

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii-viii
A. Introduction.....	1
B. Assignments of Error and Issues Pertaining Thereto.....	2
1. Assignment of Error No. 1.....	2
2. Assignment of Error No. 2.....	2
3. Issue Pertaining Thereto.....	2
4. Issue Pertaining Thereto.....	3
5. Issue Pertaining Thereto.....	3
C. Statement of the Case.....	3
D. Statement of Facts.....	4
1. Greg Davis Was Not an Employee of GDLS During <u>Any</u> Times Relevant to His Amended Complaint and Therefore He Was Not Subject to the GDLS' DRP.....	4
2. GDLS' DRP Expressly Applies Only to Employees of GDLS and Does Not Apply to Independent Contractors.....	5
3. GDLS' Human Resource Manager and Employee Admit that the DRP Does Not Apply to Independent Contractors like Greg Davis.....	8

4.	GDLS' Own Policies Explicitly Define and State that Independent Contract Workers are Not GDLS' Employees.....	19
E.	Argument.....	20
1.	Motion to Dismiss – Generally.....	20
2.	In this Appeal of GDLS' Motion to Dismiss, the Court Should Review Nothing Outside of the Complaint and Summarily Deny GDLS' Motion.....	22
3.	Motion to Dismiss Treated as a Motion for Summary Judgment.....	23
4.	The Scope of the Arbitration Agreement Does Not Encompass Claims Arising Before Greg Davis Became an Employee of GDLS.....	25
a.	Public Policy May Favor Arbitrability; But That Tells Only Part of the Story.....	26
b.	The Arbitration Clause Here Is Valid, But That Is Not the Issue.....	29
c.	The Issue of Who Decides the Issue of Arbitrability Must Be Decided, Not by an Arbitrator, But by the Court.....	29
d.	Davis' Claims Are Not Covered by the Arbitration Provision.....	40
F.	Conclusion.....	49

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington Cases</u>	
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	28, 29
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963).....	23, 24
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	28
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994).....	21, 22
<i>Fardig v. Reynolds</i> , 55 Wn.2d 540, 544, 348 P.2d 661 (1960).....	43
<i>Hoffer v. State</i> , 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd on reh'g, 113 Wn.2d 148, 776 P.2d 963 (1989).....	21, 22
<i>Kamaya Co., Ltd. v. American Property Consultants, Ltd.</i> , 91 Wn. App. 703, 959 P.2d 1140 (1998).....	39
<i>Magula v. Benton Franklin Title Ins. Co.</i> , 79 Wn.App 1, 901 P.2d 313 (1995).....	44
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 110, 922 P.2d 43 (1996).....	43
<i>McEachern v. Sherwood & Roberts, Inc.</i> , 36 Wn. App. 576, 675 P.2d 1266.....	44
<i>Mount Adams School Dist. V. Cook</i> , 150 Wn.2d 716, (2003).....	30, 32, 22, 49
<i>Phillips v. Kaiser Aluminum & Chem. Corp.</i> , 74 Wn. App. 741, 875 P.2d 1228 (1994).....	43

<i>Powell v. Sphere Drake Ins. P.L.C.</i> , 97 Wn.App 890, 988 P.2d 12 (1999).....	26, 28, 42
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	24, 27
<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000).....	23
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201, 961 P.2d 333 (1998).....	21
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007).....	27
<i>Sec. State Bank v. Burk</i> , 100 Wn. App. 94, 995 P.2d 1272 (2000).....	24
<i>Siekawitch v. Washington Beef Producers, Inc.</i> , 58 Wn. App. 454, 793 P.2d 994 (1990).....	44
<i>State ex rel. Evergreen Freedom Found, v. Wash. Educ. Ass'n</i> , 140 Wn.2d 615, 999 P.2d 602 (2000).....	20
<i>Stewart v. Chevron Chem. Co.</i> , 111 Wn.2d 609, 762 P.2d 1143 (1988).....	44
<i>Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.</i> , 138 Wn.App 203, 213-4, 156 P.3d 293 (2007), review granted, 163 Wn.2d 1011 (2008).....	37, 38
<i>Todd v. Venwest Yachts, Inc.</i> , 127 Wn. App. 393, 111 P.3d 282 (2005).....	47, 48, 49
<i>Van Dinter v. City of Kennewick</i> , 121 Wn.2d 38, 846 P.2d 522 (1993).....	24
<i>W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco</i> , 47 Wn. App. 681, 736 P.2d 1100 (1987).....	39
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	27

Federal Circuit Court Cases

Aceros Prefabricados, S.A. v. TradeArbed, Inc., 282 F.3d 92,
(2d Cir, 2002).....46

Associated Milk Dealers, Inc. v. Milk Drivers Union,
422 F.2d 546 (7th Cir. 1970).....37, 38

Chappel v. Laboratory Corp. of America, 232 F.3d 719
(9th Cir. 2000).....21

Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126
(9th Cir. 2000).....27

Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16
(2d Cir. 1995).....46

David L. Threlkeld & Co. v. Metallgesellschaft Ltd.,
923 F.2d 245 (2d Cir.).....47

Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989).....47

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840
(2d Cir. 1987).....47

Granite Rock Co. v. Int’l Brotherhood, ___ F.3d ___, ___
(9th Cir. 10-22-2008)
Nos. 07-15040, 07-16142, 07-16236.....36

I.S. Joseph Co. v. Michigan Sugar Co., 803 F.2d 396
(9th Cir. 1986).....42

In re Talbott Big Foot, Inc., 887 F.2d 611 (5th Cir. 1989).....42

Metal Products Workers Union, Local 1645 v. Torrington Co.,
358 F.2d 103 (2d Cir. 1966).....38

*Morewitz v. West of England Ship Owners Mut. Protection and
Indem. Ass’n*, 62 F.3d 1356 (11th Cir. 1995).....42

Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. 2006).....25

<i>NW. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.</i> , 460 F.3d 1125 (9th Cir. 2006).....	23
<i>Sanford v. Member Works, Inc.</i> , 483 F.3d 956, (9th Cir. 2007).....	42, 43
<i>Shroyer v. New Cingular Wireless Servs., Inc.</i> , 498 F.3d 976 (9th Cir. 2007).....	25
<i>Strauss v. Silvercup Bakers, Inc.</i> , 353 F.2d 555 (2d Cir. 1965).....	38
<i>Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.</i> , 925 F.2d 1136 (9 th Cir. 1991).....	42
<i>Torrington Co. v. Metal Products Workers Union, Local 1645</i> , 347 F.2d 93 (2d Cir. 1965).....	38
<i>Zimmerman v. International Cos. & Consulting, Inc.</i> , 107 F.3d 344 (5th Cir. 1997).....	42
<u>United States Supreme Court Cases</u>	
<i>Atkinson v. Sinclair Refining Co.</i> , 370 U.S. 238 (1962).....	30
<i>AT&T Techs., Inc. v. Communications Workers of Am.</i> , 475 U.S. 643, 106 S.Ct 1415, 89 L.Ed.2d 648 (1986).....	30, 31, 32, ... 33, 34, 35, ... 36, 37, 39, ... 41, 42
<i>Boys Markets, Inc. v. Retail Clerks</i> , 398 U.S. 235 (1970).....	30
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2005).....	36, 42
<i>Circuit City Stores, Inc. v. Adams</i> , 532 US 105, 121 S.Ct 1302, 149 L.Ed.2d 234 (2001).....	25, 26, 30, 33

