

No. 74258-2

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

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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JUN 29 PM 2:07
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I. INTRODUCTION

Respondent Terence Butler (“Butler”) sued Appellants Calfo Harrigan Leyh & Eakes, LLP, and Randall Thomsen, (collectively “Calfo Harrigan”), alleging that it negligently drafted and advised Butler to sign a Release and Settlement Agreement (“Agreement”) with one of Butler’s fellow shareholders in a small business. Butler claims that the release in the Agreement extends more broadly than Butler intended, improperly encompassing certain claims against other shareholders. However, the Agreement (CP 64-70) contains an arbitration provision requiring arbitration of “[a]ny dispute arising out of this Agreement.” CP 68-69. Because Butler’s claims against Calfo Harrigan involve a dispute regarding the scope of the release in the Agreement, that issue necessarily “arises out of” the Agreement.

Calfo Harrigan demanded arbitration of all issues that arose under and involved the interpretation or construction of the Agreement, and specifically, whether the release in the Agreement “encompassed and operated to release certain potential claims that Butler later asserted.” CP 278. But the trial court denied Calfo Harrigan’s motion to compel arbitration. CP 281-282. Because Butler is equitably estopped from avoiding arbitration of issues he clearly agreed to arbitrate, and because Calfo Harrigan was an agent of parties to the Agreement and is a third-

party beneficiary of the Agreement, the trial court erred in denying the firm's motion to compel.

II. ASSIGNMENT OF ERROR

The trial court erred in denying Calfo Harrigan's motion to compel arbitration.

III. STATEMENT OF THE CASE

A. Butler and Other ImageSource Shareholders Hire Mr. Thomsen and the Calfo Harrigan Firm to Defend Them Against Claims Asserted by White

Butler was the Chief Solutions Officer and a 25 percent shareholder of ImageSource, a company that sells and services document imaging software and equipment. ImageSource had, at one point, three other 25 percent shareholders: Terry Sutherland (CEO), Victor Zvirzdys (CFO), and Shadrach White (CTO). CP 20.

In December 2010, in an apparent bid to gain Butler's support for removing Sutherland as CEO, White told Butler that Sutherland had been paying himself an excessive salary and had run excessive personal expenses through the company (i.e., school tuition, clothing, and collector baseball cards). CP 20-21. White later gave Sutherland, Zvirzdys, and Butler an ultimatum: make him ImageSource's CEO or he would resign.

The shareholders asked an employee to estimate how much each shareholder had received from ImageSource in salary and other

compensation. CP 21. White's strategy backfired when the rough estimate revealed that what White received from the company greatly exceeded what Butler received, and was only marginally less than what Sutherland received. Thus, Butler ended up siding with Sutherland and Zvirzdys, and they decided to accept White's previously offered resignation. CP 21. In the process, Butler claims that Sutherland and Zvirzdys agreed to "level him up" to what Sutherland had received. CP 21.

Anticipating litigation by White, in May 2011 ImageSource, Butler, Sutherland, and Zvirzdys hired Mr. Thomsen and the Calfo Harrigan firm to advise and represent them in regard to their dispute with White. CP 22. They told Mr. Thomsen about Sutherland's and White's spending and that issues among the three of them in that regard had been resolved. Further, Butler said that he had personal counsel to advise him in regard to such issues. Mr. Thomsen made it clear that he could not be involved in any disputes among them. Because to his understanding disputes among the three shareholders appeared to have been resolved, and because their interests, together with ImageSource's, appeared to be aligned with regards to the dispute with White, Mr. Thomsen agreed to jointly represent all of them against White. CP 22.

B. The *White* Case and the Settlement Agreement

In June 2011, White sued ImageSource and the other shareholders including Butler. *See White v. ImageSource*, No. 11-2-01309-7 (Thurston Cnty. Super. Ct. March 4, 2013) (the “*White* Case”); CP 21-22. White complained that Sutherland received more from ImageSource than did White (which was, in turn, more than either Zvirzdys or Butler received). In June 2012, the parties mediated and signed a CR 2A Agreement. CP 23-24. It took six more months to negotiate a final agreement, which was signed in January 2013. CP 24-25. Pertinent here, the Agreement contains the following provisions:

10. Complete Release. In consideration of the promises set forth herein, the Parties agree to release one another, their ... attorneys, employees, [and] directors ... from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially [sic] includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issues) and any claims or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White.

