduct is inextricably interwoven with the formation and performance of the entire agreement, making it equitable to compel the non-signatory Counter defendants to also be bound by the arbitration clause in the entire agreement." App. Br. at 29. Under ordinary principals of contract law, this is not a basis for enforcing a contract against a non-signatory to that contract. Rather, this loosely defined and seldom used theory grew up around the development of a "federal substantive law" of arbitration which was rejected by the United States Supreme Court in *Arthur Anderson v. Carlisle*.

Before it was rejected by the Supreme Court of the United States, the ill-defined concept of "inextricably interwoven" conduct giving rise to enforcing an arbitration agreement against a non-signatory counter-defendant was unsettled and met with healthy skepticism:

> While the Fifth Circuit has recognized concerted-misconduct estoppel, the theory is far from well-settled in the federal courts. Despite hundreds of federal appeals involving arbitration, it appears in only 10 reported opinions. In the two leading cases, *Grigson v. Creative Artists Agency L.L.C.* and *MS Dealer Service Corp. V. Franklin*, the Fifth and Eleventh Circuits held that both direct-benefits and concerted-misconduct estoppel were present, so it is unclear what the latter theory added to the result. Of the remainder, the theory was found inapplicable in 4 and it was not reached in 2 more. In only 2 cases did the result hinge on the

> exception—and in those the Firth Circuit compelled arbitration in one and refused to do so in the other.

In Re. Merrill Lynch Trust Co., 235 S.W.3d at 192-93 (original emphasis omitted). The Texas court went on to note "Until the United States Supreme Court clarifies whether concerted-misconduct estoppel correctly reflects federal law, or even whether federal or state law governs the issue, today's decision must remain somewhat tentative." *Id.* at 195. In *Carlisle*, the Supreme Court of the United States spoke on the issue and held that there is no federal substantive law of arbitration and state contract law provides the correct rules of decision. *Carlisle*, 556 U.S. at 631-32.

At the district court, the non-signatory counter-defendants set forth the elements of equitable estoppel, as it applies under Idaho contract law, in support of their argument that they cannot be compelled to arbitrate against their will. R.000552. Anticipating that argument on this appeal, Boling argues that a different version of equitable estoppel applies when an arbitration clause is at issue. App. Br. at 38. In support of Boling's request to use an arbitration specific version of equitable estoppel, he claims that "In the context of Idaho arbitration law, equitable estoppel 'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'" App. Br. at 38 (citing *General Conference of the Evangelical Methodist Church v. New Heart Community Fellowship, Inc.*, 2012 WL 2916013 at *5 (D. Idaho 2012)). Boling failed to apprise this Court of the source of the authority upon which the Federal District Court relied in that opinion. Had he done so, this Court would have been advised that the Federal District Court did not rely on Idaho law, but rather relied on 5th Circuit law which was abrogated in *Carlisle*.

The following line of authority that Boling failed to explain or distinguish demonstrates that the state law rules of decision, which were advanced by counter-defendants at the district

court, is the proper framework pursuant to which this Court should consider Boling's equitable estoppel claims. The *New Heart* case cited by Boling was quoting *Comer v. Micor, Inc.*, 436, F.3d 1098, 1100 (9th Cir. 2006) which, in turn, relied on a quote from *Wash. Mut. Fin. Group. LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004). The opinion in *Bailey* made it clear that at the time of the decision the Fifth Circuit was using federal substantive law of arbitration for its rules of decision. *Id.* 267-68 and n.6.

Following the *Carlisle* decision, courts within the Fifth Circuit recognized that any federal substantive law of arbitration had been abrogated. *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 2012 U.S. Dist. LEXIS 5252 at *17-*21 (D.N.M. January 3, 2012). Noting that "equitable estoppel" had to mean the same thing in the arbitration context as other contexts, the *Hobbs* Court applied New Mexico law regarding equitable estoppel as it applies in the contract setting. *Id.* at *29 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."). After expressly noting that state law provided the appropriate rules of decision, the *Hobbs* court quoted and used New Mexico's 3-part version of equitable estoppel. *Id.* at *30 ("(1) the party to be estopped made a misleading representation by conduct; (2) the party claiming estoppel had an honest and reasonable belief based on that conduct that the party to be estopped would not assert a certain right under the contract or a defense thereto; and (3) the party claiming estoppel acted in reliance on the conduct to its determent or prejudice.")

This version of equitable estoppel is substantially similar to that used in Idaho, which was the version cited by counter-defendants at the district court. Boling has not provided any authority tending to demonstrate that Idaho law has ever adopted or applied the version of equitable estopple upon which he asks this Court to decide this case. And, because it is improper

to construe an arbitration agreement differently than a non-arbitration agreement, (*see Perry*, 482 U.S. at 492 n. 9), counter-defendants respectfully request that the version of equitable estoppel applicable to contracts in general be applied in this case.