<i>Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers</i> , 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).....	38
<i>First Options of Chicago, Inc., v. Kaplan</i> , 514 U.S. 938, 115 S.Ct 1920, 131 L.Ed.2d 985 (1995).....	36, 37, 43
<i>John Wiley & Sons, Inc. v. Livingston</i> , 376 U.S. 543 (1964).....	35, 36, 37
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) <i>cert. denied</i> , 501 U.S. 1267 (1991).....	46
<i>Operating Engineers v. Flair Builders, Inc.</i> , 406 U.S. 487 (1972).....	30
<i>Preston v. Ferrer</i> , ___ US ___, 128 S.Ct 978, 169 L.Ed.2d 917 (U.S. 2-20-2008).....	24, 27
<i>Southland Corp. v. Keating</i> , 465 U.S. 1, 104, S.Ct 852, 79 L.Ed.2d 1 (1984).....	26
<i>Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564 (1960).....	35
<i>Steelworkers v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593 (1960).....	35
<i>Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960).....	30, 35, 38
<i>Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.</i> , 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).....	27, 46

Washington State Rules

CR 12(b).....	2
CR 12(b)(6).....	20, 21, 22, 23
CR 56.....	2, 23

Federal Statutes

USC Title 9, Chapter 1, (9 USC §§1-16).....25
9 USC §2.....26
9 USC §4.....27

Federal Rules

FRCP 12(b)(6).....21

Other Authorities

25 David K. DeWolf & Keller W. Allen, *Washington
Practice, Contract Law and Practice* § 5.5 (1998).....28
Cox, *Reflections Upon Labor Arbitration*,
72 Harv. L.Rev. 1482, 1509 (1959).....36

A. Introduction

This appeal concerns the issues (1) of the applicability of a certain arbitration provision, required by defendant, General Dynamics Land Systems (“GDLS”) of all employees, but not required of independent contractors and (2) of whether the court or an arbitrator decides the issue of arbitrability.

Plaintiff, Greg Davis, was employed by Contract Professionals, Incorporated (“CPI”), a company that provides workers to other companies. CPI provided Davis to GDLS as an independent contractor. After a period of time, Davis was hired and became an employee of GDLS. Upon becoming employed, Davis was required to and did sign, as a condition of his employment, an agreement to arbitrate claims that might be made against GDLS. The arbitration provisions, by their terms, applied only to employees of GDLS and not to independent contractors.

Later, Davis filed a lawsuit against GDLS, and certain supervisors, alleging racial discrimination, hostile work environment, disparate treatment and unlawful retaliation, among other claims, for acts, which occurred only while Davis was an independent contractor and not while he was an employee. Defendants filed a Renewed Motion to Dismiss for Failure to Exhaust Administrative Remedies, claiming the GDLS’ arbitration provisions applied to the facts alleged in Davis’ lawsuit. The

lower court dismissed Davis lawsuit, holding the arbitration provisions applied, but also holding that the decision as to who was to decide the issue of arbitrability was also for an arbitrator to decide.

B. Assignments of Error and Issues Pertaining Thereto

1. Assignment of Error No. 1

The lower court erred in granting defendant defendants'¹ motion to dismiss pursuant to CR 12(b).

2. Assignment of Error No. 2

The lower court erred in granting defendants' motion to for summary judgment pursuant to CR 12(b) and CR 56 (assuming the lower court treated defendants' motion to dismiss as one for summary judgment).

3. Issue Pertaining Thereto

Did the lower court err in finding that plaintiff, Greg Davis, agreed that issues concerning who would determine the issue of *arbitrability*, including the issue of *arbitrability* for disputes arising from acts committed by defendants while Davis was an independent contractor and

¹ In addition to General Dynamics Land Services, the other defendants/respondents in this appeal are Kenneth "Ken" Sharkey and "Jane Doe" Sharkey and Jeffrey "Jeff" Taylor and "Jane Doe" Taylor

before GDLS and he entered into the employment agreement, which contained the DRP, must also be arbitrated?

4. Issue Pertaining Thereto

Did the lower court err in not making findings of fact as to whether or not the parties had “clearly and unmistakably” agreed on the issue of whether an arbitrator or the court was to be decided the issue of arbitrability?

5. Issue Pertaining Thereto

Did the lower court err in finding that plaintiff, Greg Davis, agreed to utilize GDLS’ Dispute Resolution Policy Agreement for New Hires (“DRP”) to resolve disputes against GDLS, including disputes arising from acts committed by defendants while Davis was an independent contractor with GDLS and before GDLS and he entered into their employment agreement, which contained the DRP?

C. Statement of the Case

This is an appeal from the lower court’s order of July 11, 2008, CP 315-7, granting defendant Defendants’ Renewed Motion to Dismiss for Failure to Exhaust Administrative Remedies, CP 66-75 and dismissing Davis’ Amended Complaint, CP 109-14.

D. Statement of Facts

1. Greg Davis Was Not an Employee of GDLS During Any Times Relevant to His Amended Complaint and Therefore He Was Not Subject to the GDLS' DRP

The Amended Complaint alleges that Davis' claims arise:

from severe and pervasive physically harmful racial discrimination against an African-American independent contractor of GDLS prior to his application and permanent employment by GDLS. The discrimination occurred from October of 2005 to prior to the time that plaintiff [Davis] applied for and was hired by defendant [GDLS]

CP 111, Amend. Compl. ¶ 5.1.1.

At all relevant times pleaded in his Amended Complaint, plaintiff Greg Davis was not an employee of GDLS, but instead was an employee of CPI. CP 101-7. The CPI "Term Form" specifically refers to Davis as "Employee #: 2957". CP 102. Davis was hired by CPI on October 10, 2005. CP 103, "Hire Form". He filled out an IRS W-4 form (Employee's Withholding Allowance Certificate) for CPI because he was their employee. CP 106-7. CPI had a signed "Employment Agreement" with Davis. CP 271-3. Davis worked for CPI for \$19.00 per hour, CP 103, and was placed by CPI with CPI's client GDLS as an independent contractor. CP 274-87. At all relevant times contained in his Amended Complaint, Davis received his paychecks from CPI and not from GDLS. CP 8-13, 274-287.

In fact, Davis did not fill out an application for employment with GDLS until March 21, 2006. CP 187-91. He received an offer of employment from GDLS on April 10, 2006, CP 192. Davis was hired by GDLS as an employee until April 10, 2006, CP 184-217, and he signed his GDLS' "Employment Certification", his GDLS' W-4, and the GDLS' "DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy Dispute Resolution on April 10, 2006. CP 185, 197, 207.

2. GDLS' DRP Expressly Applies Only to Employees of GDLS and Does Not Apply to Independent Contractors

The DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy and the Dispute Resolution Policy, CP 120-42, which are the documents upon which GDLS bases this motion to dismiss, apply only to employees of GDLS and, by their terms, do not apply to non-employees. The Dispute Resolution Policy Agreement for New Hires expressly limits its scope to employees, new hire:

By this agreement (the "Agreement"), I agree to the exclusive resolution of all *claims arising out of or relating to my application for employment, employment, or termination of employment* by the terms of the company's Dispute Resolution Policy ("DRP") attached as Exhibit A. (*Emphasis added*).

CP 197. (Exhibit A is found at CP 120-42.).

General Dynamics' "Dispute Resolution Handbook" expressly applies to employees. CP 119-42.

In the opening paragraph, authored by K. M. Bischoff, Vice President of Human Resources, Bischoff states, "General Dynamics Land Systems, Inc. has always encouraged the resolution of employee disputes and legal claims Employees have had the option to redress major employment and termination issues." CP 121. In the second paragraph, GDLS informs its employees, "[t]his booklet detailing the Dispute Resolution Process should be read carefully. It is an essential element of your employment relationship and compliance with it is a condition of your employment." *Id.* In the fourth paragraph GDLS states, "[a]rbitration represents the final step for employees and the Company to resolve claims that are based on certain legally protected rights." *Id.* (*Emphasis added*).