...

19. Dispute Resolution. 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 67-69.

C. **The Butler Case and Dismissal of Certain Claims**

Months later, disputes arose between Butler, Sutherland, and Zvirzdys. CP 26. ImageSource terminated Butler's employment and stopped making what Butler claims were promised "level up" payments. Butler sued ImageSource, Sutherland, and Zvirzdys making many of the same claims White did earlier. *See Butler v. ImageSource*, No. 13-2-41133-4SEA (King Cnty. Super. Ct. Jan. 7, 2016) (the "*Butler Case*"); CP 26. Butler moved for partial summary judgment on his claims for (1) breach of fiduciary duty based on Sutherland's excessive salary and payment of personal expenses, and (2) nonpayment of wages for money that Butler claimed he was owed for the "level up" payments. CP 26; 72-76.

The trial court not only denied Butler's motion, but summarily dismissed those claims as a matter of law, on three independent grounds. CP 72-76. It held: (1) that Butler lacked standing to bring the breach of fiduciary duty claims, which were ImageSource's and that the claims had not been brought derivatively; (2) that the "level up" payments were not wages and thus not subject to Washington's wage statute; and (3) that Butler released the claims when he signed the Agreement in the *White Case*. CP 73-75.

D. **Butler Sues Mr. Thomsen and the Calfo Harrigan Firm, and the Court Refuses to Compel Arbitration of Issues That Arise Out of the Agreement**

Even though Butler's other claims against Sutherland and Zvirzdys (shareholder oppression, conversion, conspiracy, unjust enrichment, accounting, declaratory relief, and criminal profiteering) were still pending in the *Butler* Case, he sued Calfo Harrigan alleging that the Agreement wrongfully released some of Butler's claims against Sutherland and Zvirzdys.¹ Calfo Harrigan demanded arbitration, not of Butler's claims in their entirety, but rather of all issues that arose under and involved the interpretation or construction of the Agreement, including, whether the release in the Agreement "encompassed and operated to release certain potential claims that Butler later asserted." CP 278. It then moved to compel arbitration. CP 41-49. Despite the fact that such issues clearly arise out of the Agreement and thus must be arbitrated (CP 68-69), the trial court denied the motion to compel. CP 281-282. This appeal followed.

¹ Butler's claims were recently dismissed with prejudice following a settlement in which ImageSource agreed to pay Butler \$2,689,000. *See* Decl. of Kent Johnson in Supp. of Mot. to Approve Settlement, Ex. 1 & Order Approving Settlement, *Butler v. ImageSource*, No. 13-2-41133-4 SEA (King Cnty. Super. Ct. Jan. 7, 2016), Dkts. 278 & 292.

IV. ARGUMENT

The trial court erred in denying Calfo Harrigan’s motion to compel because (1) the Agreement’s arbitration provision requires arbitration of “any dispute arising out of” the Agreement, and (2) Calfo Harrigan can compel arbitration as a nonsignatory to that Agreement because Butler relies upon it in his claims, because Calfo Harrigan was Butler’s agent, and because Calfo Harrigan is a third-party beneficiary of the Agreement and its terms.

The standard of review is de novo. *Salemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 375, 292 P.3d 108 (2013).

A. **Any Doubts Regarding the Applicability of An Arbitration Agreement Should Be Resolved in Favor of Arbitration**

Washington law requires trial courts to compel arbitration where an enforceable agreement to arbitrate exists:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

RCW 7.04A.060(1); RCW 7.04A.070(1).

