99715-2

NO. 81539-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HTP, Inc., a Washington corporation,

Appellant,

v.

JC AVIATION INVESTMENTS, LLC, a Washington limited liability company; and HyTech Power, LLC, a Washington limited liability company ,

Respondents.

APPELLANT HTP, INC'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES **Page(s)**

OUT OF STATE CASES

FEDERAL CASES

STATE STATUTES

I. INTRODUCTION

There is a conflict between Division One and Division Three regarding the disputes that should be arbitrated pursuant to a valid arbitration provision. In 1995 Division One construed an arbitration provision narrowly because it required arbitration of disputes " arising hereunder." Over the ensuing 25 years both federal and Washington state law have steadily evolved to recognize arbitration's importance to society and to the contracting parties and relaxed the interpretation of the technical words used in an arbitration provision to favor the strong public policy favoring arbitration.

In 2020, Division Three recognized this evolution and disagreed with Division One's 1995 technical language analysis and broadened the arbitrability of civil disputes. Division Three's case, thus, presented Division One the perfect opportunity to harmonize its 1995 technical analysis to be consonant with the modern trend increasing arbitrations to resolve civil disputes. Unfortunately, Division One, in an unpublished opinion continues to cling to its outdated 1hypertechnical 1995 analysis

This Court now has the perfect opportunity to resolve this conflict between these two divisions of the Court of Appeals and harmonize it with the now clear and strong public policy favoring arbitration to resolve disputes. Division One's opinion in this case should be reversed.

II. PETITIONER'S IDENTITY

Petitioner is the Appellant HTP, Inc., a Washington se corporation ("HTP") who was the Respondent in the trial court.

III. CITATION TO THE APPELATE DECISION TO BE REVIEWED

HTP requests the Washington Supreme Court permit and accept review of *JC Aviation Investments, LLC v. Hytech Power, LLC*, 81539-3-I, 2021 WL 778043, at *3 (Wash. Ct. App. Mar. 1, 2021) and the Order Denying Reconsideration and Motion to Publish dated March 30, 2021. Attached as Appendices A and B.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should resolve the conflict between Division One's 1995 published opinion in *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995) and Division Three's 2020 published opinion in *David Terry Investments, LLC-PRC v. Headwaters Development Group Limited Liability Company,* , 13 Wn. App. 2d 159, 167-69, 463 P.3d 117 (2020) and required courts to focus on a dispute's factual allegations rather than the technical distinction between the phrases "arising hereunder" and "arising out of."

2. Whether the scope of a valid arbitration provision in a valid contract that is subject to the Federal Arbitration Act ("FAA") should be construed using the substantive body of federal law that all reasonable doubts regarding arbitrability be construed in favor of arbitration.

3. Whether this Court should require the party opposing arbitration in cases involving a valid arbitration provision in a valid larger agreement that is subject to the FAA to prove that a dispute is not arbitrable using the body of federal law construing a valid arbitration provision's scope.

4. Whether courts confronted with a good faith motion to compel arbitration of multiple disputes in a single action must determine each claim's arbitrability rather than denying arbitration of all disputes because one dispute may not be arbitrable.

5. Whether the FAA, whether judicial dissolution actions are subject to arbitration or can they only be entertained in a judicial forum.

6. Under the FAA, whether receiver appointments can be subject to arbitration or do they have to be decided in a judicial forum.

7. Whether courts considering a request for provisional remedies in a dispute against the non-moving party who in good faith requests the dispute be compelled to arbitration due to a valid arbitration provision in a larger agreement that is subject to the FAA that provides an avenue for provisional remedies in arbitration be deferred to the maximum extent possible to the arbitrator who may determine the dispute's merits.

8. Whether courts are required to stay proceedings when a party in good faith requests the dispute be compelled to arbitration.

9. Whether a court's order determining a motion brought by a party is void when the non-moving party has in good faith requested the dispute be compelled to arbitration because *the court* is required to stay proceedings until it issues a final order determining arbitrability.

10. Whether courts should first determine good faith motions to compel arbitration prior to considering motions regarding a dispute's merits.

11. Whether courts have subject matter jurisdiction to determine a non-adverse co-defendant's motion for a temporary restraining order against another co-defendants prior to the moving co-defendant filing a cross claim against the non-moving co-defendant.

12. Whether this Court should accept review because the Opinion substantially affects the public interest because it does not promote the strong federal and state public policies favoring arbitration and does not provide uniformity in construing arbitration provisions.

V. STATEMENT OF THE CASE

On July 28, 2018 HTP and Respondent JC Aviation Investments, LLC, a Washington limited liability company ("JCAI") formed HyTech Power, LLC, a Washington limited liability company ("HyTech") and JCAI, HyTech, and HTP signed the HyTech Power, LLC Agreement ("Agreement") that contains in Paragraph 12.13 the arbitration provision involved in this dispute ("Arbitration Provision"). CP 114-117 and continuing on CP 30-47. The Arbitration Provision provision requires, among other things that all disputes "arising hereunder" that the parties cannot in good faith settle after giving the other party 30 days' notice "will be resolved through final and binding arbitration in Seattle, Washington through the arbitration services of Judicial Dispute Resolution ("JDR")."

On May 12, 2020 JCAI, without giving notice or engaging in any effort to settle a dispute, filed a Petition for Judicial Dissolution and to Appoint a General Receiver in King County Superior Court against HTP and HyTech and alleged, it was not reasonably practicable to carry on HyTech's business activities "*in conformance with the Agreement*." CP 1-

9. JCAI also requested a general receiver be appointed to take control of and sell HyTech's assets. CP 1-9. In its Petition, JCAI made numerous references to the Agreement attempting to justify the judicial dissolution action and receiver appointment. CP 1-9, ¶¶11, 12, 14, 17, 20, 25, 29, 31, 34, 35, and 36. On the same day and without notice to HTP JCAI obtained a show cause order for the general receiver appointment that was to be heard on May 29, 2020. CP 11-21 and 101-114.

On May 18, 2020, HTP served JCAI and HyTech with a 30-day notice as required by the Agreement, which they ignored. CP 442-445.

Before the hearing on the show cause hearing, HTP filed a response and two declarations pointing out the Arbitration Provision in the Agreement and requested JCAI's dispute be compelled to arbitration. CP 420-463. The Ex-Parte Commissioner did not grant JCAI's Order to Show Cause to Appoint a General Receiver; rather, he assigned the matter to a judge and instructed HTP to file its motion to compel arbitration with the assigned judge. CP 793-797.

HTP then filed its Motion to Compel Arbitration on May 29, 2020 with the trial judge and noted it for hearing on June 11, 2020. CP 809-936.