In the Introduction, GDLS informs its employees, "[t]his Dispute Resolution Handbook contains the procedure for the resolution of employee disputes effective July 2003 and is applicable to all applicants for employment, and all current employees who are not represented by a labor union. . . . Please read it carefully. It describes a condition of your employment." CP 124 ¶ 1. It goes on to say, "This process applies to those employees who believe they have been treated unfairly or in an

unlawful manner.” CP 124 ¶ 2. “Arbitration is the exclusive external remedy for employees and the Company to resolve their disputes based on certain legally protected rights.” CP 125. (Emphasis added).

In Section 4.0 “Arbitration of Claims Alleging a Violation of Certain Legally Protected Rights”, GDLS informs its employees:

The Arbitration applies to, and is intended to completely and finally resolve, any and all controversy, dispute or claim, including the arbitrability of any controversy, dispute or claim between an employee not represented by a labor union and the Company which arises out of or relates to the employment relationship and which is based on a legally protected right. (Emphasis added).

CP 129, ¶ 4.1.1.

The employee and the Company agree and hereby waive the any right to jury trial and any claim otherwise covered by the Arbitration Process. (Emphasis added).

CP 130, ¶ 4.1.8.

In Section 6, “Questions and Answers”, GDLS informs its employees, “[t]he [DRP] program applies to all employees who are not represented by a union. . . .” CP 139.

The last page (page 21) of the “Dispute Resolution Handbook”, entitled “Acknowledgment” is given to “New Hires” and signed by an employee upon being hired. In the “Acknowledgment”:

The undersigned employee of General Dynamics Land Systems, Inc., or one of its Subsidiaries or affiliates, acknowledges that he/she has received, read, and understands the General Dynamics Land Systems Dispute Resolution Policy and agrees to comply with the policy,

arbitrate all specified employment disputes and forego litigation in any judicial forum before a court, jury or administrative agency of all specified employee disputes. (Emphasis added).

CP 142.

3. GDLS' Human Resource Manager and Employee Admit that the DRP Does Not Apply to Independent Contractors like Greg Davis

Susan Williams, GDLS' the Human Resource Manager, admitted to the following in her declaration:

- Greg Davis started work as an independent contractor on October 10, 2005, and did not apply for employment with General Dynamics until March 20, 2006. CP 19-36.
- Davis was not an employee of General Dynamics until April 10, 2006. CP 19-36, 148-153, Interrogatory No. 3.
- Davis signed the DRP Dispute Resolution Handbook when he was hired as an employee of General Dynamics on April 10, 2006. CP 19-36, 154-163, Interrogatory No. 2, 6, 7; CP 218-232.

Interrogatory Question No. 7 asked "Please identify whether Greg Davis signed or endorsed any form of "dispute resolution policy agreement for new hires" before he interviewed and became a permanent employee of General Dynamics Land Systems. The Answer was, "Mr. Davis signed the Dispute Resolution Policy Agreement for New Hires on April 10, 2006." CP 158. Davis was not given a copy of the Dispute

Resolution Handbook while he was an employee of CPI and not until April 10, 2006, when he became an employee of GDLS.

GDLS admitted the following in their response to the Request for Admissions:

- Between October 10, 2005 and April 9, 2006, Greg Davis was an employee of Contract Professionals, Incorporated and was not an employee of General Dynamics Land Systems. CP 143-147, RFA 1 and 2.

GDLS admitted the following in discovery responses:

- Davis was interviewed on March 20, 2006 and was recommended to be hired and he was later hired. CP 164-217.
- Davis was offered a position as an employee of General Dynamics on March 30, 2006. CP 164-183.
- On April 10, 2006, when Greg Davis was hired as an employee of General Dynamics, he signed many agreements and acknowledgements as an employee of General Dynamics, including a new IRS W-4 on April 10, 2006. CP 184-217.

GDLS Human Resource Representative, Kim Keys, testified to the following:

Q. What's your familiarity with Greg Davis?

A. That he is an employee for GD, and that on his orientation day, I was with him.

Q. Do you recall what date that orientation day was?

A. No.

Q. Was that in April 2006?

A. Yes.

Q. April 10th of 2006?

A. Possibly.

Q. Is that the date that he would have signed a dispute resolution procedure --

A. Yes.

Q. -- agreement. That was the day of his orientation?

A. The day of his orientation would have been the day he signed his dispute.

Q. And prior to the time that Greg Davis went through his orientation, who employed him?

A. I believe a contracting house.

CP 223-224.

Q. You've heard of Contract Professionals, Incorporated?

A. Yes, I have, but I do not know which one he belonged to.

Q. And that was otherwise known as CPI?

A. Yes.

Q. And is CPI affiliated with General Dynamics?

A. Not affiliated, but they are one of our contractors that we deal with.

Q. Okay. It's a company that provides contract workers?

A. Correct.

Q. But it's a separate company or corporation?

A. Yes.

Q. Well, let me ask that better. Contract Professionals, Incorporated, is a separate corporation than General Dynamics Land Systems?

A. Correct.

CP 224-225.

Q. Is Exhibit No. 1 - - what is Exhibit No. 1?²

A. It is the signed confirmation that he read the dispute resolution policy and understood it.

² See CP 197.

Q. And what is the date of that document?

A. 4/10 of '06.

Q. April 10, 2006?

A. Yes.

Q. And were you there when Greg Davis signed that document?

A. Yes, I was.

Q. And the documents that new hires are signing are documents related to them being hired as employees of General Dynamics Land Systems?

A. Yes.

Q. And does that Exhibit 1 apply for new hires that are employed by General Dynamics Land Systems?

A. Yes.

Q. Do you ever have individuals sign Exhibit 1 that are not new hires?

A. In April, no.

CP 225-7.

Q. Back at the time that Exhibit 1 was signed, the only people that would sign a document like Exhibit 1 are

people that were offered a position as a new hire for
General Dynamics Land Systems?

A. Yes.

Q. For instance, you wouldn't have a contractor that
had not been offered a position sign Exhibit 1; is that
correct?

A. I would not know what the contracting house
provides their employees, so I would say that I do not
know.

Q. But with regard to General Dynamics Land
Systems, unless a person had actually been offered a
position, they would not sign Exhibit 1?

A. Correct. Unless they were doing a new hire
orientation, they would not sign this document.

Q. And a new hire orientation applies to people that
were going to be hired to General Dynamics Land
Systems?

A. Correct.

CP 227-228. (Emphasis added).

Q. Is Exhibit 1 the date that Greg Davis became an
official employee of General Dynamics Land Systems?

A. Yes.

Q. And prior to the date on Exhibit 1, April 10th of 2006, he was not an employee of General Dynamics Land Systems; is that correct?

A. That is correct.

Q. Based on your understanding as a human relations representative, people that worked for contractors such as QSTAFF or CPI were not employees of General Dynamics Land Systems?

A. Yes.

CP 230.

GDLS Human Resource Manager, Susan Williams, testified to the following:

Q. Does Exhibit No. 1 show the date that Greg Davis became an employee of General Dynamics Land Systems?

A. Yes.

Q. And what date did Greg Davis become an employee of General Dynamics Land Systems?

A. April 10, 2006.

CP 238-9.

Q. And when did Greg Davis become an employee of General Dynamics Land Systems?

A. April 10th, 2006.

Q. Was Greg Davis an employee of General Dynamics Land Systems prior to April 10th of 2006?

A. No.

CP 242-3.

Q. I'm showing you what has been marked as Exhibit 3. Can you identify what Exhibit No. 3 is?³

A. It says it's an amended complaint for damages.

Q. And do you understand Exhibit 3, this lawsuit, to apply to Greg Davis's experience as an independent contractor, based on the language you just read?

A. Yes.

Q. And based on the language you just said, Greg Davis is not bringing a claim related to his employment or as an employee of General Dynamics Land Systems; is that correct?

A. Correct.

CP 243-4.

³ CP 8-13.

Q. But there's nothing in Exhibit No. 1 that would cover any claims that occurred prior to a person becoming an employee of General Dynamics Land Systems in the language of Exhibit 1, is there?

A. Correct.

CP 246.

