

No. 74258-2

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

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TERENCE BUTLER,

Respondent,

v.

RANDALL THOMSEN, Individually, and CALFO HARRIGAN LEYH  
& EAKES, LLP, a Washington Professional Limited Liability Partnership,  
f/k/a DANIELSON HARRIGAN LEYH & TOLLEFSON, LLP,

Appellants.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

Butler's opposition has to mischaracterize Calfo Harrigan's arguments regarding arbitration and the actual issue on appeal in order to legitimize its responding arguments. Let's set the record straight again:

**First**, Calfo Harrigan does not claim to be a party to the Agreement or seek to enforce it as a party. *See* Respondent's Br. at 1, 5 n.1, 20. Rather, the firm and Mr. Thomsen are invoking the arbitration provision as nonparties on various grounds. The question to be decided is whether Calfo Harrigan can enforce that provision against Butler, who *is* a party to the Agreement.

**Second**, Calfo Harrigan does not claim to have been released from any claims by virtue of the release in the Agreement. *See* Respondent's Br. at 7 n.5, 16. Indeed, quite the contrary. Calfo Harrigan recognizes that this was not the intent of the release in the Agreement. That someone might construe the language otherwise reveals the absurdity of the trial court's ruling in *Butler v. ImageSource* that the release in the Agreement released claims between Butler and shareholders other than White.

**Third**, Calfo Harrigan does not contend that Butler's *claims* against it are subject to arbitration. *See* Respondent's Br. at 1-2, 3, 13. Rather, Calfo Harrigan argues only that certain discrete *issues* (not claims) that arise from the Agreement and which bear on the resolution of Butler's

claims against Calfo Harrigan – issues that Butler clearly agreed to arbitrate, such as the scope of the release between he and the other shareholders – are subject to arbitration. Butler claims that Calfo Harrigan negligently drafted the release. To resolve that issue, one must first determine the scope of it. That issue is arbitrable. Depending on the outcome of that issue, one must determine whether Calfo Harrigan was negligent in drafting the release. That issue is not arbitrable, and would be resolved by the trier of fact.

With the benefit of an accurate depiction of the case and issues on appeal, Butler’s arguments are quickly exposed as flawed.

## **II. ARGUMENT**

### **A. Opposition to Butler’s Motion to Strike**

Butler begins by asking that the Court strike certain portions of Calfo Harrigan’s brief based on relevance and the fact that it was not before the trial court. He is wrong. First, the crux of Butler’s claim is that Calfo Harrigan was negligent in drafting the release in the Agreement, such that it encompassed claims against other shareholders, and prompted a court to dismiss those claims based on the release (and based on other independent grounds). Yet Butler contends that the fact that he has since settled those very claims for approximately \$2.7 million has no bearing on his claims against Calfo Harrigan. The relevance is obvious. Further, the

settlement could not have been part of the record on appeal because it was filed as a matter of public record in the *Butler* case on January 7, 2016, after the trial court denied Calfo Harrigan's motion to compel arbitration on October 22, 2015. It is a matter of public record of which the Court may take judicial notice.

Next, Butler complains that Calfo Harrigan's opening brief suggests that Butler had personal counsel review the Agreement before Butler signed it. While that may have happened, Calfo Harrigan's brief does not purport to make that point. Rather, Calfo Harrigan's brief discusses (and Butler does not deny) that Butler informed Mr. Thomsen at the outset of his engagement that Butler had separate counsel that had advised him as to any potential areas of dispute as between him, Sutherland, and Zvirzdys. Butler's motion to strike should be denied.

**B. There Is No Conflict of Interest or Other RPC Grounds to Preclude Calfo Harrigan From Enforcing the Arbitration Provision As a Nonparty to the Agreement**

Of the nine issues framed in Butler's Rebuttal to Assignments of Error, five are predicated on the notion that in seeking to enforce the arbitration clause in the Agreement, Calfo Harrigan is somehow acting in violation of various RPCs. Specifically, Butler argues that the arbitration

provision cannot be enforced against him for public policy reasons under the RPCs 1.7 and 1.8.<sup>1</sup> This is simply not the case.

Butler first attempts to manufacture an “unwaivable conflict” under RPC 1.7. *See* Respondent’s Br. at 14-15. RPC 1.7 prohibits an attorney from representing a client if there is a significant risk of a concurrent conflict, *i.e.*, one where the representation will be materially limited by a personal interest of the lawyer. This argument must be rejected because it was not raised in the trial court below and may not be raised for the first time on appeal. RAP 2.5(a).

