

**FILED**

OCT 16 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 33242-0-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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GORDON SCHUSTER, on behalf of himself, individually, and on behalf  
of the Estate of RONALD SCHUSTER; DIANA YECKEL, individually;  
PAT SCHUSTER, individually; KARL W. LAMBERT, ARNP;  
REDIMEDI CLINIC; and HOUSECALL, PLLC,

Respondents/Cross-Appellants,

v.

PRESTIGE SENIOR MANAGEMENT, LLC, et al., Defendants,

v.

LA VIDA COMMUNITIES, INC.; LSREF GOLDEN OPS 14 (WA),  
LLC; SERVCO OPERATING LLC; SRG LA VIDA OPPS NW SERIES;  
and SRG SERVCO LLC,

Appellants/Cross-Respondents.

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**REPLY BRIEF OF SCHUSTER RESPONDENTS/CROSS-  
APPELLANTS**

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## **I. INTRODUCTION**

Having written the agreement choosing the National Arbitration Forum (“NAF”) as the sole forum for arbitration of disputes, Appellants (collectively the “Blossom Creek Defendants”) now want the Court to rewrite the provision to force Ronald Schuster’s estate (and the other Schusters, if the Blossom Creek Defendants get their way) into arbitrating in a forum to which he never agreed. Presumably, the Blossom Creek Defendants chose the NAF because of its business-friendly reputation; now that the NAF has voluntarily ceased arbitrating consumer claims as part of its settlement with the Minnesota Attorney General’s office, the sole forum to which LSREF and Ronald Schuster agreed is no longer available. If the Court reaches this issue, which it need not do if affirms the trial court on the waiver issue, it should reverse the trial court’s ruling and remand for trial on the merits.

## **II. ARGUMENT**

The Blossom Creek Defendants insist that the NAF forum selection clause in the arbitration provision isn’t integral, arguing that the agreement provides for an alternate arbitrator by mentioning the Federal Arbitration Act (“FAA”). Claiming the issue can be simply resolved by reference only to the agreement and the FAA, the Blossom Creek Defendants nonetheless cite cases from around the country that have

resolved this question in their favor. As detailed below, courts have indeed ruled differently on this issue, but the better reasoned ones seek to enforce what the parties actually agreed to rather than using federal law as a stop-gap measure to fill in whatever elements are missing once the offending provisions are stripped out of the arbitration agreement.

In its opening brief, the Schusters cited numerous cases that held the selection of the NAF was integral to the parties' agreement to arbitrate and that the absence of the chose forum rendered the provision unenforceable. Those citations and arguments will not be repeated here. Instead, the following paragraphs will briefly address the Blossom Creek Defendant's primary cases and the central point on which they depend: that section 5 of the FAA solves all problems.

The Blossom Creek Defendants primarily rely on two federal court of appeals' decisions, *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013) and *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012), both of which, interestingly enough, drew thoughtful and compelling dissents.<sup>1</sup> In *Khan*, the majority strained to find ambiguity in the phrase "[all claims] SHALL BE RESOLVED EXCLUSIVELY AND FINALLY

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<sup>1</sup> The other federal circuit court decision the Blossom Creek Defendants cite, *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000), only cursorily analyzes the issue and is not helpful. Nor do the other cases cited analyze the issue differently than *Green* or *Khan*.

BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect.” 669 F.3d at 351. In the majority’s view, the word “EXCLUSIVELY” could modify either “BINDING ARBITRATION” or “THE NATIONAL ABITRATION FORUM” or both. *Id.* at 354. Because of the supposed ambiguity, the majority appealed to the generic policy in favor of arbitration and ruled accordingly. *Id.* at 356.

In dissent, Judge Sloviter correctly noted that the phrase was written in all caps, unlike the surrounding sentences, which indicated that the parties intended the phrase to be read together. *Id.* at 358 (Sloviter, J., dissenting). Because the parties agreed only to the NAF as arbitrator, section 5 of the FAA was inapplicable and could not save the unenforceable agreement. *Id.*

In so opining, Judge Sloviter reiterated the foundation of arbitration—that is, a private dispute resolution procedure based solely on the parties’ agreement: “Given “the consensual nature of private dispute resolution,” courts must respect the principle that “parties are generally free to structure their arbitration agreements as they see fit.” *Id.* (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010)). In other words, courts should not violate the parties’ agreement in a misguided attempt to send the dispute to

arbitration at any cost. Finally, Judge Sloviter attaches importance to the reason for NAF's unavailability: it "represented to corporations that it would appoint anti-consumer arbitrators and discontinue referrals to arbitrators who decided cases in favor of consumers." *Id.* Such an arbitrator is hardly the neutral forum Congress contemplated in enacting the FAA.