Q. And Page 9, 4.1.1 (Exhibit 5 to this Response)⁴ relates to any controversy, dispute, or claim between an employee and the company by the language of that section you just read; correct?

A. Correct. "Which arises out of or relates to the employment relationship," correct.

Q. Did General Dynamics Land Systems have an employment agreement with Greg Davis prior to April 10th of 2006?

A. Not to my knowledge.

CP 247. (Emphasis added).

Q. And Exhibit No. 1, that's when Greg Davis was hired on as a new employee of General Dynamics Land Systems; correct?

⁴ CP 129.

A. Correct.

Q. And in that agreement, he, as an employee, agreed to submit all claims related to his employment with General Dynamics Land Systems to an arbitration or dispute resolution process; correct?

A. Correct.

Q. And by the face of Exhibit 1, this agreement for dispute resolution applies -- or is for new hires; correct?

A. Correct.

Q. And that was what Greg Davis was as of April 10th, 2006, a new hire for General Dynamics Land Systems?

A. Correct.

Q. Is there anything in Exhibit 1 that identifies or names contractors as individuals that are covered by this agreement?

A. No.

CP 248

Q. Based on Exhibit No. 1, the claims that new hires are agreeing to submit to the dispute resolution policy of General Dynamics Land Systems are only those claims relating to their application of employment, their

employment, or termination of their employment related to General Dynamics Land Systems; is that correct?

A. Yes.

Q. The allegations in Greg Davis's complaint for damages relate to his experiences as an independent contractor and employee of Contract Professionals, Incorporated; is that correct?

A. Yes.

Q. Prior to April 10th of 2006, Greg Davis's employment relationship was with Contract Professionals, Incorporated; is that correct?

A. Correct.

Q. And after April 10th of 2006, Greg Davis's employment relationship was with General Dynamics Land Systems; is that correct?

A. Correct.

Q. Did General Dynamics Land Systems pay wages to Greg Davis prior to April 10th of 2006?

A. No.

Q. In Exhibit No. 5, the Dispute Resolution Handbook, there's nothing in there that directly states that a new hire's

pending claims are covered by the dispute resolution handbook?

A. Correct.

CP 249-250. (*Emphasis added*).

4. GDLS' Own Policies Explicitly Define and State that Independent Contract Workers are Not GDLS' Employees.

General Dynamic's own policy statement on "Contract Personnel Services" states explicitly and conclusively that GDLS' own policies explicitly define and state that independent contract workers are not GDLS' employees (CP 252-69):

Contract personnel are utilized to perform work/tasks generally not met by the permanent staff. Contract personnel are sourced in lieu of hiring regular full time employees when business conditions and/or the conditions of the external labor market require it. Contract personnel are employees of the contract personnel supplier and are neither employees of the Company nor employees of subcontractors. (*Emphasis added*).

CP 257, 258. (GDLS 0221, 0222).

This is also confirmed in General Dynamics Purchase Order Terms and Conditions Contract Labor. CP 262-9. Paragraph 1, "Contract for Services", states, "[a]ny individual persons named herein or otherwise assigned by Supplier [Labor Contractors] to perform services shall be deemed employees or agents of the Supplier and not employees or agents of the Purchaser [GDLS]." CP 266, GDLS 0200 ¶ 1. Paragraph 9(A),

“Termination”, states, “Purchaser may, at its option, direct Supplier to remove and Supplier shall remove any employee from an assignment to perform services under this agreement.” CP. 268. (GDLS 0202). And paragraph 14, “Rates and Payment”, states, “Seller’s contract labor employees assigned to GDLS shall be classified and paid in accordance with rates agreed to between GDLS and the Seller as specified in the GDLS purchase order.” CP 268. (GDLS 0202).

E. Argument

1. Motion to Dismiss - Generally

Whether or not dismissal of a plaintiff’s claim was appropriate under CR 12(b)(6) is a question of law that appellate courts review de novo. *State ex rel. Evergreen Freedom Found, v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 629, 999 P.2d 602 (2000).

Defendants filed a motion to dismiss Davis’ Amended Complaint pursuant to CR 12 without citing to a specific subsection of that Court Rule. It is presumed by Davis that defendants are attempting to raise the arbitration issue under 12(b)(6)⁵, failure to state a claim upon which relief

⁵ Defendants might also claim that the trial court does not have subject matter jurisdiction under CR 12(b)(1), but the subject matter is the employment agreement, DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy and the Dispute Resolution Policy (“DRP”). The FAA does not provide substantive jurisdiction, and therefore the court has jurisdiction over the DRP, subject to defenses raised, such as CR 12(b)(6), failure to state a claim upon which relief can be granted.

can be granted. See *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 725 (9th Cir. 2000), where the Ninth Circuit determined the issue of arbitrability pursuant to FRCP 12(b)(6), the federal equivalent of CR 12(b)(6).

“CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which [a] plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” (*Emphasis added*). *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff’d on reh’g*, 113 Wn.2d 148, 776 P.2d 963 (1989)).

Under CR 12(b)(6), Washington’s courts are required to accept as true all of the allegations in plaintiff’s complaint and all reasonable inferences from those allegations. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). In ruling on a defense of failure to state a claim, the trial court must construe the complaint in the manner most favorable to the pleader, *Reid v. Pierce County*, 136 Wn.2d at 201, in this case Davis and not defendants. And dismissal, pursuant to CR 12(b)(6), is appropriate only if the complaint alleges no facts that would justify recovery. *Reid v. Pierce County*, 136 Wn.2d at 200-1.

Courts should dismiss under this rule only when it appears beyond a reasonable doubt that no facts justifying recovery exist. (***Emphasis added***). *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 755. “[A] complaint survives a CR 12(b)(6) motion if any set of facts, ‘including hypothetical facts not part of the formal record’, could exist that would justify recovery.” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d at 755. *Hoffer v. State*, 110 Wn.2d at 420.

2. In this Appeal of GDLS’ Motion to Dismiss, the Court Should Review Nothing Outside of the Complaint and Summarily Deny GDLS’ Motion

After reviewing Davis’ complaint and applying the correct standard, the Court of Appeals should find that Davis stated adequate claims for relief and at the time of the facts set forth in his Amended Complaint, he was an independent contractor. No other facts provided by defendant should be admissible or considered unless the court wishes to treat this motion as one for summary judgment, in which case, plaintiff has included additional relevant facts in this opening brief.

Although in a CR 12(b)(6) motion, unless it is treated as a summary judgment motion, the court may not review facts outside of the pleadings and therefore, defendant may not introduce facts, including the DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy

and the Dispute Resolution Policy, Davis is allowed to present hypothetical facts upon which the court may deny defendants' CR 12(b)(6) motion to dismiss.

3. Motion to Dismiss Treated as a Motion for Summary Judgment

When reviewing a grant of summary judgment appellate courts engage in the same inquiry as the trial court. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). That review is *de novo*. *NW. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132 (9th Cir. 2006).

Pursuant to CR 12(b):

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(b).

A party who moves for summary judgment has the burden of proving there are no genuine issues of material fact, and all material evidence and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgments shall be

granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Id.*

Courts may not resolve questions of fact on summary judgment unless, considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, reasonable minds could reach but one conclusion from the evidence presented. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993).

Summary judgment is unwarranted when, although evidentiary facts are not in dispute, different inferences may be drawn from them as to ultimate facts such as *intent*, knowledge, good faith, or negligence. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Sec. State Bank v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000) (summary judgment is not proper if reasonable minds could draw different conclusion from otherwise undisputed evidentiary facts).

Summary judgment is inappropriate where there is contradictory evidence and an issue of credibility is present. *Balise v. Underwood*, 62 Wn.2d at 200.