Further, to reach this conclusion, Butler suggests that Calfo Harrigan seeks arbitration of whether the release not only released claims between Butler and the other shareholders, but also as between Butler and Calfo Harrigan. But, as noted above, that is not true. While the language of the release encompasses the parties’ attorneys, Calfo Harrigan contends that its scope only encompassed claims by a party (*e.g.*, White) against the

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<sup>1</sup> On this same basis, Butler argues – based on no cited authority – that “when parties call upon the Court to interpret an arbitration clause, the public interest must necessarily trump the principle of ‘liberal construction’ urged by Calfo Harrigan.” Respondent’s Br. at 19. However, Butler admits that the public interest cannot be used as a means to rewrite an agreement. Respondent’s Br. at 19 n.11. Just as courts should not force a party to arbitrate a dispute that he did not agree to arbitrate, courts should not excuse a party from arbitrating an issue that he clearly agreed to arbitrate.

other party's attorney (e.g., Calfo Harrigan). It does not encompass claims between a party and its own attorney, just as it does not encompass claims between Butler and his co-defendants. Once this argument is exposed, there is no concurrent conflict to give rise to a violation of RPC 1.7. A lawyer is not prohibited from representing a client simply for fear of any risk at all that the client might one day sue the attorney, and that mere possibility does not give rise to a concurrent conflict under RPC 1.7. Were that true, no attorney could ever represent a client because every representation runs the risk of potential malpractice.

Butler next attempts to manufacture a violation of RPC 1.8, which prohibits a lawyer from entering into a business transaction with a client or knowingly acquiring a pecuniary interest adverse to a client. As noted above, however, and as Butler admits, Calfo Harrigan is not a party to the Agreement and so the Agreement was not one between Calfo Harrigan and Butler. *See* Respondent's Br. at 5 n.1. That is why Calfo Harrigan can seek to enforce the arbitration clause in the Agreement only as a nonparty.

To avoid this obvious outcome, Butler cites *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014), for the notion that Calfo Harrigan cannot be a third-party beneficiary of the arbitration provision, because such a status would still mean that an improper "business transaction" or "gift" took place between a lawyer and his client.

Butler argues that *LK Operating* extends RPC 1.8's prohibition on transactions between an attorney and his client to include "contracts solely between non-attorneys if the attorney nevertheless participated in the 'business transaction' in the role of an 'attorney.'" See Respondent's Br. at 16 (citing *LK Operating*, 181 Wn.2d at 76-77).

But *LK Operating* addresses an entirely different, highly unique, and ultimately distinguishable set of facts. In that case, in an email to its lawyer, a debt collection company proposed to create a 50/50 joint venture with a corporation formed to benefit the lawyer's children. *LK Operating*, 181 Wn.2d. at 59. Both the corporation and client would provide funding, the client would perform administration and management, and the lawyer – ostensibly under a separate agreement with the corporation and not as a party to the joint venture – would perform the legal work necessary to collect the debts. *Id.* The court analyzed whether the attorney participated in a "business transaction" under RPC 1.8 even though he was not a party to the joint venture itself, and concluded that he had. *Id.* at 72-84. The Court held that the transaction to be analyzed for purposes of RPC 1.8 was not limited to the joint venture, but rather encompassed all terms contemplated in the email, which essentially proposed an exchange of ownership interest for legal services. *Id.* at 75.

Here there is no such exchange. The scope of the transaction is clear: it is the White settlement. Calfo Harrigan was not a party to that agreement, committed itself to nothing in that agreement, and only received an incidental benefit: a release of claims from White, and not from Butler. Thus, the White Settlement is not a business transaction between Calfo Harrigan and Butler for purposes of RPC 1.8. Attorneys routinely advise clients to execute settlement documents wherein standard language akin to the language in the Agreement is included. There is no prohibition on attorneys enforcing such provisions as a nonparty and subject to the stringent requirements that must be met in order to do so.

Neither RPC 1.7 nor 1.8 apply. There is no burden of compliance with the RPCs for Calfo Harrigan to carry in order to enforce the arbitration provision, or to give rise to public policy arguments that it may not do so.

C. **The Arbitration Provision Is Not Limited to Disputes Between Signatories of the Agreement**

Having dispensed with Butler's RPC theories, Butler's remaining arguments are easily dispatched. First, he contends that the arbitration provision is limited to disputes between the signatories of the Agreement. *See Respondent's Br. at 20, 22, 23.* He fabricates this argument from

whole cloth by creatively rewriting the syntax of that provision and, in doing so, substantially (and impermissibly) alters its plain meaning.