Boling cannot establish, under Idaho's version of equitable estoppel, that the arbitration clause (or any other provision of the contract) can be enforced against the non-signatory counter-defendants. In order to enforce a contract on the grounds of equitable estoppel, the party claiming estoppel generally must show

> [1] a false representation or concealment of a material fact be made with actual or constructive knowledge of the true state of facts; [2] that the party to whom the false representation was made was without knowledge or the means of acquiring knowledge of the real facts; [3] that the false representation was made with the intent that it be acted upon; and [4] that the party to whom it was made relied on and acted upon it to his prejudice.

Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468, 531 P.2d 227, 230 (1975) (quoting *Bjornstad v. Perry*, 92 Idaho 402, 405, 443 P.2d 999, 1002 (1968)) (brackets added). "All of the above factors are of equal importance and there can be no estoppel absent any of the elements." *Id.* (citing *Sullivan v. Mabey*, 45 Idaho 595, 264 P. 233 (1928) and *Alder v. Mountain States Tel. & Tel. Co.*, 92 Idaho 506, 446 P.2d 628 (1968)). Boling has failed to present a cogent argument applying Idaho law of equitable estoppel to the facts that he claims entitle him to enforce the arbitration provision against the non-signatory counter defendants. Rather, Boling relies on his allegations of the "incestuous operation of the individual corporate officers and their web of interlocking business entities under the umbrella of the 'Clearwater' name" (App. Br. At 34) and an "inextricably intertwined" version of estoppel that developed under the federal substantive law of arbitration (App. Br. At 29 and 38)—a body of law that has been rejected by the Supreme Court of the United States.

At the district court, counter-defendants argued that Boling could not satisfy the requirements of Idaho's equitable estoppel law. The district court agreed. On this appeal, Boling makes no effort to satisfy the requirements of Idaho's equitable estoppel law but, instead—and in the face of very clear, contrary authority from the Supreme Court of the United States, which authority has been recognized by several federal courts in overruling and/or abrogating prior decisions that follow a body of arbitration specific contract law—Boling argues only that ordinary principals of contract law do not apply and that special rules applicable only in arbitration should be considered. App. Br. at 38. Boling's argument and legal authority miss the mark and Boling has not provided to this Court any bases upon which it should reverse the district court's decision.

4. The presumption in favor of arbitration does not apply when determining whether a party has agreed to submit a dispute to arbitration.

Boling appears to acknowledge that, in order to compel the non-signatory counter-defendants into arbitration, he must establish the grounds to do so under ordinary principals of contract or agency law. Because Boling is unable to do so, he asserts that any doubts regarding the scope of an arbitration clause should be resolved in favor of arbitration. App. Br. 25-26. However, the presumption in favor of arbitration applies only to the scope of an arbitration agreement; it does not apply to the determination of whether an agreement can be enforced against a non-signatory. *Waffle House*, 534 U.S. at 293-94 n.9 (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468, 478 (1989)).

> The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.

Westera, 129 Cal. App. 4th at 763 (quoting *Buckner v. Tamarin*, 98 Cal. App. 4th 140, 142 (citing *Benasra v. Marciano*, 92 Cal. App. 4th 987, 990 (2001)). Boling has failed to establish,

under ordinary agency or contract principals, that the contract can be enforced against the non-signatory counter-defendants. Because this is the threshold question of arbitrability, the presumption in favor of arbitration does not apply and this court should not "resolve any doubts" in favor of compelling these non-signatory defendants to arbitration.

B. Boling has waived his right and is otherwise judicially estopped from attempting to compel arbitration.

Even if Boling could have established a right to compel the non-signatory counter-defendants to arbitration, he waived that right by making representations to the district court that judicially estop him from asserting that right. "A waiver is the intentional relinquishment of a known right. It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon." *Motor Carrier Operations v. IDAHO PUC*, 83 Idaho 351, 357, 364 P.2d 167, 171 (1961) (quoting *Crouch v. Bischoff*, 78 Idaho 364, 304 P.2d 646, 649 (1956)). "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Hoagland v. Ada County*, 2013 Ida. LEXIS 154, *27 (Idaho May 16, 2013) (citing *Loomis v. Church*, 76 Idaho 87, 94, 277 P.2d 561, 565 (1954)). "The policy behind judicial estoppel is to protect 'the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding.'" *Id.* (citing *A & J Constr. Co. v. Wood*, 141 Idaho 682, 685, 116 P.3d 12, 16 (2005)). "It is intended to prevent parties from playing fast and loose with the legal system." *Id.* (also citing 31 C.J.S. *Estoppel and Waiver* §186 (2012)).