4. The Scope of the Arbitration Agreement Does Not Encompass Claims Arising Before Greg Davis Became an Employee of GDLS

Appellate courts review de novo a lower court's order granting a defendant's motion to compel arbitration. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) ("The validity and scope of an arbitration clause are reviewed de novo. Whether a party has waived the right to sue by agreeing to arbitrate is reviewed de novo.").

USC Title 9, Chapter 1, (9 USC §§1-16), the Federal Arbitration Act (FAA) applies to worker's arbitration agreements.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce⁶ to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

⁶ In *Circuit City Stores, Inc. v. Adams*, 532 US 105, 121 S.Ct 1302 (2001), the United States Supreme Court, in an opinion divided along anti-labor/pro-labor lines (Justices Kennedy, Rehnquist, O'Connor, Scalia, Thomas in the majority and Justices Stevens, Ginsburg, Breyer, Souter in dissent) and authored by Justice Kennedy, the Court found, without resort to legislative history and ignoring the plain language of the statute, that the last part of the exemption clause found in 9 USC §1, "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*" (emphasis added), refers only to transportation workers and not to simply "any other class of workers engaged in . . . interstate commerce".

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
9 USC §2.

In *Circuit City Stores, Inc. v. Adams*, the United States Supreme Court found the FAA was applicable in state courts and pre-emptive of state laws hostile to arbitration. *Id.*, 532 US 105, 121 S.Ct 1302, 149 L.Ed.2d 234 (2001) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 104, S.Ct 852, 79 L.Ed.2d 1 (1984)).

Whether a particular dispute is governed by an arbitration clause is a matter of federal law. (Foot note omitted). *Powell v. Sphere Drake Ins. PLC*, 97 Wn.App 890, 894, fn. 7, 988 P.2d 12 (1999)

We thus read the underlying issue of arbitrability to be a question of substantive federal law: “Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.”
Southland Corp. v. Keating, 465 U.S. 1, 12, 104 S.Ct. 852 (1984)..

GDLS made four arguments to the lower court: first, public policy favors arbitrability, CP 70; second, the arbitration clause here is valid, CP 72; third, Davis’ claims are covered by the arbitration clause, CP 72; and fourth, the issue of arbitrability must be arbitrated, CP 73.

a. Public Policy May Favor Arbitrability; But That Tells Only Part of the Story

In Defendants’ Renewed Motion to Dismiss for Failure to Exhaust Administrative Remedies, GDLS makes the legally correct claim that

arbitration provisions are favored in the law: citing the United States Supreme Court case of *Preston v. Ferrer*, ___ US ___, 128 S.Ct 978, 981, 169 L.Ed.2d 917 (U.S. 2-20-2008), “9 USC §4 establishes a strong national policy favoring arbitration”, CP 70; citing the Ninth Circuit Court case of *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000), “courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed”, CP 71; and citing the Washington State Supreme Court case of *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 301, fn. 2, 103 P.3d 753 (2004), “the national public policy in favor of arbitration has been expressly adopted by Washington courts”, CP 71.

But, GDLS’ statements of policy, set out above, makeup only part of this story.

The United States Supreme Court has said on many occasions, the FAA “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478, 109 S.Ct 1248 (1989). And, the Washington State Supreme Court has recently affirmed this, declaring that Congress requires that courts to put arbitration clauses on the same footing as other contracts, not to make them special favorites of the law. *Scott v.*

Cingular Wireless, 160 Wn.2d 843, 858, 161 P.3d 1000 (2007) (citing 9 U.S.C. §2).

While under the FAA, arbitration clauses are a matter of federal law, *Powell v. Sphere Drake Ins. PLC*, 97 Wn.App 890, 894, fn. 7, courts apply ordinary state law contract principles in deciding whether the parties agreed to arbitrate a particular dispute in the first instance. *Id.* at 894.

The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. (Footnote omitted). *Id.*, 97 Wn.App at 894. This was again recently articulated by the Washington State Supreme Court in the context of determining arbitrability under the FAA:

To interpret the meaning of a contract's terms, Washington courts employ the context rule. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The context rule requires that we determine the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.

Adler v. Fred Lind Manor, 153 Wn.2d 331, 351-2, 103 P.3d 773 (2004) (citing 25 David K. DeWolf & Keller W. Allen, *Washington Practice, Contract Law and Practice* § 5.5 (1998)).

b. The Arbitration Clause Here Is Valid, But That Is Not the Issue

GDLS next argues the arbitration clause is valid. Unfortunately, this begs the issue. Davis has not argued that the arbitration provisions, under which GDLS wishes to arbitrate this case, are not valid. That is simply not an issue in this case and Davis has no position on the validity of the arbitration provisions here.⁷

The two issues that follow are the key issues. Who decides arbitrability here, an arbitrator or the court? Are Davis' claims covered by the arbitration provisions?

c. The Issue of Who Decides the Issue of Arbitrability Must Be Decided, Not by an Arbitrator, But by the Court

GDLS argued, CP 73-5, and the lower court ruled, CP 316⁸, the issue of who decides the issue of arbitrability was to be decided by the arbitrator.

⁷ GDLS pats itself on the back, claiming its acts are only "even-handed" and that this is shown by the fact of "GDLS going so far as agreeing to pay all of the arbitrator's expenses and compensation". CP 72:29-35. First, there is nothing "even-handed" about arbitration provisions in employment agreements for non-management employees. These are take-it-or-leave-it negotiations, not "even-handed". *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346, 103 P.3d 773 (2004) (discussing "unequal bargaining power"). Second, if GDLS did not agree to pay the arbitrator's expenses and compensation, the arbitration provisions would most likely be unconscionable. See *Id.*, at 353-4 (where an arbitration provision contains a requirement to split the arbitrator's fees, which requirement would effectively prohibit an employee from arbitrating his or her claims, it is unconscionable).

⁸ The lower court's order states in part, "Questions concerning arbitrability are also covered by DRP and themselves must be arbitrated." CP 316.

In making their motion to the lower court, that the issue of who decides arbitrability be decided by an arbitrator, GDLS relied upon the case of *Mount Adams School Dist. V. Cook*, 150 Wn.2d 716, 724 (2003) (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct 1415, 89 L.Ed.2d 648 (1986) (“the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”). (*Emphasis added*).⁹

In asserting that the issue of who decides the issue of arbitrability was to be decided by the arbitrator, GDLS’ argument was flawed and in so deciding, the court’s ruling was incorrect.

In a portion of *AT&T Techs., Inc. v. Communications Workers of Am.* following the section quoted by GDLS, the United States Supreme Court, in reversing the Seventh Circuit held, in no uncertain terms the

⁹ In *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. at 647, the United States Supreme Court cited the following additional authority:

Steelworkers v. Warrior & Gulf [Navigation Co.], *supra*, [363 U.S. 574] at 582-583 [1960)]. See *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970). Accord, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

issue of determining arbitrability is for the court, not the arbitrator to decide:

it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. *It is the court's duty* to interpret the agreement and *to determine whether the parties intended to arbitrate grievances* If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. *It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.*

Id. at 651. (*Emphasis added*).

Here, GDLS relies on the Supreme Court's statement in *AT&T Techs., Inc. v. Communications Workers of Am.* that "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649. (*Emphasis added*). Thus, in maintaining, "that once [Davis] agreed to the Dispute Resolution Process, he agreed to submit *all* claims that he may have against GDLS and its employees to that process, regardless of when the claims arose", CP 73:18-22, GDLS is arguing these arbitration provisions "clearly and unmistakably" provide for the arbitrator to decide the issue of arbitrability. GDLS goes on to maintain, "[t]he agreement between GDLS and [Davis] . . . contains a 'clear and unmistakable' statement of the parties' intent to have the arbitrator decide the question of arbitrability," CP 74:31-5, and, ". . . the Dispute Resolution

Process *explicitly* states that “arbitrability is among the issues to be conclusively decided by the arbitrator, CP 74:44-75:1.

But, in so asserting, GDLS is incorrect.