Washington’s strong and well-established policy in favor of enforcing arbitration agreements requires that courts indulge every presumption in favor of arbitration. *Naumes, Inc. v. City of Chelan*, 184

Wn. App. 927, 932, 339 P.3d 504 (2014) (citing *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010)). If the reviewing court can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends. *Davis v. Gen. Dynamics Land Sys.*, 152 Wn. App. 715, 718, 217 P.3d 1191 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002). Any doubts regarding the applicability of an arbitration agreement "should be resolved in favor of coverage." *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 405, 200 P. 3d 254 (2009) (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413–14, 924 P.2d 13 (1996)).

B. Butler's Claim Against Calfo Harrigan Requires Resolution of Issues "Arising Out of" the Settlement Agreement

In ruling on a motion to compel arbitration, a court generally must determine whether there is an enforceable agreement to arbitrate and whether the dispute at issue falls within the scope of that agreement. *Heights*, 148 Wn. App. 400. Washington law leaves no place for the exercise of discretion. RCW 7.04A.070(1).

Butler does not contest the existence of a valid and enforceable arbitration agreement. The Agreement clearly states:

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 (emphasis added). Rather, Butler disputes whether his claims “arise out of” the Agreement.

Clearly they do. It is the Agreement itself that Butler claims Mr. Thomsen drafted negligently. It is absurd to suggest that the claims do not arise out of the Agreement. More significantly, Calfo Harrigan did not demand arbitration of Butler’s claims in their entirety, but rather only of all issues that arose under and involved the interpretation or construction of the Agreement, and specifically, whether the release in the Agreement “encompassed and operated to release certain potential claims that Butler later asserted.” CP 278. A dispute regarding the scope of the release in the Agreement is, by definition, a dispute that “arises out of” the Agreement.

Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. *King Cnty. v. Boeing Co.*, 18 Wn. App. 595-603, 570 P.2d 713 (1977). If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration unless it can be said that it is not susceptible to an interpretation that covers the asserted dispute. *Id.*

“Arising out of” arbitration language has been said to limit the arbitrable issues to those having some direct relation to the terms and

provisions of the contract. *See Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961).² Both *Mediterranean* and *Kinoshita* reasoned that where an arbitration clause refers solely to disputes or controversies “arising out of” the contract, arbitration is restricted to claims “relating to the interpretation of the contract and matter of performance.” *Mediterranean*, 708 F.2d at 1464 (quoting *Kinoshita*, 287 F.2d at 953); *see also Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013) (“Arising out of” language limits arbitration to those claims that have a direct relationship to a contract’s terms and provisions.).

Butler’s primary contention, that Mr. Thomsen negligently drafted paragraph 10 of the Agreement to release certain potential claims that Butler later tried to assert against Sutherland and Zvirzdys, inherently involves a dispute regarding the interpretation of that clause. *See Mediterranean*, 708 F.2d at 1464. Thus, Butler’s claims have a direct

² The Washington arbitration statute is similar to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and federal authority persuasive in regard to such issues. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238 (1985) (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.”); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (same); *Kilgore v. Keybank Nat’l Ass’n*, Nos. 09-16703, 10-15934, 2013 WL 1458876, at *2 (9th Cir. Apr. 11, 2013) (same).

relationship to the Agreement's terms and provisions. That a "relating to" arbitration provision has been described by some courts as being broader than an "arising out of" arbitration provision is of no moment. Calfo Harrigan does not seek arbitration of Butler's claims in their entirety, but rather only particular issues that arise out of the Agreement, such as the scope of the release. Indeed, Butler's claims against Calfo Harrigan cannot be resolved without interpretation of the allegedly negligently drafted release provision. Accordingly, the dispute between Butler and Calfo Harrigan regarding the interpretation of that clause "arises out of" the Agreement. Because issues raised by Butler's complaint have a direct relation to the terms of the Agreement relating to the interpretation of that contract, arbitration of those issues is required. *Mediterranean*, 708 F.2d at 1464; *Kinoshita*, 287 F.2d at 953.