The arbitration provision does not state (as Butler misleadingly suggests) that “the arbitration clause *only* applies to ‘disputes’ that ‘arise out of this Agreement’ among ‘the Parties’ to the Agreement.” *See* Respondent’s Br. at 22 (emphasis in original). Nor does the arbitration provision refer to “an arbitration by ‘the Parties.’” *See* Respondent’s Br. at 20. Rather, the exact language of the arbitration provision is:

Any dispute arising out of this Agreement shall be settled by arbitration before Judicial Dispute Resolution (“JDR”) in Seattle, using Paris Kallas or a single arbitrator as agreed by the Parties.

CP 68.

This provision defines arbitrable disputes to be “[a]ny dispute arising out of this Agreement.” The provision’s reference to “the Parties” at the end of the sentence relates only to selection of an arbitrator, and does not limit or otherwise qualify the scope of arbitrable issues. The provision’s language is to be read as it is written and without transposing words. Butler’s reading rearranges the order of the provision’s words (moving the “the Parties” language to a position earlier in the sentence) which in so doing effectively rewrites the provision entirely.

Butler relies heavily on a New Jersey case, *Lederman v. Prudential Life Insurance Co. of America*, 385 N.J. Super. 324, 897 A.2d 337 (2006),

to argue that the arbitration provision is limited to disputes between the Agreement's signatories. *See* Respondent's Br. at 21 n.13, 20-22. *Lederman*, however, is inapplicable because that Court analyzed different arbitration language. In *Lederman*, an employee hired a law firm to represent him in a lawsuit against his former employer. *Lederman*, 385 N.J. Super. at 332. The employee signed an agreement to participate in the employer's ADR program under which the employer would pay the employee's attorneys' fees. *Id.* That agreement also contained an arbitration provision requiring the employee to arbitrate "any dispute about the terms or application" of the ADR agreement. *Id.* at 343. After settling his claims against the employer, the employee sued his attorneys. *Id.* at 336. The appellate court held that the attorney could not compel arbitration because, by its clear terms, the arbitration provision only applied to disputes about the terms or application of the ADR agreement, not to disputes between the employee and his attorneys. *Id.* at 340. Simply put, the *Lederman* arbitration provision is not analogous to the arbitration provision at issue here.

**Lederman Arbitration Provision:** Any dispute about the terms or application [of the ADR agreement] shall be resolved by arbitration....

**White Arbitration Provision:** Any dispute arising out of this [Settlement] Agreement shall be settled by arbitration  
....

*Id.* at 341-42; CP 68.

The *Lederman* arbitration clause limits its application to disputes about the terms or application of the ADR agreement; the *White* arbitration provision is not so limited and applies to “any dispute arising” out of the Agreement. Accordingly, the *Lederman* court’s holding that the lawyers could not compel arbitration of the claims against them is of no moment in this case.

Likewise, Butler’s citation to a Texas case, *Jenkins & Gilchrist v. Riggs*, 87 S.W.3d 198, 202 (Tex. App. 2002), is not persuasive. See Respondent’s Br. at 21-22. In that case, the court analyzed an arbitration provision that specifically denoted that it was intended to address the resolution of disputes “between” the two named signatories. *Jenkins*, 87 S.W.3d at 202.

In order to ensure the speedy, impartial resolution of all disputes **between [Signatory 1] and [Signatory 2]** ... which relate to, or arise from the employment relationship, **the parties** agree to forego litigation ... and **the parties** consent to the final and binding arbitration of all claims and disputes which may arise **between the parties**....

*Id.* (emphasis added). That provision included limiting language that simply does not exist in regard to the agreement in *White*.

**D. Equitable Estoppel and Sokol's Consent and Fairness Concerns Support Compelling Butler to Arbitrate**

Butler argues that *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008), limits the circumstances under which a nonsignatory such as Calfo Harrigan may utilize equitable estoppel principles to compel a signatory such as Butler to arbitrate. *See* Respondent's Br. at 24-28. That court's analysis, however, actually supports Calfo Harrigan's arguments here.