Neither *Mount Adams School Dist. V. Cook* nor *AT&T Techs., Inc. v. Communications Workers of Am.*, both cited frequently by GDLS, supports GDLS’ position.

In *Mount Adams School Dist. V. Cook*, the Court specifically held the parties had “clearly and unmistakably” agreed the issue of arbitrability be decided by the arbitrator. *Id.* at 724. No such finding of fact was made here. The lower court only provided a conclusory holding that the issue of arbitrability was to be decided by the arbitrator.

In *Mount Adams School Dist. V. Cook*, the Court based its holding on the following findings:

The language of article IX, section 4 of the collective bargaining agreement could not be clearer when it provided, “the merits of a grievance and the substantive and procedural arbitrability issues arising in connection with that grievance may be consolidated for hearing before an arbitrator.” The agreement requires that the arbitrator, however, “shall not resolve the question of arbitrability of a grievance prior to having heard the merits of the grievance.” Therefore the collective bargaining agreement makes clear the MAEA and the District have agreed that ‘the question of arbitrability of a grievance’ is for an arbitrator to decide. [Citations to record omitted].

Id. at 724-5.

The collective bargaining agreement defines a grievance as “an alleged violation, misinterpretation, or misapplication of the Collective Bargaining Agreement.” The grievance the MAEA brought on Cook's behalf alleges the District violated article III, section 4 of the collective bargaining agreement by terminating Cook without sufficient due process. Cook was a member of the MAEA at all times relevant to this dispute. Nothing more is needed to establish the arbitrability of Cook's grievance. [footnote 2]¹⁰

Id at 725.

Mount Adams School Dist. V. Cook is simply a case that falls under the narrow exception carved out in *AT&T Techs., Inc. v. Communications Workers of Am.* where the parties had “clearly and unmistakably” agreed the issue of arbitrability would be decided by the arbitrator.

In *AT&T Techs., Inc. v. Communications Workers of Am.*, the United States Supreme Court simply carved out that narrow exception, applied by the Washington State Supreme Court in *Mount Adams School*

¹⁰ Footnote 2 in *Mount Adams School Dist. V. Cook*:

Where, as here, a collective bargaining agreement explicitly vests an arbitrator with authority to resolve issues of substantive and procedural arbitrability, the threshold inquiry of arbitrability must ultimately be submitted to an arbitrator to decide. See *AT&T Techs.*, 475 U.S. at 649. If the arbitrator determines the dispute is not subject to arbitration, the arbitrator's job is finished. If the arbitrator decides the dispute is subject to arbitration, then the merits of the dispute shall be arbitrated. But here the collective bargaining agreement provides an arbitrator with the authority to resolve issues of substantive and procedural arbitrability only after hearing the merits of the grievance. As such, this dispute must be submitted to arbitration, notwithstanding the fact that the arbitrator may decide Cook's grievance is not subject to arbitration after hearing the merits.

Mount Adams School Dist. V. Cook at 725, fn 2.

Dist. V. Cook, to the general rule that courts determine the issue of arbitrability.

In *AT&T Techs., Inc. v. Communications Workers of Am.*, petitioner employer and respondent union were parties to a collective-bargaining agreement, which provided for arbitration of differences arising over interpretation of the agreement. Article 9 of the agreement provided the employer was free to exercise certain management functions, including the hiring, placement, and termination of employees, not subject to the arbitration clause. Article 20 prescribed the order in which employees were to be laid off “[w]hen lack of work necessitates Layoff.” The union filed a grievance challenging the employer’s decision to lay off 79 Chicago workers, claiming there was no lack of work and therefore the layoffs violated the agreement. The employer refused to submit the grievance to arbitration on the ground that under Article 9 the layoffs were not arbitrable. The union then sought to compel arbitration by filing suit in federal district court, which, after finding that the union’s interpretation of Article 20 was at least “arguable”, held it was for the arbitrator, not the court, to decide whether that interpretation had merit and ordered the employer to arbitrate. The Court of Appeals affirmed. The issue before the United States Supreme Court was “whether . . . the dispute over interpretation of Article 20 was subject to the arbitration clause, should

have been decided by the District Court and reviewed by the Court of Appeals, and should not have been referred to the arbitrator.” *Id.* at 648-657. The Supreme Court held that under the principles set forth in the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593(1960)), it was the District Court's duty to interpret the collective-bargaining agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a “lack of work” determination by the employer. *Id.* at 648-651. Further:

[t]he Court expressly reaffirmed this principle in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The “threshold question” there was whether the court or an arbitrator should decide if arbitration provisions in a collective-bargaining contract survived a corporate merger so as to bind the surviving corporation. *Id.*, at 546. The Court answered that there was “no doubt” that this question was for the courts. “Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.’ . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.” *Id.*, at 546-547. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. at 649.

The question of who decides arbitrability is an issue for judicial determination. *Id.* Unless the parties “clearly and unmistakably” provide

otherwise, the question of arbitrability must be decided by the court not by an arbitrator. *Id.*

But to counter this, GDLS repeatedly argues the public policy favoring arbitration requires that an arbitrator decide the issue of arbitrability. They seemingly argue this public policy virtually trumps everything else. But, that is not so. The rule set forth in the *Steelworkers Trilogy*, *John Wiley & Sons, Inc. v. Livingston*, and in *AT&T Techs., Inc. v. Communications Workers of Am.* was very recently applied once again by the Ninth Circuit in *Granite Rock Co. v. Int'l Brotherhood*:

Congress and the Supreme Court have declared a “national policy favoring arbitration.” *Buckeye Check Cashing*, 546 U.S. at 443 (citing the Federal Arbitration Act, 9 U.S.C. §§ 1-16). As courts have noted however, this policy is best served by limiting arbitrators' jurisdiction to those cases where the parties have actually agreed to arbitrate; “[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be ‘drastically reduced’ . . . if a labor arbitrator had the ‘power to determine his own jurisdiction. . . .’” *AT & T [Techs., Inc. v. Communications Workers of Am.]*, 475 U.S. at 651 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L.Rev. 1482, 1509 (1959)).

Granite Rock Co. v. Int'l Brotherhood, ___ F.3d ___, ___ (9th Cir. 10-22-2008) Nos. 07-15040, 07-16142, 07-16236 at 14721.

In a number of other cases, the United States Supreme Court has made it clear, “[c]ourts should not assume that the parties agreed to arbitrate arbitrability.” *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938, 115 S.Ct 1920, 131 L.Ed.2d 985 (1995). In *First Options of*

Chicago v. Kaplan, the United States Supreme Court reversed the usual presumption in favor of arbitration when it came to the issue of “who decides” whether parties agreed to arbitrate. The Court went on to affirm the standard set forth in *AT&T Techs., Inc. v. Communications Workers of Am.*, saying that in determining whether a party had agreed to arbitrate a particular matter, the presumption is that a court should make that determination “unless there is clear and unmistakable evidence” the parties intended for an arbitrator to decide arbitrability. *First Options of Chicago, Inc., v. Kaplan* 514 U.S. at 944.

In deciding the issue of who decides arbitrability, Washington courts follow the reasoning set forth in *First Options of Chicago, Inc., v. Kaplan*. “The party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention.” *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn.App 203, 213-4, 156 P.3d 293 (2007), review granted, 163 Wn.2d 1011 (2008) (citing *Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546, 550 (7th Cir. 1970)). In *Associated Milk Dealers, Inc. v. Milk Drivers Union*, the Seventh Circuit made the following finding:

Though strongly favoring arbitration, the Supreme Court in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 913, 11 L.Ed.2d 898 (1964), stated, “[t]he

duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." The district court must determine whether the dispute between the parties is arbitrable, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L. Ed.2d 1409 (1960), unless the parties voluntarily submit arbitrability to the arbitrator. *Metal Products Workers Union, Local 1645 v. Torrington Co.*, 358 F.2d 103, 105 (2d Cir. 1966). The party claiming that arbitrability is for the arbitrator to decide bears the burden of proof and must show that the contract clearly manifests such an intention, *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra* 363 U.S. at 583 n. 7, 80 S.Ct. 1347. AMDI has not satisfied this burden. The reference in Article 6 to "[a]ny matter in dispute" is insufficient, without further evidence of intent or express mention of the question of arbitrability, to demonstrate that the parties intended the arbitrator to decide arbitrability. *Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555, 557 (2d Cir. 1965); *Torrington Co. v. Metal Products Workers Union, Local 1645*, 347 F.2d 93, 96 (2d Cir. 1965). *See also Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962).