On May 27, 2020 HyTech filed a motion for a temporary restraining order against non-adverse co-defendant HTP without filing any

cross-claim against HTP. CP 672 – 780. HyTech requested relief against HTP alleging HTP was not abiding by the terms of the Agreement. *Id*. HTP resisted HyTech's Temprorary Restraining Order by asserting the HyTech dispute was not ripe and the trial court had no subject matter jurisdiction to consider a non-adverse do-defendant's motion until it filed a cross-claim asserting a basis for relief and also because the alleged dispute was subject should be compelled to arbitration and that there was a motion to compel arbitration pending. CP 1131-115VRP 51, ln 1-3. The Commissioner granted HyTech's Motion and issued a Temporary Restraining Order. CP 1312-1314.

The trial judge did not decide HTP's Motion to Compel Arbitration first even though it was noted for hearing first. Instead, he combined HTP's arbitration motion with HyTech's Preliminary Motion Judgment and heard them together and at the same time. He deemed HyTech's preliminary injunction motion the "lead motion" and let it (and JCAI) argue the injunction motion and the merits underlying the dispute first before determining HTP's arbitration motion. VRP 66, ln 13- 67, ln 7. The trial judge granted HyTech's preliminary injunction motion and denied HTP's arbitration motion. HTP filed an appeal the following day. CP 1646-1656. This appeal resulted in the Opinion. App. A. This matter has been stayed.

VI. ARGUMENT

There is a conflict between Division One's 1995 opinion in*McClure* that holds an arbitration provision requiring all disputes arising under a larger agreement be arbitrated is narrow while an arbitration provision stating all disputes arising out of a larger agreement is broad and Division Three's Opinion in *Terry* that holds they should be construed as being equally broad. *See* *McClure* 77 Wn. App. at 314-315; *Terry*, 440 P.3d at 1203; and the Opinion, f.n. 11. This conflict and the confusion it created should be decided by this Court. The public's interest in uniformity and predictability is at stake.[1]

When resolving this conflict, this Court should consider the strong public policy favoring arbitration of disputes. When the FAA was enacted in 1923, it was enacted to "enable businessmen to settle their disputes expeditiously and economically" and to "reduce congestion in the Federal and State courts." . , 532 U.S. 105, 126, 121 S. Ct. 1302, 1315, 149 L. Ed. 2d 234 (2001). Its purpose was to ameliorate "the"delay and expense of litigation." *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 280–81, 115 S. Ct. 834, 842–43, 130 L. Ed. 2d 753 (1995). It was designed to make arbitration agreements "universally enforceable."

[1] HTP requested the Opinion be published because it continued the conflict between the Court of Appeals' Divisions (in a footnote), but the Court of Appeals denied HTP's request that the Opinion be published.

Allied, 513 U.S. at 280. The Opinion does nothing to further these purposes.

As such, a body of federal law developed that all state and federal courts must follow when construing an arbitration provision in a larger agreement that is subject to the FAA. Applying this FAA standard, in cases like this when the only issue is whether a dispute is arbitrable (as opposed to revoking, modifying, or refusing to enforce an agreement based on a state law defense that applies to contracts generally)[2] the FAA requires the court construing an arbitration provision's breadth to "indulge every presumption 'in favor of arbitration." Zuver, 153 Wn.2d 293, 301, 103 P.3d 753 (2004). (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). In these cases, the FAA requires state courts to give "due regard" "to the federal policy favoring arbitration" and if there are any doubts as to whether a dispute is within the scope of an arbitration provision, then those doubts must be "resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76, 109 S. Ct. 1248, 1253–54, 103 L. Ed. 2d 488 (1989). In other words, a motion to compel arbitration should not be denied unless it may

[2] *See* Opinion, Pg. 2.

be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *AT & T Techs., Inc. v. Commc'ns Workers of A*m., 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648 (1986).

Moreover, the party resisting arbitration pursuant to a valid arbitration provision that is part of a larger agreement "bears the burden of showing the arbitration agreement is invalid or does not encompass the claims at issue." *Mediterranean Enterprises, Inc. v. Ssangyong Corp.,* 708 F.2d 1458, 1463 (9th Cir. 1983); and *Quiroz v. Cavalry SPV I, LLC*, 217 F. Supp. 3d 1130, 1135 (C.D. Cal. 2016). If the party resisting arbitration cannot meet its burden, then the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (emphasis in original). This is true even if it results in piecemeal litigation. *Moses Cone Mem'l Hosp.* at 20.

In addition. when a court is required to determine whether multiple claims are arbitrable, the court must determine each dispute's arbitrability. *KPMG LLP v. Cocchi*, 565 U.S. 18, 22, 132 S. Ct. 23, 26, 181 L. Ed. 2d 323 (2011) (internal citations omitted). <u>See</u>, <u>also</u>, *Wiese v. Cach, LLC*, 189

Wash. App. 466, 479, 358 P.3d 1213, 1220 (2015). Here, there were three claims that HTP wanted to be compelled to arbitration: JCAI's action to judicially dissolve HyTech; JCAI's petition to appoint a general receiver; and HyTech's request for injunctive relief. VRP 93, ln 18-24. The trial judge, however, only decided whether JCAI' petition to dissolve HyTech was arbitrable, decided it was not, and then denied HTP's arbitration motion as to all three claims that were asserted against it without findings or legal analysis. VRP 108 ln 19 – 109, ln. 1; and CP 1646-1656. The Opinion never addressed this argument that HTP raised in its Opening Brief and then again in its Motion for Reconsideration.

Moreover, HyTech both at the trial court and at the Court of Appeals never asserted its claim was not subject to mandatory arbitration. It never addressed HTP's argument. HTP raised it with the trial court commissioner and the trial judge. They never addressed the issue. HTP then raised the issue with the Court of Appeals in its Opening Brief, in its Reply Brief, and in its Motion for Reconsideration. The Court of Appeals never addressed the issue. By affirming the trial court's order does that mean HTP must litigate an issue that HyTech does not even contest is subject to mandatory arbitration? If that is the result, then that result surely turns the strong policy favoring arbitration on its head.

The Court of Appeals also improperly addressed HTP's argument that the trial judge never determined whether JCAI's receivership petition was arbitrable. As shown in the verbatim report of proceedings, the trial judge stopped determining arbitrability as soon as he decided JCAI's judicial dissolution claim was not arbitrable and denied HTP's arbitration motion in its entirety. VRP 108 ln 19 – 109, ln. 1. Despite the trial court never analyzing whether JCAI's receivership claim was arbitrable, the Court of Appeals decided the issue and held the "trial court did not err by concluding arbitration of the request for a receiver was not compelled." Opinion, Pg. 6.