In this matter, Boling has taken impermissibly inconsistent positions with the judicial system. At the time counter-defendants filed their petition to stay the arbitration, Boling responded by filing substantive counterclaims. R.000026-000223. Counter-defendants objected

to the substantive counterclaims on the grounds that they were improperly brought in response to a petition to stay the arbitration. R.000002. In his opposition to the petition to stay arbitration, Boling made the following representation to the District Court:

> If the Court allows Boling's counterclaims to be prosecuted in this lawsuit, which all Plaintiffs/Counter-Defendants have been served with the counterclaims and discovery is pending, then Defendant Boling accepts Plaintiffs' objection to arbitrate and decision not to arbitrate claims against Plaintiff/Counter-Defendants. Judicial intervention in this lawsuit is Boling's preferred method to resolve his ICPA claims because 1) it allows Boling the right to judicial discovery of information exclusively in Plaintiffs/Counter-Defendants' possession, which is denied by arbitration, 2) none of the proposed arbitrators have any experience in handling unique ICPA claims or issues, and 3) for judicial economy, the prosecution of the counterclaims is significantly advanced at this time.

R.000253 (original emphasis omitted) (emphasis added). Boling re-iterated this position in the conclusion: "Additionally, if the Court allows Boling's counterclaims to be prosecuted in this lawsuit, which all Plaintiffs/Counter-Defendants have been served with the counterclaims and discovery is pending, Boling, as the prevailing party, accepts Plaintiffs' objection to arbitrate and decision not to arbitrate claims against Plaintiffs/Counter-Defendants." R000260 (emphasis omitted). The district court granted counter-claimants motion to stay arbitration and allowed Boling to pursue his counter-claims. R.000278-279. Because Boling expressly waived his right to seek to compel arbitration if he was allowed to proceed with his counterclaims in the district court, and because Boling gained the advantage of substantial discovery which, by Boling's own admissions, would not have been available to him in arbitration, Boling should be judicially estopped from taking a different, inconsistent position. Accordingly, counter-defendants respectfully request that this Court find that Boling is judicially estopped from seeking to compel arbitration against them.

C. Counter-defendants are entitled to attorney's fees on this appeal.

The counter-defendants respectfully request attorney's fees under Idaho Code section 12-121 and Idaho Appellate Rule 41, for their defense of Boling's frivolous appeal. Idaho Code section 12-121 "permits an award of attorney fees in a civil action to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation." *Gerdon v. Rydalch*, 153 Idaho 237, 245, 280 P.3d 740, 748 (2012) (citing *Newberry v. Martens*, 142 Idaho 284, 292-93, 127 P.3d 187, 195-96 (2005)). An appeal is deemed to be frivolous when arguments are "unsupported by any authority" or "contrary to prior decisions rendered by this Court." *Grazer v. Jones*, 294 P.3d 184, 197 (Idaho 2013). Attorney's fees on appeal are proper when "the law is well settled and the appellant fails to make a showing that the trial court misapplied the law." *Navarrete v. City of Caldwell*, 130 Idaho 849, 852, 949 P.2d 597, 600 (Ct. App. 1997) (citing *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991). "Pro se litigants are held to the same standards and rules as litigants represented by an attorney and this Court has previously awarded attorney fees against a pro se litigant that pursued an appeal frivolously." *Rizzo v. State Farm Ins. Co.*, 2013 Ida. LEXIS 159, *27 (Idaho May 22, 2013) (citing *Twin Falls Cnty, v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003).

Boling's motion to compel arbitration and continued pursuit of that motion on appeal are frivolous because Boling expressly represented to the district court he preferred to resolve this dispute in the judicial forum and, further, that if he was allowed to pursue his substantive counterclaims in the district court, he would consent to counter-defendant's objection to arbitration. He was granted the requested relief, substantially invoked the litigation machinery, and then took a fundamentally inconsistent position. The district court then denied his motion to

compel on the merits and in light of well settled authority out of the Supreme Court of the United States.

Rather than arguing a basis for distinguishing the authority of the Supreme Court of the United States, Boling argued that such authority did not apply and supported his argument with authority out of the Federal District Court, in and for the District of Idaho, which relied on precedent from the Fifth Circuit that had been overruled by the Supreme Court's decision in *Carlisle*. Instead of fairly facing this adverse authority, Boling failed to even apprise this Court of the source of the authority upon which he was relying by omitting the relevant citations.

Boling's appeal has been brought frivolously and the counter-defendants are entitled to an award of attorney's fees for having to defend against the frivolous and unsupported appeal.

V. CONCLUSION

For the forgoing reasons, counter-defendants respectfully request that this Court affirm the decision of the district court granting their motion to stay arbitration and denying Boling's motion to compel arbitration, and award counter-defendants their reasonable attorney's fees incurred in defending against this appeal.

DATED this 6th day of August, 2013.

RAINEY LAW OFFICE

Rebecca A. Rainey – Of the Firm
Attorneys Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2013, I caused to be served a copy of the foregoing **RESPONDENT'S BRIEF** on the following, in the manner indicated below:

Mark Boling
21986 Cayuga Lane
Lake Forest, CA 92630

(X) Via U.S. Mail
( ) Via Facsimile – 949-588-7078
( ) Via Overnight Mail
( ) Via Hand Delivery
(X) Via e-mail

Rebecca A. Rainey