Associated Milk Dealers, Inc. v. Milk Drivers Union, 422 F.2d at 550-1.

Neither the facts nor the holding in *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.* supports GDLS position, nor the lower court's holding, that an arbitrator should determine the issue of arbitrability. But, a correct interpretation of the facts does support Davis' claim that the issue of arbitrability is for the court to determine.

Four principles have been articulated by the U.S. Supreme Court and adopted by Washington courts for determining arbitrability: (1) the

duty to arbitrate arises from the contract; (2) a question of arbitrability is a judicial question unless the parties clearly provide otherwise; (3) a court should not reach the underlying merits of the controversy when determining arbitrability; and, (4) as a matter of policy, courts favor arbitration of disputes. *Kamaya Co., Ltd. v. American Property Consultants, Ltd.*, 91 Wn. App. 703, 713-4, 959 P.2d 1140 (1998) (quoting *W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987) (citing *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. at 648)).

In their motion to the lower court, defendants elected to quote only a small portion of the GDLS' Dispute Resolution Process. CP 74:35-44. By quoting only the portion they quoted and leaving out another significant portion, defendants leave the court with a false impression. GDLS only quoted this:

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, ***including the arbitrability of any controversy, dispute or claim***

CP 74:35-44.

When reading only this portion of the GDLS' Dispute Resolution Process, GDLS' argument may seem almost reasonable. That is why they cut off the quote where they did. The entire quote, which should be provided for the Court for review is, as follows:

***The Arbitration Process applies to,** and is intended to completely and finally resolve, any controversy, dispute or claim, including the arbitrability of any controversy, dispute or claim, **between the employee** not represented by a labor organization **and the Company which arises out of or relates to the employment relationship** and which is based on a legally protected right. . . .*

CP 130 (DRP 4.1.1). (***Emphasis added.***)

From this language it is clear the GDLS' arbitration process, "including the arbitrability of any controversy, dispute or claim" applies only to those controversies, disputes or claims "between the employee . . . and [GDLS] which arises out of or relates to the employment relationship. . . ." It is equally clear from the facts alleged in Davis' Amended Complaint against GDLS that the facts alleged therein do not arise out of or relate to Davis' "employment relationship" with GDLS. CP 110-115.

The facts, as alleged in Davis Amended Complaint, raised again in his response to defendants' motion to dismiss and then raised again in this opening brief, at the very least, create an issue of fact as to what the parties' intentions were in entering into the GDLS' Dispute Resolution Process. If there exists a question of fact, the Court of Appeals must reverse the lower court's holding on who decides the issue of arbitrability.

d. Davis' Claims Are Not Covered by the Arbitration Provision

If the court was correct that the issue of arbitrability was one for the arbitrator to decide, the remaining issue, of whether or not the GDLS'

arbitration provision requires arbitration of the issues in Davis' complaint, is moot and was not an issue to have been decided by the lower court. *See AT&T Techs., Inc. v. Communications Workers of Am.*, at 654-6, (Brennan, J., concurring).

But, the court was in error on the issue of who is to decide arbitrability. Contrary to the ruling of the court, the issue of arbitrability was to be decided by the court, not by the arbitrator. Assuming the lower court should decide the issue of arbitrability, but did so incorrectly, and should also decide the issue of whether or not the arbitration provision requires arbitration of the facts alleged in Davis' complaint, the court erred in ruling the facts here require arbitration. To be clear, here, the lower court, in addition to being incorrect on its ruling regarding who decides arbitrability, was incorrect on its ruling regarding submission of the underlying dispute to the arbitrator. Therefore, if the Court of Appeals reverses the lower court on the issue of who decides arbitrability and holds that it is an issue for the court, not an arbitrator, then the Court of Appeals can proceed with this issue: whether or not the arbitration provision requires arbitration of the facts alleged in Davis' complaint.

“[F]ederal case law confirms that, parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so.

[Footnote 21].”¹¹ *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn.App 890, 898, 988 P.2d 12 (1999).

An arbitrator’s authority to adjudicate a dispute is derived solely from the agreement of the parties. *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991). The arbitrator “has no independent source of jurisdiction apart from the consent of the parties.” *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (9th Cir. 1986). Consequently, the question of whether a particular party entered into a contract containing an arbitration agreement “must first be determined by the court as a prerequisite to the arbitrator’s taking jurisdiction.” *Id. Sanford v. Member Works, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007). Similarly, challenges to the validity of an agreement to arbitrate must be resolved by a court. *Buckeye Check Cashing, Inc. v.*

¹¹ Footnote 21 in

See, e.g., Zimmerman v. International Cos. & Consulting, Inc., 107 F.3d 344, 346 (5th Cir. 1997); *Morewitz v. West of England Ship Owners Mut. Protection and Indem. Ass’n*, 62 F.3d 1356, 1365 (11th Cir. 1995) (“Although we recognize that *Morewitz* now ‘stands in the shoes’ of General Development, we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so.”), *cert. denied*, 516 U.S. 1114 (1996); *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 (5th Cir. 1989) (citing, *inter alia*, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).

Powell v. Sphere Drake Ins. P.L.C., 97 Wn.App 890, 898, fn. 21, 988 P.2d 12 (1999).

Cardegna, 546 U.S. 440, 444, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2005).

“It is axiomatic that “[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.” *Sanford v. Member Works, Inc.*, 483 F.3d at 962 (quoting *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. at 648). Therefore, only disputes that the parties have agreed to submit to arbitration will be submitted. *First Options v. Kaplan*, 514 U.S. at 943. Issues concerning the existence of an agreement to arbitrate are for the court to decide. *Sanford v. Member Works, Inc.*, 483 F.3d at 962. In ruling on this issue, a court generally “should apply ordinary state-law principles that govern the formation of contracts.” *First Options v. Kaplan*, 514 U.S. at 944.

The common law distinguishes between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved. *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996) (citing *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 749 fn. 23, 875 P.2d 1228 (1994)).

Whether the statements contained in an employee manual are sufficiently specific to be enforceable is a question of law. *Magula v. Benton Franklin Title Ins. Co.*, 79 Wn.App 1, 5, 901 P.2d 313 (1995) (citing *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613, 762 P.2d 1143 (1988)). But, even where a court decides the promises are sufficiently specific to be enforceable, the remaining issues present questions of fact, here the question of fact remaining is whether such statements in the DRP are applicable to the particular employee, *Magula v. Benton Franklin Title Ins. Co.*, 79 Wn.App at 5 (citing *Siekawitch v. Washington Beef Producers, Inc.*, 58 Wn. App. 454, 793 P.2d 994 (1990)).

An enforceable contract requires a “meeting of the minds” on the essential terms of the parties' agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266. Here, no meeting of the minds occurred as to the application of the GDLS' DRP to acts of independent contractors who later become employees, nor was there any finding that such a meeting of the minds occurred.

The Dispute Resolution Policy agreement was not executed by Greg Davis when he first started as an independent contractor with GDLS, but only when he became an employee. CP 148-217, 225-8, 230, 238-50. These policies and agreements contain the following statements:

By this agreement (the “Agreement”), I agree to the exclusive resolution of all claims arising out of or related to my application for employment, employment, or termination of employment by the terms of the company’s dispute Resolution Policy (“DRP”) attached hereto as Exhibit A. (*Emphasis added*).