Not only is this portion of the Opinion inconsistent with the record, it also avoided HTP's argument that each claim must be separately analyzed when there are multiple claims. Here, JCAI sought receivership under multiple theories. It sought a receiver pursuant to the judicial dissolution statute and RCW 7.60.025(1)(t). It sought a receiver under other provisions as well. Each of these claims needed to be analyzed.

The one thing JCAI did not assert in its Petition was the right to have a receiver provisionally appointed pursuant to RCW 7.60.025(1)(b) in connection with an action to enforce its Senior Security Agreement its rights as a secured creditor. Yet this was the ground upon which the Court of Appeals determined JCAI had a right to a receiver. Opinion, Pg. 6.

Neither the trial court nor the appellate court addressed any of the other claims upon which JCAI sought a receiver (e.g. RCW 7.60.025(1)(a), (i), (t), (u), and (nn)). *See* Petition, CP 1-9.

Ironically, the receivership provisions that were not addressed were the only issues that HTP requested by compelled to arbitration because those were the only claims that JCAI asserted against it. HTP only requested the claims against it by JCAI and HyTech be compelled to arbitration. HTP was not a party to the Senior Security Agreement. Had JCAI commenced an action to enforce the Senior Security Agreement, then it would not have named HTP; rather, it would have named HyTech and the junior Class C secured creditor Acamar because Acamar was a junior secured creditor that would necessarily be affected by any senior security agreement enforcement action. Not only did JCAI not name Acamar as a defendant in the Petition, but it also successfully resisted Acamar's intervention. VRP pps. 1-16.

The Court of Appeals also determined JCAI's right to have a receiver appointed based on an incorrect reading of the record. In avoiding the real issue, which was whether people can contract to require receivers be appointed through arbitration, the Opinion relied upon a senior security agreement that HyTech granted to JCAI for additional loans that were not contemplated by the Agreement ("Senior Security

Agreement"). The Agreement only contemplated two security agreements when it was signed - a legacy security interest HTP granted Acamar in HTP's intellectual property that it was contributing to HyTech ("IP") that Acamar subordinated to JCAI when JCAI signed the Agreement and agreed to fund HyTech and HyTech's granting of a "Class B" secuithy interest to JCAI to secure its funding of up to $5.7 Million for HyTech's operations. Because Acamar subordinated its legacy security interest in the IP to JCAI's Class B Security Interest, Acamar became a junior Class C Security Interest.

After the Agreement was signed, and in January 2019 (as amended in August 2019) JCAI (and Acamar) loaned additional sums to HyTech and received a new Senior Security Interest that was higher in priority than both JCAI's Class B Security Interest and Acamar's Class C Security Interest. These additional uncontemplated additional 2019 loans are what is secured by the Senior Security Agreement. The security agreement language in the Agreement, §4.05(e) that the Court of Appeals relied upon in the Opinion, Pg. 6, was to secure JCAI's funding the initial $5,7 Million. It had nothing to do with the subsequent Senior Security Agreement.

This case also presented an opportunity to decide whether judicial dissolutions and receiver appointments are arbitrable. This debate is not

settled amongst state and federal jurisdictions across this country and defies the uniformity the FAA has sought for almost 100 years. JCAI cited two cases – one from Montana and one from Georgia – that state judicial dissolution actions are not arbitrable. See *Georgia Rehab. Ctr., Inc. v Newnan Hosp.*, 283 Ga. 335, 658 S.E.2d 737 (2008); and *Gordon v. Kuzara*, 358 Mont. 432, 245 P.3d 37, (2010). For each of those two caes there are, however, dozens that hold the exact opposite. *B&S MS Holdings, LLC v. Landrum*, 302 So. 3d 605, 607 (Miss. 2020), reh'g denied (Oct. 1, 2020); *Bosworth v. Ehrenreich*, 823 F. Supp. 1175 (D.N.J. 1993); *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Properties, Inc. v. Robson*, 231 Ariz. 287, 294 P.3d 125 (2012); *Ray v. Chafetz*, 236 F. Supp. 3d 66 (D.D.C. 2017); *Stone v. Theatrical Inv. Corp.,* 64 F. Supp. 3d 527, 541 (S.D.N.Y. 2014); *Green v. Short*, No. 06 CVS 22085, 2007 WL 2570821, (N.C. Super. Mar. 9, 2007); *Johnson v. Foulk Rd. Med. Ctr. P'ship*, No. CIV.A. 18984, 2001 WL 1563693, at *1 (Del. Ch. Nov. 21, 2001); *Jackman v. Jackman*, No. 06-1329-MLBDWB, 2006 WL 3792109 (D. Kan. Dec. 21, 2006); *Travel Express Investments, Inc. v. Hemani*, No. 608CV01699ORL35DAB, 2009 WL 10670424, at *3 (M.D. Fla. May 12, 2009); and *Sharpe v. Lytal & Reiter, Clark, Sharpe, Roca, Fountain, Williams*, 702 So. 2d 622 (Fla. Dist. Ct. App. 1997). Here, the Court of Appeals declined to consider this important issue that could lend

predictability and certainty to businesspeople, large and small, as well as consumers on whether they may contract to have these claims decided through arbitration and, thereby, decrease court congestion and receive speedy and effective relief.

The Court of Appeals also failed to address three important issues regarding the Preliminary Injunction. First, it never addressed whether the trial court was required to stay the proceedings once HTP requested the dispute by compelled to arbitration. RCW 7.04A.070(5) states

> If a party files a motion with the court to order arbitration under this section, *the court* *shall* on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

Seemingly this requires *courts* to stay all proceedings regarding a claim without a request from a party as to all claims a party seeks to compel to arbitration until there is a final order entered determining arbitrability.

Here, both the commissioner and the trial judge did just the opposite. The commissioner granted a temporary restraining order when he knew HTP had already filed a motion to compel arbitration and re-asserted arbitration at the temporary restraining order hearing. The trial judge then did not decide HTP's arbitration motion on the day it was properly noted and deferred it to be heard

at the same time as HyTech's preliminary injunction motion and made HyTech's preliminary injunction motion the lead motion allowing HyTech (and JCAI) to argue the merits of the disputes prior to hearing argument or determining HTP's arbitration motion.

These actions by the commissioner and the trial judge not only violated the automatic stay the court was to automatically impose, but it also resulted in the commissioner and the trial judge to hear the merits of the case prior to deciding the arbitration motion. The Opinion recognized this would be improper, Opinion, Pg. 4, f.n. 20, but never addressed the automatic stay issue in the Opinion.

Second, the Court of Appeals never addressed whether a state trial court should defer to an arbitrator any decisions regarding provisional remedies when a claim is arbitrable. The federal law in the Ninth Circuit is clear that federal district courts should not grant provisional remedies on claims subject to mandatory arbitration, but should leave that up to the arbitrators that are to decide the disputed issue.