C. **Calfo Harrigan Can Compel Arbitration As a Nonsignatory to the Settlement Agreement**

Butler also challenges Calfo Harrigan's standing to invoke the arbitration clause, since Calfo Harrigan is not a signatory to the Agreement. Rather, Calfo Harrigan's clients – including Butler – are signatories. But whether Calfo Harrigan signed the Agreement as party is not dispositive. Numerous courts acknowledge that nonsignatory defendants, such as Calfo Harrigan, may compel a plaintiff, such as

Butler, to arbitrate where the plaintiff is a signatory to an arbitration agreement even though the defendant is not. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012); *see also McClure v. Tremaine*, 77 Wn. App. 312, 315, 890 P.2d 466 (1995) (“Numerous courts have held that even when it is not explicitly provided for in an arbitration agreement, some nonsignatories can compel arbitration”).³ Here, Calfo Harrigan has standing to invoke the Agreement’s arbitration clause under the principle of equitable estoppel, as an agent of the signatories, and as a third-party beneficiary of the release itself.

1. Calfo Harrigan Can Compel Arbitration Based on Equitable Estoppel

Under the principle of equitable estoppel, a signatory plaintiff is precluded from claiming the benefits of a contract containing an arbitration clause while simultaneously avoiding the burdens that clause imposes. *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008). The doctrine applies when two circumstances exist:

³ No Washington case directly addresses whether a nonsignatory defendant may compel arbitration against a signatory plaintiff. The Washington Supreme Court, however, has cited a Ninth Circuit Court of Appeals case, *Mundi*, favorably with respect to its analysis of equitable estoppel in the arbitration context. *Townsend*, 173 Wn.2d at 461. The *Mundi* case, in turn, analyzed and applied the Second Circuit standard for equitable estoppel. *See Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (citing *Sokol Holdings, Inc. v. BMB Munai, Inc.* 542 F.3d 354, 361 (2d Cir. 2008)). *Mundi* applied the same substantive law on equitable estoppel that a California court would have applied. *Kramer v. Toyota Corp.*, 705 F.3d 1122, 1130 n.5 (9th Cir. 2013).

- **Rely Upon/Intertwined Requirement:** The signatory must be relying upon the terms of the written agreement in asserting its claims against the nonsignatory, or the claims are “intimately founded in and intertwined with” the underlying contract; and
- **Relationship Requirement:** There is a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.

Kramer, 705 F.3d at 1128; *Sokol*, 542 F.3d at 359.

a) **Issues Central to Butler’s Claims Rely Upon and Are Intertwined With the Settlement Agreement**

The Rely Upon/Intertwined Requirement comports with, and indeed derives from, the very purposes of the equitable estoppel doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of the same agreement. *Kramer*, 705 F.3d at 1129 (citing *Jones v. Jacobson*, 195 Cal. App. 4th 1, 1 Cal. Rptr. 3d 522 (2011)). The analysis asks whether the plaintiff would have a claim against the nonsignatory defendant independent of the existence of the agreement containing the arbitration provision. *Id.* at 1131.

The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. That the claims are cast in tort rather than contract does not avoid the arbitration clause.... The fundamental point is that a

party may not make use of a contract containing an arbitration clause and then attempt to avoid the duty to arbitrate by defining the forum in which the dispute will be resolved.

Boucher v. Alliance Title Co., Inc., 127 Cal. App. 4th 262, 272, 25 Cal. Rptr. 3d 440 (2005) (citations omitted). Thus, it is “essential ... that the subject matter of the dispute [be] intertwined with the contract providing for arbitration.” *Sokol*, 542 F.3d at 361. “Claims are intertwined where the merits of an issue between the parties [i]s bound up with a contract binding one party and containing an arbitration clause.” *Bimota SPA v. Rousseau*, 628 F. Supp. 2d 500, 504 (S.D.N.Y. 2009) (alteration in original) (internal quotation marks omitted); *see also Hawkins v. KPMG LLP*, 423 F. Supp. 2d 1038, 1050 (N.D. Cal. 2006).