In *Green*, the parties had agreed to arbitration to be conducted under the rules of the NAF. 724 F.3d at 788. The majority criticized the "integral" approach and opined that section 5 of the FAA could be used to correct any deficiencies in the parties' agreement. *Id.* at 792. In dissent, Judge Hamilton again focused on the key element of arbitration, the parties' intent. *Id.* at 793 (Hamilton, J., dissenting). The following illustrations are a few of the high points from his well-reasoned dissent.

Judge Hamilton pointed to the NAF's code, particularly Rule 48(D), whereby the NAF could decline to hear a matter, in which case the parties could "seek legal and other remedies in accord with applicable law." *Id.* at 796. He then states: "In other words, the terms of the Forum's Code, chosen by these parties, repeat that the Code provides for arbitration by the Forum or by nobody. Since the Forum made itself unavailable, that should mean arbitration by nobody." *Id.* Nor does a generic severability

clause help because it allows the court to “pick[] and choos[e] terms that promote arbitration and eras[e] the ones that do not.” *Id.*

In response to the majority’s arguments regarding section 5 of the FAA, Judge Hamilton notes, that as applicable to these NAF agreements, the statute provides for a court to appoint an arbitrator “if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy.” *Id.* at 796 (quoting 9 U.S.C. § 5). He reasons persuasively that failure of the parties’ chosen and exclusive arbitrator is not a lapse within the meaning of the statute, citing *In re Salomon Inc. Shareholders’ Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995). Instead, a “lapse” means a “lapse in time in naming an arbitrator or filling a vacancy on a panel of arbitrators, or some other mechanical breakdown in selecting an arbitrator, and not as a means ‘to circumvent the parties’ designation of an exclusive arbitral forum.’” 724 F.3d at 797 (citing *Salomon*, 68 F.3d at 560-61). Judge Hamilton would follow *Salomon* as the persuasive side of the circuit split—as opposed to *Khan* and *Brown*—because the parties’ agreement provided the exclusive means of arbitrating and provided for an alternative if that was unavailable, namely, litigation. *Id.* at 798.

The Blossom Creek Defendants represent this issue as a simple matter of contract interpretation without needing to resort to interpretive

case law. But the issue is not so simple, as courts have decided it both ways. Instead, the Court should examine the best reasoning of these decisions and apply it here. In a nutshell, when the parties have agreed to a particular arbitration forum, rules, and alternative if the forum is unavailable (i.e., litigation), the court should enforce the parties' agreement as written and not rewrite it to compel them to arbitrate as they never intended. As the Supreme Court has said, courts should "rigorously enforce arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013). Indeed, the "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). As the Schusters have argued previously, the care agreement provided the exclusive means for arbitration administered by the NAF according to its rules. Now that the NAF has voluntarily withdrawn from this work, the parties are left with litigation per the NAF rules. The Court should so rule.

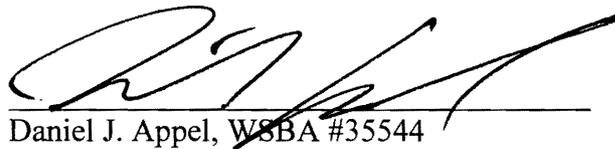
### **III. CONCLUSION**

For the foregoing reasons, the Court should rule, if it reaches the issue, that the unavailability of the NAF as the arbitration forum renders

the arbitration provision unenforceable, thereby reversing the trial court's ruling and remanding for trial on the merits of the dispute.

Dated this 13th day of October, 2015.

FOREMAN, APPEL, HOTCHKISS & ZIMMERMAN, PLLC

A handwritten signature in black ink, appearing to read 'D. Appel', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington that I am over the age of eighteen and not a party to this action, and that on October 13, 2015, I served a true and correct copy of the foregoing document as indicated below:

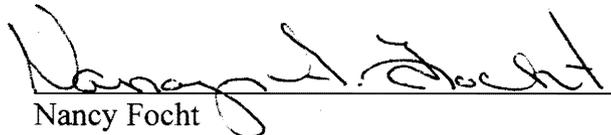
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Dated this 13th day of October, 2015.

  
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