> Furthermore, once a court determines that all disputes are subject to arbitration pursuant to a binding arbitration clause, it is improper for a district court to grant preliminary relief where *provisional relief is available from an arbitral tribunal. See Simula, Inc. v. Autolive, Inc.,* 175 F.3d 716, 726 (9th Cir.1999) (emphasis added). District courts within the Ninth Circuit have consistently followed

> this holding. *See, e.g., DHL Info. Servs., Inc. v. Infinite Software Corp.,* 502 F.Supp.2d 1082, 1083 (C.D.Cal.2007) (applying *Simula* to refrain from carving out interim relief issues from the arbitrator); *Ever-Gotesco Res. and Holding, Inc. v. PriceSmart, Inc.,* 192 F.Supp.2d 1040, 1044 (S.D.Cal.2002) (holding that Simula requires an arbitral tribunal to grant provisional relief where the parties submit to arbitration); *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.,* 155 F.Supp.2d 1174, 1182 (C.D.Cal.2001) (reversing magistrate judge's issuance of a writ and finding that *"Simula* dictates that the court must respect [an arbitration] agreement and refrain from awarding provisional relief when the parties have provided for another means to obtain such relief").

Greenpoint Technoligies, Inc. v. Peridot Associated S.A., C08-1828 RSM, 2009 WL 674630, at *3 (W.D. Wash. Mar. 11, 2009).

Here, the only party that sought provisional relief was HyTech on its injunctive relief claim that it does not contest is subject to mandatory arbitration. Despite HTP having made this argument with both the trial court and the Court of Appeals, HyTech never responded to it, and the Court of Appeals never addressed it. This, too, is an important issue that needs to be decided and affects the public interest – when an agreement contains an arbitration provision that is subject to the FAA must the state follow the federal law or can follow its own state law.

If either of these arguments are successful – either the automatic stay or the deference to the arbitrator – then the

Preliminary Injunction should be deemed void and vacated and the issue of injunctive relief, either preliminary or permanent, should be deferred to the arbitrator for determination.

Finally, the Court of Appeals never addressed whether the trial court had subject matter jurisdiction to consider a temporary restraining order or a preliminary injunction motion brought by a non-adverse codefendant against another non-adverse co-defendant without first asserting a cross claim against the non-moving co-defendant. Other jurisdictions have held that courts do not have subject matter jurisdiction. See *Koplow v. City of Biddeford*, 494 A.2d 175, 176 (Me. 1985); *Hutchins v. Stanton*, 23 N.C. App. 467, 469–70, 209 S.E.2d 348, 349–50 (1974); *Long Prairie Packing Co. v. United Nat. Bank, Sioux Falls*, 338 N.W.2d 838, 840–41 (S.D. 1983); and *Smith v. Spitzenberger,* 363 N.W.2d 470, 472 (Minn. Ct. App. 1985). Once again, HTP raised this jurisdictional argument with the commissioner who never addressed his subject matter jurisdiction and issued a temporary restraining order and set a hearing date for a preliminary injunction motion that HyTech filed without still having asserted a counterclaim against HTP. HTP raised the issue again on appeal, but HyTech did not address it and neither did the Court of Appeals. Subject matter jurisdiction is constitutional and a matter that is

of great public importance that this Court should accept review and decide.

DATED this 29th day of April 2021

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on May 7, 2021, I caused a true and correct copy of the foregoing document, ***Appellant's Petition for Review*** to be served via the Appellate Court Web Portal to:

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DATED this 7th day of May 2021, at Sumner, Washington.

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Appendix 1

FILED
3/1/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JC AVIATION INVESTMENTS, LLC, a Washington limited liability company, Respondent, v. HYTECH POWER, LLC, a Washington limited liability company, and HTP, INC., a Washington corporation, Appellant.	)	No. 81539-3-I UNPUBLISHED OPINION

VERELLEN, J. — Parties can be compelled to arbitrate only the matters they agreed to arbitrate. Because the unambiguous language of the arbitration clause in the limited liability corporation (LLC) agreement between members HTP, Inc., and JC Aviation Investments, LLC (JCAI) is narrowly drafted and does not encompass the parties' disputes, we affirm the trial court order denying HTP's motion to compel arbitration.

Because HTP fails to satisfy the standards for discretionary review, we deny review of other issues.

FACTS

HyTech Power, LLC researches and builds tools to make internal combustion engines more efficient. It was formed on June 14, 2018 with an LLC

agreement signed by its two members, JCAI and HTP. JCAI holds 52 percent of HyTech and is one of its secured creditors. HTP holds 48 percent of HyTech. HyTech has a five-member board of directors, with JCAI controlling three seats and HTP the other two.

Over the spring of 2020, relations between JCAI and HTP frayed as HyTech's financial position became more perilous. On March 2, 2020, the board met to discuss HyTech's "paths forward" when it had "no cash resources" and was "insolvent."[1] It also noted secured creditor Acamar Investments, Inc. had, without board approval, been paying for HyTech employees to take international business trips to sell HyTech's product. On March 6, the board unanimously passed a resolution deciding it was "in the best interests of the Company to immediately discontinue employment of all employees" because HyTech was insolvent, was unable to meet payroll, had defaulted on $2.3 million in debt to its creditors, and was unable to agree on new financing offers.[2] Shortly thereafter, HTP executive chairman and HyTech board representative Henry Dean asked the board to rescind that decision. The board declined, but HTP obtained more outside funding from Acamar to rehire HyTech's employees.

On April 9, the board met, discussed outside funding from Acamar, and unanimously agreed to retroactively reinstate its employees until April 17 when "[a]ll company employees will be terminated" unless the board agreed to additional

[1] Clerk's Papers (CP) at 1540.

[2] CP at 1293.

funding.[3] The board also retroactively authorized new funding provided from January through April 15 and agreed to refuse any additional new funding.

On May 12, the board had a contentious meeting where HTP surprised the JCAI board members by announcing it was independently funding beta tests of HyTech's product and would continue to do so "even if a lawsuit was filed."[4] The same day, JCAI filed a petition seeking judicial dissolution of HyTech and appointment of a general receiver to liquidate the company's assets. On May 20, HTP told the board beta testing was ongoing, and Acamar filed a CR 24 motion to intervene in the action for dissolution and appointment of a receiver. On May 27, HyTech filed a motion for a temporary restraining order (TRO) enjoining HTP from using HyTech's assets or conducting business in its name. On May 28, superior court Commissioner Judson denied Acamar's motion to intervene, declined to consider the motion to dissolve HyTech, and referred the case to Judge McDonald for trial on dissolution and appointment of a receiver. On May 29, HTP filed a motion to compel arbitration of JCAI's motion for dissolution and appointment of a receiver.