In *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1003 (N.D. Cal. 2012), the court found that a rental car customer could be compelled to arbitrate his personal injury claims against a nonsignatory rental car company (Hertz) because the customer was relying on the terms of a written agreement containing an arbitration provision with Hertz’s rental car licensee in Costa Rica. The court reasoned that the customer made “reference to or presume[d] the existence of” the underlying car rental agreement in his complaint against Hertz.

Plaintiffs have sued Hertz for strict liability and negligence, and the entire factual basis for their claim relies upon the

existence of the car rental agreement [plaintiff] signed when he rented the car from Costa Rica Rent a Car. Simply put, he would not have been able to rent the car - and thus would not have had any relationship with Hertz - without signing the rental agreement. In such a situation, it would not be fair to allow [plaintiff] to rely upon his signing the rental agreement to rent the car and to prevent Hertz from attempting to enforce the contract's arbitration clause.

Id. at 1003.

By way of contrast is the decision in *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 92 Cal. Rptr. 3d 534 (2009), in which a California court found that nonsignatory lawyers and accountants could not compel arbitration of the breach of fiduciary duty and fraud claims against them by their investor clients related to a fraudulent tax avoidance scheme. The accountants and attorneys sought to compel arbitration based on a clause in the operating agreements of limited liability companies that the advisors assisted in forming as one step in the scheme. *Id.* at 216. The appellate court found that the breach of fiduciary duty and fraud claims were “unrelated to any of the obligations in the operating agreements, which were merely a procedural and collateral step in the creation of the fraudulent tax shelters.” *Id.* at 218. The court observed that the complaints did not “rely on or use any terms or obligations of the operating agreements as a foundation for their claims” and did not even mention the agreements. *Id.*; see also *Kramer*, 705 F.3d at 1129-30 (signatory

plaintiffs' claim "merely referencing" price term in underlying purchase contract was "not enough" to consider the purchase contract's arbitration provision to be "intimately founded in and intertwined with" the plaintiffs' products liability claim regarding defective automobiles); *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1230 (9th Cir. 2013) (affirming denial of motion to compel arbitration where signatory plaintiff's misrepresentation claims against BestBuy did not rely on and were not intertwined with DirectTV Customer Agreement and Lease Addendum; "Customer Agreement [was] factually irrelevant to Plaintiffs' claims" and the "complaint [was] replete with allegations of deceit by BestBuy that **have nothing to do** with the Customer Agreement.") (emphasis added).

Here, unlike *Goldman* and *Kramer*, the release provision in the Agreement is the very foundation of Butler's negligence claim. He does far more than "merely reference" the Agreement – rather it is the focal point of his complaint. *See* CP 24, ¶ 3.12 ("[T]he attorneys for the parties, including [Calfo Harrigan], drafted a more formal Release to effectuate the CR 2A Agreement.... [Calfo Harrigan] participated in drafting, approved the resulting final draft, and advised Butler to sign the Release and Settlement Agreement...."), *see also* CP 25-27 ¶¶ 3.13-3.17, 3.20-3.21. The Agreement is not "factually irrelevant" to Butler's allegations; it is central to them. Like *Lucas*, without the Agreement, Butler would have

no claim against Calfo Harrigan. Thus, Butler sufficiently relies upon and intertwines his claims with the arbitration provision in the Agreement such that compelling arbitration is appropriate. The trial court erred in denying the motion to compel.

b) Butler Had a Relationship With Calfo Harrigan

The second prong of the equitable estoppel test looks to whether there exists a sufficient relationship between the signatory plaintiff and the nonsignatory defendant who seeks to compel arbitration. *Sokol*, 542 F.3d at 359. This is a “fact-specific” inquiry:

[T]here must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitration with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.

....

The relationships among the parties [must develop] in a manner that [makes] it unfair for [the party opposing arbitration] to claim that its agreement to arbitrate ran only to [the fellow signatory to the arbitration agreement], and not to [the non-signatory seeking to compel arbitration].

Id. at 359, 361.