CP 197. (Exhibit A is found at CP 120-42.).

DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy, First ¶.

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, including the arbitrability of any controversy, dispute or claim, between the employee not represented by a labor organization and the Company which arises out of or relates to the employment relationship and which is based on a legally protected right. (*Emphasis added*).

CP 129, DRP § 4.1.1. (From the DRP Referred to as Exhibit A in the Preceding Paragraph.).

The language emphasized above, makes it clear that these dispute resolution policies and agreements apply only to “employee[s]” who have an “employment relationship” with GDLS. They do not apply to independent contractors, employed by other entities. Here, prior to becoming employed by GDLS, Davis was an independent contractor of GDLS and an employee of CPI.

The following facts are set forth in Davis’ Amended Complaint, as follows:

- At the time of the discriminatory conduct by defendants, plaintiff was an independent contractor employed by Contract Professionals, Incorporated (hereinafter (“CPI”). CP 9, Am. Comp. 4.1.1.

- This claim arises from the severe and pervasive and physical harmful racial discrimination against an African-American independent contractor of GDLS prior to his application and permanent employment by GDLS. CP 10, Am. Comp. § 5.1.1.
- Racial comments, treatment and name calling has occurred on a continued basis when plaintiff went to work as an independent contractor at GDLS.” CP 10, Am. Comp. § 5.2.1.
- African American independent contractors were often written up, threatened or disciplined for the same actions that Caucasians were never written up, threatened or disciplined for. African American independent contractors were forced to do jobs that Caucasians were not.” CP 10, Am. Comp. § 5.2.3.
- African American independent contractors were treated in a disparate manner than Caucasians. CP 11, Am. Comp. § 5.3.1.
- Despite notice, GDLS has failed to take necessary and appropriate steps to end such racial discrimination upon ethnic minority independent supervisors (sic) [contractors]. CP 11, Am. Comp. § 5.5.1.

(Emphasis added).

State law generally governs contract-interpretation issues arising in an arbitration dispute. *See, e.g., Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 100 (2d Cir, 2002).

[T]he duty to arbitrate is a contractual obligation controlled by the parties' intentions, and the FAA “does not require parties to arbitrate when they have not agreed to do so. . . .” *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) (quoting *Volt Info. Scis., Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). The courts interpret agreements in favor of arbitrability. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444

(1985). “Our inquiry is two-fold: whether the parties agreed to arbitrate and, if so, whether the scope of that agreement encompasses the asserted claims.” *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir.) (citing *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1050 (2d Cir. 1989); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987); *Mitsubishi*, 473 U.S. at 626-28), *cert. denied*, 501 U.S. 1267 (1991).

Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 397, 111 P.3d 282 (2005).

This arbitration agreement is unambiguous and nowhere in its terms does it reflect an intention of the parties to include claims arising before Davis became an “employee” of and had an “employment relationship” with GDLS. And, as the court in *Todd v. Venwest Yachts, Inc.* stated, although the parties may have agreed to arbitrate something, “the scope of that agreement” does not “encompass[] the asserted claims”. That is the situation we find here. Although there may be an arbitration agreement that is enforceable upon Davis becoming an employee of GDLS, the arbitration policy and agreement, by their terms, apply only to employees with an employment relationship with GDLS and not to independent contractors, which Davis was at all times of which he complains in his Amended Complaint.

In *Todd v. Venwest Yachts, Inc.*, plaintiff, a commissioned salesperson of defendant sought to recover commissions he claimed were owed to him for boats he sold or listed for sale. At the time of the

employment relationship was entered into, both parties were members of a professional association, the Northwest Yacht Broker's Association ("NYBA"), having bylaws containing a mandatory arbitration clause. The employment agreement between the parties did not contain an arbitration provision and did not incorporate by reference the professional association's arbitration clause. Plaintiff sued for his commission and defendant affirmatively defended that plaintiff had failed to mediate/arbitrate as required by the NYBA bylaws. The court held that although the parties had agreed under the bylaws of the NYBA to arbitrate, and the NYBA arbitration agreement fell within the scope of the Federal Arbitration Act ("FAA"), and courts interpret the FAA in favor of arbitration, the actual "duty to arbitrate is a contractual obligation controlled by the parties' intentions" and the FAA "does not require parties to arbitrate when they have not agreed to do so." *Todd v. Venwest Yachts, Inc.*, 127 Wn. App. at 397. The court went on to say their decision was based on a two prong test. First, the court must determine if the parties agreed to arbitrate. And second, whether the scope of the arbitration agreement encompasses the asserted claims. *Id.* Although the court in *Todd v. Venwest Yachts, Inc.* based their decision on the first prong of the test, it is clear from the decision that both prongs are of equal weight and both prongs must be satisfied in order for an arbitration

agreement to be binding on the parties. *Id.* In *Davis v. GDLS*, it is the second prong of the test, which defendants are unable to meet.

Here, the facts are simple. Davis was an employee of Contract Professionals, Incorporated and an independent contractor at GDLS at all relevant times pleaded in his Amended Complaint. Any employment agreements, including the DISPUTE RESOLUTION POLICY AGREEMENT FOR NEW HIRES – Agreement to Submit All Covered Claims to Dispute Resolution Policy and the Dispute Resolution Policy, apply only to employees and, by their very terms, do not apply to independent contractors. As an independent contractor the employment agreements did not apply to Davis and defendant's motion to dismiss should have been denied in the lower court.

F. Conclusion

On the issue of who decides arbitrability, in *Mount Adams School Dist. V. Cook*, the Court specifically held the parties had “clearly and unmistakably” agreed the issue of arbitrability be decided by the arbitrator. *Id.* 150 Wn.2d at 724. No such finding was made here. Without such a finding of fact, there are only two actions the Court of Appeals can take. On the issue of who determines arbitrability, the Court of Appeals may either reverse the lower court and remand for trial on the issues or remand to the lower court in order

that they can hear evidence on this issue in order to make findings of fact. As, at the very least there exists issues of fact surrounding the parties' intent, the Court of Appeals should elect the former and simply reverse the lower court and remand for trial.

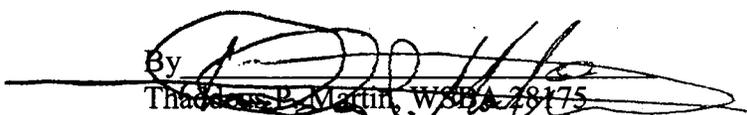
On the issue of whether or not the facts, as alleged in Davis' complaint, are subject to arbitration, the DRP is clear that it applies only to employees and to the employment relationship. GDLS HR personnel testified in deposition that the GDLS' DRP applies only to employees. It is equally clear that Davis was an independent contractor and not an employee at all times relevant to his complaint.

The courts must decide the issue of who decides arbitrability and the court must decide if the facts, as alleged in Davis' complaint, are subject to arbitration.

For the reasons stated above, defendants' motion to dismiss should have been denied. The Court of Appeals should reverse the lower court and remand this matter for a jury trial.

RESPECTFULLY SUBMITTED this 5th day of January 2009.

THADDEUS P. MARTIN, LLC

By 

~~Thaddeus P. Martin, WBA 78175~~

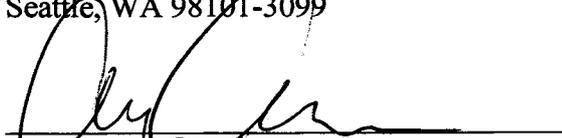
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via legal messenger on the 5th day of January, 2009.

Persons served:

Bruce Cross
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099



Carlie Clarence, Legal Assistant

FILED
COURT OF APPEALS
09 JAN -5 PM 11:07
STATE OF WASHINGTON
BY  DEPUTY