On June 3, HyTech filed for a preliminary injunction to enjoin HTP from using HyTech's assets or conducting business in its name. On June 4, Commissioner Judson granted HyTech's request for a TRO to expire on June 16 when Judge McDonald would consider the motion for a preliminary injunction. On

[3] CP at 1179.

[4] CP at 1547.

June 16, Judge McDonald heard argument on HTP's motion to compel arbitration and HyTech's motion for a preliminary injunction. Judge McDonald first denied the motion to compel arbitration, explaining the LLC agreement did not encompass the issues of dissolution, appointment of a receiver, or injunctive relief. He then granted the preliminary injunction, finding "[n]one of HTP's operations of HyTech's business or use of its assets were authorized by the Board."[5]

On June 17, HTP appealed, as a matter of right, denial of its motion to compel arbitration and sought discretionary review of the preliminary injunction. Judge McDonald concluded RAP 7.2(a) precluded further proceedings as of June 17 when this court accepted review of the motion to compel, and he struck the pending trial on the motions for dissolution and appointment of a receiver until this appeal is resolved. A commissioner of this court referred HTP's motion for discretionary review to us because its issues were closely related to the merits of HTP's direct appeal.

ANALYSIS

I. Arbitration

We review denial of a motion to compel arbitration de novo.[6] The parties agree the LLC agreement is valid and the court, rather than an arbitrator, decides threshold questions of arbitrability. But they dispute whether the LLC agreement

[5] CP at 1632.

[6] Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009) (citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773 (2004)).

compels arbitration of dissolution, appointment of a receiver, and injunctive relief. Thus, the key question is whether those issues are within the scope of the arbitration clause in the parties' LLC agreement.[7]

HTP argues the Federal Arbitration Act (FAA), 9 U.S.C. § 2, applies here and compels arbitration. The threshold issue of arbitrability is the same under the FAA and Washington's Uniform Arbitration Act, chapter 7.04A RCW: whether the parties agreed to arbitrate a particular dispute.[8] Both federal and Washington law presume a dispute is arbitrable, so any doubt must be resolved in favor of arbitration.[9]

Section 12.13 of the LLC agreement contains the arbitration clause here:

> The parties hereto will use their reasonable best efforts to resolve any dispute hereunder through good faith negotiations. In the event a dispute cannot be resolved informally within thirty (30) days of notice by one party to the other of such dispute, the parties agree

[7] See Jeoung Lee v. Evergreen Hosp. Med. Ctr., 7 Wn. App. 2d 566, 572, 434 P.3d 1071 (2019) (for a motion to compel arbitration, a court considers both validity and scope of an arbitration clause) (quoting Cox v. Kroger, 2 Wn. App. 2d 395, 404, 409 P.3d 1191 (2018)), aff'd, 195 Wn.2d 699, 464 P.3d 209 (2020).

[8] See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) ("This Court has determined that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting Steelworkers v. Warrior & Gulf. Nav. Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)); Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38, 48, 470 P.3d 486 (2020) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting Satomi, 167 Wn.2d at 810).

[9] Gandee v. LDL Freedom Enters., Inc., 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) (citing Zuver v. Airtouch Comms., Inc., 153 Wn.2d 293, 301, 103 P.3d 753 (2004)).

> that such dispute will be resolved exclusively through final and binding arbitration.[10]

The LLC agreement provides for arbitration of "any dispute hereunder." HTP argues the arbitration clause should be read broadly, asserting it is the equivalent of clauses compelling arbitration for disputes "arising out of" and "relating to" an underlying agreement. But we reject the premise that a dispute "under" an agreement is just as broad as a claim "arising out of" or "relating to" the agreement.[11] Neither "arising out of," "relating to," nor any similar terms appear in

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[10] CP at 163 (emphasis added).

[11] HTP relies on David Terry Investments, LLC-PRC v. Headwaters Development Group Limited Liability Company, 13 Wn. App. 2d 159, 167-69, 463 P.3d 117 (2020), where Division Three of this court concluded the phrases "arising out of," "relating to," and "over this" had the same broad meaning when used in arbitration clauses. Because the operative word here, "hereunder," is not considered in David Terry, it is not apt. We also note that David Terry relies on a Colorado Court of Appeals case, Digital Landscape Inc. v. Media Kings LLC, 2018 COA 142, 440 P.3d 1200 (2018), to identify a majority federal rule and conclude "arising out of," "relating to," "over this," "and similar phrases" are indistinguishable and should all be construed broadly. 13 Wn. App. 2d at 167-68. But Digital Landscape reviewed how federal courts construed the phrase "arising under" because that was the language of the arbitration clause at issue, not "arising out of," "relating to," or "over this." 440 P.3d at 1203. Digital Landscape does not support David Terry's conclusions.

To the extent David Terry holds all phrases similar to "arising out of," "relating to," and "over this" must be construed identically, we disagree. Individual words and phrases matter and must be interpreted in each contract to determine whether the parties intended to arbitrate a dispute. Satomi, 167 Wn.2d at 810; see Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (applying the objective manifestation theory of contract). Clauses requiring arbitration of disputes "arising out of" are interpreted broadly. See McClure v. Davis Wright Tremaine, 77 Wn. App. 312, 314-15, 890 P.2d 466 (1995) (explaining the phrase has a broad scope). Clauses requiring arbitration of disputes "arising under" or "hereunder" are interpreted narrowly. Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 924 (9th Cir. 2011) (citing Mediterranean Enter. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983)); see Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 307-08, 130 S. Ct. 2847, 177 L.

the arbitration clause here. Because the arbitration clause is narrowly limited to "any dispute hereunder," we decline to speculate on the impact a broader arbitration clause would have.[12]

Most importantly, the key provisions in the arbitration clause at issue here include terms specifically defined in the agreement. Section 12.13 mandates arbitration of "any dispute hereunder."[13] In turn, section 1.02 specifies that "'hereunder' refer[s] to this Agreement as a whole."[14] Section 1.01 defines "Agreement" as "this Limited Liability Company Agreement, as executed and as it may be amended."[15] And section 12.07 distinguishes the LLC agreement from other documents associated with HyTech: "This Agreement, together with the Certificate of Formation and all related Exhibits and Schedules, constitutes the sole and entire agreement of the parties to this Agreement with respect to the

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Ed. 2d 567 (2010) (describing the phrase "arising under this agreement" as "relatively narrow") (citing Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, 370 U.S. 254, 256-57, 82 S. Ct. 1346, 8 L. Ed. 2d 474 (1962)); but see Yei A. Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1086 (9th Cir. 2018) (construing the phrase "any disputes arising out of or related to" broadly). When, as here, the parties specifically define "hereunder," we interpret the contract to effectuate the defined scope of their agreement to arbitrate. See Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 117, 163 P.3d 807 (2007) ("[W]e look to the language of the agreement to determine the scope of the arbitration clause.") (citing Drake Bakeries, 370 U.S. at 256; Mediterranean Enter., 708 F.2d at 1464).