In *Sokol*, the Second Circuit examined what kind of "special relationship" could suffice to justify compelling an arbitration provision signatory to arbitrate with a nonsignatory. *Sokol*, 542 F.3d at 358-62. The court reviewed the facts of several earlier non-Washington cases and observed a "pattern" which it described by assigning letters to the parties in each case: "x" (an arbitration agreement signatory), "y" (the signatory's contractual counterpart), or "y<sup>1</sup>" (an entity associated with y, but a nonsignatory to the arbitration agreement).<sup>2</sup> *Id.* at 359. The court concluded that in each of the cases it reviewed, the nonsignatory seeking to compel arbitration was successful where it was, or could be predicted to

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<sup>2</sup> In none of the cases *Sokol* reviewed did any of the decisions state that its rationale was because of the pattern described by *Sokol*. The "x-y-y<sup>1</sup>" scheme is entirely post hoc.

become associated with, the signatory's contracting partner, such that it would be unfair to allow the signatory to avoid arbitration with the nonsignatory. *Id.* at 361. That is to say, the nonsignatory was not a "stranger" to the contract containing the arbitration provision.

*Sokol* stated that the pattern it identified was "consistent with the basic principle that one does not give up one's right to court adjudication except by consent" and that compelling the signatory to arbitrate with the nonsignatory flowed from fairness principles. *Id.* Importantly, *Sokol* does not state that its x-y-y<sup>1</sup> pattern is the only factual iteration in which the Relationship Requirement may be met.

As to the first principle of consent, Butler consented to arbitrate "[a]ny dispute arising out of" the Agreement. And that is all regarding which Calfo Harrigan seeks to compel arbitration: issues (not claims) arising out of the Agreement. Butler's consent was not limited to disputes between he and White or any other party, or any known associate of another party. The scope of disputes subject to arbitration was not limited in any way other than that such a dispute must have "arisen from" the Agreement. While a court may not expand the breadth of disputes to which a party consented to arbitrate, it likewise may not unilaterally restrict it either. Rather, the court must enforce the plain meaning of the

arbitration provision in the form to which Butler consented which has no qualification other than that the dispute need arise from the Agreement.

As to the principle of fairness, the nature of the relationship between Butler and Calfo Harrigan is closer than the relationships between “x” and “y<sup>1</sup>” in the cases reviewed by *Sokol* in which arbitration was compelled. *Sokol* approved compelling a signatory to arbitrate with a party (y<sup>1</sup>) which had only an indirect, attenuated relationship with the signatory. The “y<sup>1</sup>” parties were one step removed from the signatories and only affiliated with the agreement containing the arbitration provision through *another signatory* (y). Here, though, the signatory’s (Butler) relationship with the nonsignatory (Calfo Harrigan) is direct. The relationship between Butler and Calfo Harrigan, thus, is a more convincing case for arbitration than *Sokol* and the cases it reviewed.

E. **Townsend Supports Compelling Arbitration Because Butler Exploits the Benefits of the Agreement**

Butler also relies on *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012), to support his argument that equitable estoppel is inapplicable. *See* Respondent’s Br. at 22-28. *Townsend* is not factually analogous, however, because in that case a signatory was seeking to compel a nonsignatory to arbitrate. *Id.* at 460-62. This case is the opposite. *Townsend* remains useful, however, to the extent that its analysis supports

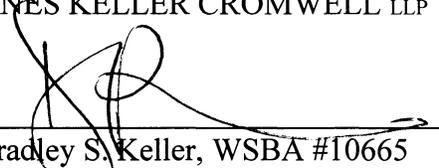
compelling arbitration where a party simultaneously seeks to exploit the benefits of an agreement containing an arbitration clause while simultaneously seeking to avoid its burdens – namely, arbitration. *Id.* at 461-62. Here, Butler exploits the benefits of the Agreement in that he asserts its validity in settling the *White* litigation and releasing him from related claims. *Townsend* thus supports application of equitable estoppel to prevent Butler from avoiding the burdens of arbitration of issues that fall within the scope of its arbitration provision.

### **III. CONCLUSION**

The trial court erred in denying Calfo Harrigan's motion to compel arbitration because issues necessary to the resolution of Butler's complaint arise from the Agreement. As a nonsignatory to the arbitration agreement, Calfo Harrigan may compel a signatory like Butler to arbitrate such issues. Washington's strong policy in favor of arbitration agreements requires that any doubts as to whether this dispute is within the scope of the arbitration provision be resolved in favor of arbitration.

DATED this 28th day of March, 2016.

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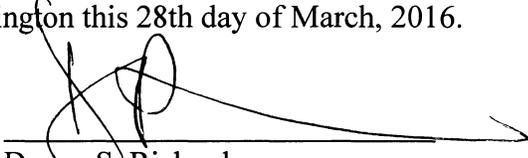
**CERTIFICATE OF SERVICE**

The undersigned attorney certifies that a true copy of the foregoing pleading was served upon the following individuals via email and U.S. Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington this 28th day of March, 2016.



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