The Second Circuit analyzed the Close Relationship Requirement in *Ragone v. Atlantic Video at Manhattan Center.*, 595 F.3d 115 (2d Cir. 2010), in which a make-up artist’s employment agreement with a television production company contained an arbitration clause. When she sued the production company’s client, ESPN, for sexual harassment, the

Second Circuit found that she was estopped from refusing to arbitrate those claims. *Id.* at 126-28. Even though ESPN was not mentioned in the arbitration agreement, or in any other document relating to the plaintiff's employment, the Court noted that it was not a case where the nonsignatory was "linked textually" to the plaintiff's claims." *Id.* at 127 (quoting *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 407 (2d Cir. 2001)). Rather, "as set forth in [the] complaint, it is plain that when [plaintiff] was hired by [her employer], she understood ESPN to be, to a considerable extent, her co-employer." *Id.* Thus, ESPN was far from a stranger to the arbitration agreement that the plaintiff was fully aware applied to an employment relationship in which ESPN would necessarily be and was in fact thoroughly involved. *Id.* at 127-28.

The *Ragone* court contrasted its facts to an earlier case, *Ross v. American Express Co.*, 547 F.3d 137 (2d Cir. 2008). In *Ross*, the plaintiffs entered into credit card agreements with Visa, Mastercard, and Diners Club (the "Issuing Banks") that contained arbitration clauses. The court held that they were *not* estopped from refusing to arbitrate claims relating to those agreements against a different credit card company, American Express. While it was "indisputable that the subject matter of the dispute between the parties ... is related to the subject matter" of the contracts containing the arbitration clauses, the Second Circuit held:

[T]he further necessary circumstance of some relation between Amex and the plaintiffs sufficient to demonstrate that the plaintiffs intended to arbitrate this dispute with Amex is utterly lacking here. Amex has no corporate affiliation with the Issuing Banks; the plaintiffs allege without contradiction that Amex is in fact a *competitor* of the Issuing Banks in the credit card market. **Amex did not sign the cardholder agreements, it is not mentioned therein, and it had no role in their formation or performance....** Amex's only relation with respect to the cardholder agreements was as a third party allegedly attempting to subvert the integrity of the cardholder agreements. In sum, arbitration is a matter of contract and, contractually speaking, **the plaintiffs do not know Amex from Adam.** Amex therefore cannot avail itself of the arbitration agreements contained in the cardholder agreements.

Id. at 146 (bolded emphases added).

Applying the Relationship Requirement here leads inevitably to the conclusion that Butler and Calfo Harrigan had a relationship sufficiently close in regard to the Agreement to compel arbitration. As in *Rangone*, Calfo Harrigan is no stranger to Butler and the Agreement. The complaint alleges that Mr. Thomsen negotiated and drafted the Agreement on Butler's behalf. Further, the Agreement specifically names and releases the firm from liability. This is unlike the situation in *Ross*, in which the plaintiff did not know the nonsignatory defendant "from Adam" or where the nonsignatory defendant had no role in the formation or the performance of the Agreement. Butler himself alleges that Mr. Thomsen was responsible for drafting the release that is the subject of his

professional negligence claims. See CP 24 ¶ 3.12 (“[T]he attorneys for the parties, including [Calfo Harrigan], drafted a more formal Release to effectuate the CR 2A Agreement.... [Calfo Harrigan] participated in drafting, approved the resulting final draft, and advised Butler to sign the Release and Agreement....”).

The Relationship Requirement is met. Butler should be estopped from refusing to arbitrate issues that arise out of the Agreement. The trial court erred in denying Calfo Harrigan’s motion to compel arbitration.

2. Calfo Harrigan Can Compel Arbitration on Agency Principles

Calfo Harrigan can also compel arbitration on the basis that it was Butler’s agent, and Butler was a signatory to the Agreement containing the arbitration provision. Agents of a signatory to an arbitration agreement can compel a signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in their capacities as agents, and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause. *Kwan v. Clearwire Corp.*, C09-1392JLR, 2012 WL 32380, at *11 (W.D. Wash. Jan. 3, 2012) (citing *Amisil Holdings, Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 831–33 (N.D. Cal. 2007) (relying upon *Letizia v. Prudential Bache*

Secs., Inc., 802 F.2d 1185 (9th Cir. 1986), and *Britton v. Co-op Banking Grp.*, 4 F.3d 742 (9th Cir.1993)).