[12] See Walker v. Munro, 124 Wn.2d 402, 418, 879 P.2d 920 (1994) (courts may not "render advisory opinions or pronouncements upon abstract or speculative questions").

[13] CP at 163.

[14] CP at 128.

[15] CP at 120.

subject matter contained herein and therein."[16] Thus, arbitration is required for a dispute about the LLC agreement itself, exclusive of documents not part of the "Agreement" defined in section 1.01. The agreement's narrow, unambiguous language is sufficient to show the parties' objective intent to limit the scope of arbitration.[17]

A. Dissolution

HTP contends arbitration is required for the issue of dissolution because only an arbitrator can decide whether JCAI or HTP breached the operating agreement and whether either breach impacts who will serve as HyTech's liquidator. HTP mischaracterizes its motion to compel arbitration.

On May 12, JCAI filed its petition to dissolve HyTech and appoint a receiver. Specifically, JCAI requested a decree of judicial dissolution pursuant to RCW 25.15.274 and appointment of a general receiver. On May 29, HTP filed its motion to compel arbitration, asking the court to decide "[w]hether this action for judicial dissolution of HyTech and for appointment of a general receiver is a[n arbitrable] dispute between JCAI, HTP and HyTech under the LLC Agreement."[18]

[16] CP at 162.

[17] See Healy v. Seattle Rugby, LLC, ___ Wn. App. 2d ___, 476 P.3d 583, 587 (2020) (under objective manifestation theory of contracts, parties' intentions are based upon the reasonable meaning of their words) (citing Hearst, 154 Wn.2d at 503.

[18] CP at 947 (emphasis added). HTP filed an amended motion to compel arbitration on June 1.

HTP argued whether JCAI breached the LLC agreement "bears directly on the expressed terms in the LLC Agreement and is, thus, subject to arbitration."[19]

Whether a dispute is arbitrable is decided by the terms of the parties' agreement without considering the merits of the dispute.[20] We read agreements to uphold the parties' objective intent as shown by the terms used.[21] Agreements should be read to give meaning to the parties' chosen terms and to avoid "'render[ing] some of the language meaningless or ineffective.'"[22]

Section 11.01 of the operating agreement identifies four "dissolution events":

> (a) The determination of the Members to dissolve the Company;
>
> (b) At the election of a non-defaulting Member, in its sole discretion, if the other Member breaches any material covenant, duty or obligation under this Agreement . . ., which breach remains uncured for thirty (30) days after written notice of such breach was received by the defaulting member;
>
> (c) The sale, exchange, involuntary conversion, or other disposition or Transfer of all or substantially all the assets of the company; or

[19] CP at 949.

[20] Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn. App. 400, 403, 200 P.3d 254 (2009); see Nelson, 140 Wn. App. at 117 ("[W]e look to the language of the agreement to determine the scope of the arbitration clause.") (citing Drake Bakeries, 370 U.S. at 256; Mediterranean Enter., 708 F.2d at 1464).

[21] Hearst, 154 Wn.2d at 503-04.

[22] GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 140, 317 P.3d 1074 (2014) (quoting Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)).

> (d) The entry of a decree of judicial dissolution under RCW 25.15.274 of the Washington [Limited Liability Company] Act.[23]

Because JCAI invoked only section 11.01(d) as the basis for dissolution and HTP sought arbitration of only JCAI's motion, the question is whether the parties intended to arbitrate judicial dissolution.

Section 11.01(d) requires dissolution upon "entry of a decree of judicial dissolution under RCW 25.15.274."[24] RCW 25.15.274 states "the superior courts may order dissolution." By allowing for dissolution "under RCW 25.15.274," section 11.01(d) is an objective manifestation that a party to the LLC agreement may seek a decree of judicial dissolution in superior court, as contemplated by the statute. In the absence of a dispute about the meaning of section 11.01(d) or the LLC agreement, JCAI could petition for judicial dissolution without arbitration.[25]

Nor is an arbitrator required to determine whether a decree of judicial dissolution is appropriate. RCW 25.15.274 allows entry of a decree of judicial dissolution following:

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[23] CP at 157 (emphasis added).

[24] Id.

[25] HTP emphasizes the broad grant of authority to the arbitrator contained in section 12.13(c) of the LLC agreement possibly includes the ability to enter a decree of judicial dissolution. JCAI argues RCW 25.15.265 and RCW 25.15.018(3)(k) limit this authority to superior courts. Even assuming an arbitrator has the authority to order a decree of judicial dissolution, the LLC agreement does not deprive JCAI of the ability to seek such a decree directly from a court. Because HTP agrees the parties intended to resolve threshold disputes like this in court and the plain language of the LLC agreement does not compel arbitration of judicial dissolution, we need not address further this question of an arbitrator's authority.

> application by a member or manager . . . whenever: (1) [i]t is not reasonably practicable to carry on the limited liability company's activities in conformity with the certificate of formation and the limited liability company agreement; or (2) other circumstances render dissolution equitable.

This determination does not require resolving a dispute under the LLC agreement. The court must determine whether, under these circumstances, it is "reasonably practicable" for HyTech to continue operating in the manner required in its LLC agreement.[26] For example, a mutually acknowledged deadlock or agreement to dissolve HyTech would support a dissolution with no dispute over the meaning of the LLC agreement itself. Because this issue arises from circumstances outside the terms of the operating agreement, it does not require arbitration.

HTP argues a related section of the LLC agreement, 11.03, shows that the parties intended to arbitrate any dissolution. It requires that HyTech must be wound up and liquidated upon dissolution. Section 11.03(a) provides that JCAI must serve as the liquidator "unless the Company is being dissolved pursuant to Section 11.01(b) based on a breach by JCAI, in which case the Liquidator shall be HTP."[27] Thus, at most, section 11.03(a) could require an arbitrator to determine a question of breach only if HyTech was being dissolved pursuant to section 11.01(b). HTP asserted during oral argument that it unilaterally declared a dissolution and alleged that JCAI breached the operating agreement. But its motion to compel did not seek to arbitrate dissolution of HyTech under section

[26] RCW 25.15.274.

[27] CP at 158.

11.01(b).[28] Because the issue of dissolution for breach under section 11.01(b) was not raised before nor addressed in the trial court, we need not decide whether arbitration would be compelled under that section.[29]

B. Receiver

HTP argues the operating agreement prohibits appointment of "a third-party receiver" because the operating agreement requires that either JCAI or HTP serve as liquidator. JCAI contends the receiver issue is not arbitrable because its security agreement with HyTech, not the operating agreement, provides for appointment of a receiver. And JCAI expressly relied upon section 4.04 of its security agreement to petition for appointment of a receiver.