It is undisputed that the wrongful acts for which Calfo Harrigan is sued relate to its role as Butler's agent, as well as the agent of other signatory shareholders jointly represented by Calfo Harrigan, who Butler claims were erroneously released from his claims due to Calfo Harrigan's negligence. *West v. Thurston Cnty.*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) ("We recognize that the attorney-client relationship is generally a type of principal-agent relationship."). Butler's claims turn in part on Calfo Harrigan's joint representation of those shareholders. Further, the claim that Calfo Harrigan negligently drafted the release provision is inextricably linked to the Agreement in which it resides, which in turn contains the arbitration clause. Thus, as an agent of signatories to the Agreement, Calfo Harrigan may compel arbitration of issues that fall within the scope of the arbitration clause, and thus, which Butler agreed to arbitrate.

3. Calfo Harrigan Can Compel Arbitration As a Named Third-Party Beneficiary of the Settlement Agreement

Nonsignatories can also enforce arbitration agreements as third-party beneficiaries. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 811 n.22, 225 P.3d 213 (2009) (citing *Mundi*, 555 F.3d at 1045 n.2). "To

sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party.” *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2000)).

Here, the release that is the subject of Butler’s claims explicitly extends to Calfo Harrigan, stating that “the Parties agree to release one another, [and] ... their respective ... attorneys ... from any and all charges.” CP 67-68, ¶ 10. Calfo Harrigan is one of the expressly stated beneficiaries of the release. The arbitration provision does not contain any language limiting its application to disputes raised between the settling parties. Rather, the arbitration provision explicitly states that it applies to “any disputes arising out of this Agreement.” CP 68 (emphasis added). As a third-party beneficiary of the release that is the focal point of Butler’s claims, Calfo Harrigan has standing to invoke the arbitration clause in the Agreement.

4. Calfo Harrigan’s Right to Arbitration Has Not Been Waived

Finally, Butler argued below that Calfo Harrigan waived the right to arbitrate. The Washington Supreme Court has identified a three-factor test to determine whether a party has waived the right to compel

arbitration: “(1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that right, and (3) prejudice.” *Steele v. Lundgren*, 85 Wn. App. 845, 849, 935 P.2d 671 (1997) (cited with approval in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 362, 103 P.3d 773 (2004)). But there is no evidence that Calfo Harrigan engaged in any conduct inconsistent with enforcing its right to arbitrate. Rather, Butler based his contention on the conduct of the *other* individuals in *other* proceedings – i.e., the other shareholders, who elected to litigate the release issue before the Washington Superior Court in the *Butler* Case, rather than seek arbitration of that issue. But those shareholders were not acting on Calfo Harrigan’s behalf in that case, nor was their conduct binding on Calfo Harrigan in some capacity. No party other than Calfo Harrigan can waive Calfo Harrigan’s right to arbitrate. The acts of other people in other cases have no bearing here on Calfo Harrigan’s right to compel arbitration of arbitrable issues posed by Butler’s claims.

V. 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 out of the Agreement. Even though a nonsignatory to the Agreement, Calfo Harrigan may compel a signatory like Butler to arbitrate such issues, and Calfo Harrigan has not waived its right to compel arbitration.

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. The Court should reverse the trial court's order, and order Butler to arbitrate all arbitrable issues.

DATED this ²⁹~~22~~nd day of January, 2016.

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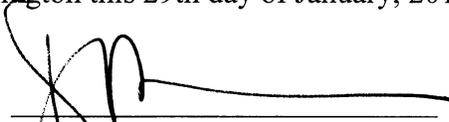
CERTIFICATE OF SERVICE

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 29th day of January, 2016.



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