JCAI's security agreement was executed between itself and HyTech on January 7, 2019. It does not contain an arbitration clause. The LLC agreement was executed between JCAI and HTP on June 14, 2018, and does not provide for appointment of a receiver. Section 4.05(e) of the LLC agreement states JCAI's security interest in HyTech's assets "will be evidenced by a separate agreement."[30] Because arbitration is required only for disputes under the LLC agreement and the receivership provision in JCAI's security agreement is entirely

[28] See CP at 947 (asking for arbitration of "this action for judicial dissolution").

[29] RAP 2.5(a).

[30] CP at 134-35.

separate and not subject to an arbitration clause, the court did not err by concluding arbitration of the request for a receiver was not compelled.[31]

HTP contends this question is arbitrable because the liquidator's powers under the LLC agreement overlap with the powers of a general receiver. But this argument is not properly before us. A receiver's authority is set by statute, court rule, and court order.[32] The trial court has not decided whether JCAI can request appointment of a general receiver, whether a receiver is necessary, or the scope of a possible receivership. The only question before us is whether the LLC arbitration provision mandates arbitration of JCAI's petition for a receiver under the security agreement. We decline to issue an advisory opinion on issues that may never arise.[33]

C. Injunctive relief

HyTech requested a TRO and a preliminary injunction against HTP and its chairman because of their ongoing refusal to comply with the HyTech board's decision to terminate all employees as of April 17, 2020. HTP argues the operating agreement limits HyTech to seeking injunctive relief from an arbitrator and not a superior court.

[31] See Satomi, 167 Wn.2d at 810 (Because "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting Howsam, 537 U.S. at 83).

[32] RCW 7.60.060.

[33] Walker, 124 Wn.2d at 418.

Section 12.13(e) provides that "[i]n lieu of seeking injunctive relief before a court, ether party may, in its sole discretion, seek and obtain an injunction from the arbitrator. Either party may apply for and obtain a temporary restraining order and/or preliminary injunction on an expedited basis from an arbitrator."[34]

HTP argues this section provides each party the option of seeking an injunction that can be granted only by an arbitrator. But this interpretation makes "in its sole discretion" meaningless because the law already provides HTP and JCAI the power to seek or not seek an injunction.[35] Because we interpret contracts to give meaning to each term,[36] HTP's interpretation is not persuasive.

Read to give each term meaning, section 12.13(e) allows each party the choice, "in its sole discretion," to "seek and obtain an injunction from the arbitrator" instead of "seeking injunctive relief before a court." Although section 12.13(c) provides that an arbitrator "shall have the same authority to award remedies and damages as provided to a judge and/or jury,"[37] that grant of authority to an arbitrator does not itself restrict the parties to injunctive relief from an arbitrator only. Allowing either party the discretion to seek injunctive relief from an arbitrator, who has clear authority to grant an injunction, does not create ambiguity or uncertainty about the scope of arbitration. Thus, the court did not err by

[34] CP at 164 (emphasis added).

[35] Ch. 7.40 RCW; CR 65.

[36] GMAC, 179 Wn. App. at 140 (quoting Wagner, 95 Wn.2d at 101).

[37] CP at 163.

concluding the LLC agreement did not compel arbitration of HyTech's request for injunctive relief.[38]

II. Stay Pending Arbitration

HTP contends the court erred by not entering a stay on May 29 because RCW 7.04A.070 compelled the court to stay all proceedings when HTP filed its motion to compel arbitration. As a question of law, we review this issue de novo.[39]

RCW 7.04A.070(5) provides that following a motion to compel arbitration, "the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." Assuming without deciding that HTP's interpretation is correct, HTP fails to demonstrate a reviewable error.

HTP moved to compel arbitration on May 29. Judge McDonald denied the motion on June 16. The only court action between those dates was Commissioner Judson's entry of a TRO on June 4. The TRO automatically terminated at 9:00 a.m. on June 16. Judge McDonald stayed further proceedings as of June 17 when

[38] HTP argues the court erred by granting injunctive relief when HyTech "plainly alleges its request was made because HTP was not complying with the LLC agreement," mandating arbitration. Appellant's Br. at 39. Although section 12.13 states "any disputes hereunder . . . will be resolved exclusively" through arbitration, CP at 163, this narrow clause does not compel arbitration of the injunction because HTP does not establish the injunction required resolving a dispute about the meaning of the LLC agreement. Rather, HyTech's request for injunctive relief arose from HTP's conduct, ignoring the HyTech board's decision terminating all HyTech employees.

[39] Perkins Coie v. Williams, 84 Wn. App. 733, 736, 929 P.2d 1215 (1997) (citing Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 443, 842 P.2d 956 (1993)).

HTP filed its notice of appeal. The alleged failure to stay does not meet the criteria for review as a matter of right under RAP 2.2(a). And HTP does not demonstrate that the absence of an immediate stay warrants discretionary review under RAP 2.3(b). We decline to review this alleged error.[40]

III. Acamar's Status as an Intervenor or Indispensable Party

HTP argues Acamar was an indispensable party and should have been joined under CR 19(a). It assigns error to the court's decision to "not require JCAI to join Acamar as an additional party."[41] We decline to consider these issues because they are not properly before us.

Acamar filed a CR 24 motion to intervene on May 20. Commissioner Judson denied it eight days later. Acamar has not appealed that decision, and HTP does not explain why it can assert any legal theory on Acamar's behalf.[42]

To the extent HTP's appeal rests on its CR 19(a) motion to dismiss for failure to join an indispensable party, its position is still unavailing. In HTP's response to JCAI's dissolution petition, it argued the petition should be dismissed pursuant to CR 19(a) because Acamar was an indispensable party. But the court

[40] In its reply brief, HTP appears to imply prejudice from Judge McDonald allowing argument on June 16 on both arbitrability and the preliminary injunction. Judge McDonald made clear that he would decide the issue of arbitrability of the preliminary injunction first "because that would be dispositive of the other motions." Report of Proceedings (June 16, 2020) at 107. HTP fails to show prejudice from both motions being before the court on the same day.

[41] Appellant's Br. at 2.

[42] See Walker, 124 Wn.2d at 419 ("The standing doctrine prohibits a litigant from raising another's legal rights.").

never reached this issue. Judge McDonald denied HTP's motion to compel on June 16, and HTP filed its notice of appeal on the 17th. All proceedings on the dissolution petition were then stayed. HTP's motion to dismiss under CR 19(a) was never considered or decided, giving us nothing to review. Because HTP has not presented a justiciable decision for review, we decline to consider the merits of this issue.[43]

IV. Discretionary Review

Judge McDonald enjoined HTP, HTP's chairman, and HTP's agents from "conducting HyTech's business operations or using any of HyTech Power, LLC's products, assets, contact lists, and any other proprietary information in any way."[44] HTP requested discretionary review, and Commissioner Koh referred HTP's request to us.

HTP contends review is warranted under RAP 2.3(b)(2) because the preliminary injunction "disturbed the status quo."[45] RAP 2.3(b)(2) "was intended to

[43] We note that although DeLong v. Parmelee, 157 Wn. App. 119, 165, 236 P.3d 936 (2010), states a CR 19 motion may be made for the first time on appeal, its reasoning should not be followed. DeLong allowed a CR 19 motion to be made for the first time on appeal because "a trial court lacks jurisdiction if all necessary parties are not joined." Id. (citing Treyz v. Pierce County, 118 Wn. App. 458, 462, 76 P.3d 292 (2003)). But as this court explained in Matter of Dependency of L.S., 200 Wn. App. 680, 687-89, 402 P.3d 937 (2017), that reasoning was expressly overruled more than 30 years ago in Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 887-88, 888 n.4, 691 P.2d 524 (1984).

[44] CP at 1633.

[45] Appellant's Br. at 44. HTP also asserts review should be granted under RAP 2.3(b)(1), which allows review when the court "has committed an obvious error which would render further proceedings useless." Id. at 42. Because HTP does not argue why entry of a preliminary injunction rendered further proceedings useless, review is not warranted under RAP 2.3(b)(1). Regardless, RAP 2.3(b)(2)

apply 'primarily to orders pertaining to injunctions.'"[46] It allows review when the court "has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act."

HTP argues review is required because, first, the injunction changed HyTech's business by shutting down operations and, second, prohibited it from using HyTech's intellectual property for any reason when the operating agreement permits use of proprietary information "to monitor or analyze HTP's investment."[47]

The injunction merely protected HyTech's board's right to manage the company and did not change the status quo by shutting down its operations. On March 6, the board unanimously agreed to terminate all employees. It affirmed this decision the following month when it again agreed unanimously to terminate all employees as of April 17. HyTech's board, and not the court, effectively ceased its business operations.

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is more suitable when seeking review of a preliminary injunction. See JUDGE STEPHEN J. DWYER, LEONARD J. FELDMAN, HUNTER FERGUSON, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 SEATTLE U. L. REV. 91, 102 (2014) ("RAP 2.3(b)(2) should be limited to trial court orders granting or denying injunctive relief and other orders that impact parties' rights outside litigation proceedings . . . . RAP 2.3(b)(1), in turn, should apply to orders that affect the litigation.").

[46] State v. Howland, 180 Wn. App. 196, 206-07, 321 P.3d 303 (2014) (quoting GEOFFREY CROOKS, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 WASH. L. REV. 1541, 1545-46 (1986) (quoting RAP 2.3(b) cmt. b).

[47] Appellant's Br. at 44.

A petitioner seeking a preliminary injunction must demonstrate (1) a clear legal or equitable right, (2) a well-grounded fear that right will be immediately invaded, and (3) that the invasion will cause actual and substantial injury.[48] HTP does not address these criteria when arguing how the court committed probable error. Indeed, as HyTech notes,[49] HTP does not directly address the question of probable error in its opening brief.[50]

To the extent HTP's opening brief could be construed as asserting a probable error, it argues the preliminary injunction deprived it of the ability to use HyTech's proprietary information to monitor its investment in the company as allowed by section 12.03(a) of the operating agreement.[51]

We review a grant of a preliminary injunction for abuse of discretion.[52] A court abuses its discretion when its decision rests upon untenable grounds or was made for untenable reasons.[53]

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[48] Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998) (citing Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)).

[49] HyTech Resp't's Br. at 14.

[50] See Appellant's Br. at 44-45 (arguing the preliminary injunction was erroneous only because it altered the status quo).

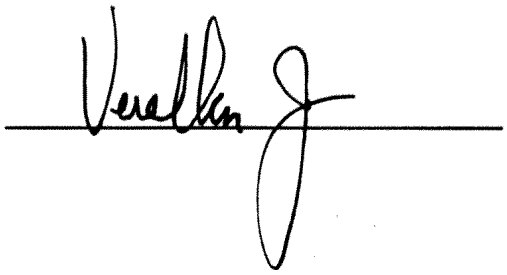
[51] Appellant's Br. at 44; CP at 160 (Section 12.03 provides: "[N]o member shall, directly or indirectly, disclose or use (other than solely for the purpose of such member monitoring and analyzing its investment in the Company) at any time, including, without limitation, use for . . . advantage or profit . . . any Confidential Information.") (emphasis added).

[52] Speelman v. Bellingham/Whatcom County Hous. Auths., 167 Wn. App. 624, 630, 273 P.3d 1035 (2012) (citing Rabon, 135 Wn.2d at 284).

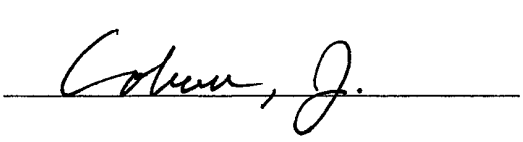
[53] Id. at 639 (citing Rabon, 135 Wn.2d at 284).

Here, it is undisputed HyTech has a right to control its employees, and it is undisputed HTP paid HyTech's terminated employees to continue soliciting business from prospective customers and to engage in beta testing. Because HTP used its knowledge of HyTech's proprietary information to repeatedly interfere in HyTech's business and makes no more than a bald assertion of its inability to monitor its investment, HTP fails to demonstrate review is warranted under RAP 2.3(b).[54]

Therefore, we affirm the denial of the motion to compel arbitration and deny discretionary review of other issues.[55]



WE CONCUR:



[54] To the extent HTP addresses probable error in its reply brief, it raises new issues that we decline to address. RAP 2.5(a).

[55] Because it is not necessary to resolve the issues on appeal, we deny HTP's motion to supplement the record.

Appendix 2

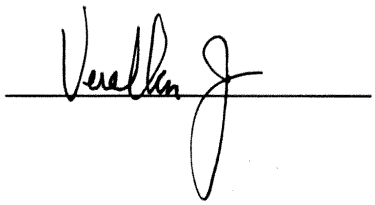
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JC AVIATION INVESTMENTS, LLC, a Washington limited liability company, Respondent, v. HYTECH POWER, LLC, a Washington limited liability company, and HTP, INC., a Washington corporation, Appellant.	)	No. 81539-3-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

Appellant filed a motion for reconsideration of and a motion to publish the court's March 1, 2021 opinion. The panel has determined both motions should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration and motion to publish are denied.

FOR THE PANEL:



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Appellate Court Case Number:	99715-2
Appellate Court Case Title:	JC Aviation Investments, LLC v. HTP, Inc.

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