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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 367924

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

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DAVID TERRY INVESTMENTS, LLC-PRC, a Washington State limited liability company, and DAVID TERRY, a married individual,

Plaintiffs-Respondents,  
v.

HEADWATERS DEVELOPMENT GROUP, LIMITED LIABILITY COMPANY, a Washington State limited liability company, STONERIDGE CONTRACTORS, LLC, a Washington State limited liability company, SG SPADY CONSULTING & CONSTRUCTION MANAGEMENT, LLC, a Washington State limited liability company, PARK ROAD COMMONS, LLC, a Washington State limited liability company, and STEVE SPADY, an individual,

Defendants-Appellants,

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

This case involves, among other things, claims of significant and widespread financial fraud and misconduct involving approximately \$5,500,000. Defendants-Appellants (hereinafter “Defendants”) are seeking to overturn the trial court’s ruling that grants in part and denies in part Defendants’ motion to compel arbitration of the claims. (CP 391-393). In making its motion, the trial court properly interpreted three Joint Venture Agreements between David Terry Investments (hereinafter “DTI”) and Headwaters Development Group (hereinafter “Headwaters”).

The trial court thoroughly considered the narrow arbitration language in the Joint Venture Agreements and rightfully compelled arbitration of the breach of contract claim against Headwaters, which is based on those agreements. The trial court declined to compel arbitration for the other claims – fraud, unjust enrichment, and conversion – because those claims are not “over” the Joint Venture Agreements. Indeed, these claims involve entities or individuals that were not parties to the Joint Venture Agreements. Accordingly, the trial court’s order granting in part and denying in part Defendants’ motion to compel arbitration was appropriate and should be affirmed.

## **II. QUESTIONS PRESENTED**

1. Did the trial court properly interpret the arbitration clauses as being narrow in scope, as supported by case law? Yes.
2. Did the trial court correctly find that the claims for fraud, unjust enrichment, and conversion are not subject to arbitration? Yes.
3. Did the trial court properly grant Plaintiffs' motion to amend the complaint and motion to compel discovery when it correctly denied in part Defendants' motion to compel arbitration? Yes.

## **III. STATEMENT OF CASE**

### **A. Background**

On August 21, 2018, DTI and David Terry (hereinafter "Terry") filed this lawsuit concerning approximately \$5,500,000 paid to Headwaters. (CP 3-10). These funds were obtained by Defendants through fraud. (CP 4-8, CP 100-105). Then, the funds were wrongfully converted and transferred to various others, including Steve Spady (hereinafter "Spady"), Stoneridge Contractors LLC (hereinafter "Stoneridge"), SG Spady Consulting and Construction Management (hereinafter "SG Spady"), and Park Road Commons LLC (hereinafter "Park Road"), that have improperly retained these funds. (CP 9, CP 105-106). These actions form the basis for the causes of action for fraud, unjust enrichment, and conversion. (CP 3-10, CP 99-107).

Certain conduct by Headwaters also violated three Joint Venture Agreements between DTI and Headwaters, and that conduct forms the

basis for a breach of contract cause of action against Headwaters, that was added to this case in Plaintiffs' First Amended Complaint. (CP 106-107).

In late 2013, DTI and Headwaters signed three Joint Venture Agreements, each having to do with developing a separate property. (CP 33-39, CP 49-56, CP 69-76). These Joint Venture Agreements contain identical narrow arbitration clauses, each providing for arbitration “[i]n a dispute **over this agreement.**” (CP 36-37, CP 52-53, CP 72-73) (emphasis added).<sup>1</sup> The first was dated September 10, 2013. (CP 33-39). The second was dated December 5, 2013. (CP 49-56). The third and final Joint Venture Agreement was dated December 15, 2013. (CP 69-76).

The Joint Venture Agreements are not signed by the other Defendants. (CP 33-39, CP 49-56, CP 69-76). In other words, only DTI and Headwaters are parties to these agreements. In fact, the agreements do not even mention Stoneridge or Park Road. (*Id.*). Further, these agreements only make a passing reference to SG Spady. (*Id.*). Steve

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<sup>1</sup> Defendants cite three Consulting Agreements between SG Spady and DTI entered into in July and October 2013. (CP 27-31, CP 41-45, CP 60-64). These agreements provided that SG Spady would facilitate the entering into of the Joint Venture Agreements between DTI and Headwaters. A plain reading of the First Amended Complaint indicates these agreements have no bearing on this case. (CP 99-107). Plaintiffs have not pled or asserted any claim against any of the Defendants based on those agreements. That said, the Consulting Agreements contain identical key arbitration clause language as the Joint Venture Agreements. The Consulting Agreements do not change Plaintiffs' analysis or position.

Spady signed on behalf of Headwaters but is not separately a party to these agreements. (*Id.*). Lastly, the Joint Venture Agreements are silent as to Headwaters' or Spady's other business relationships or agents. (*Id.*).

Laura Koger was subsequently added as a defendant in the Second Amended Complaint and claims of unjust enrichment, conversion, and civil conspiracy have been asserted against her. (CP 376-386).

### **B. Trial Court Proceedings**

After receiving the Summons and Complaint, Defendants hired counsel who filed a motion to compel arbitration on September 21, 2018. (CP 14-21). This attorney was subsequently disqualified due to a conflict of interest on October 5, 2018. (VRP 15, VRP 20-22). On October 9, 2018, Plaintiffs filed the First Amended Complaint. (CP 99). That complaint alleged causes of action for: (1) fraud against Spady and Headwaters; (2) unjust enrichment against all Defendants; (3) conversion against all Defendants; and (4) breach of contract against Headwaters based on the three Joint Venture Agreements. (CP 99-107).

On March 22, 2019, Defendants, through new counsel, again moved to compel arbitration. (CP 11-12). The motion to compel arbitration was set for hearing on April 12, 2019. (VRP 1-2). On that same day, Plaintiffs scheduled a motion to compel discovery and a motion to amend the Complaint to add Laura Koger. (*Id.*). The trial court granted

in part and denied in part the motion to compel arbitration with regard to the claims alleged in the First Amended Complaint. (CP 364-367). Specifically, the trial court compelled Plaintiffs' breach of contract claims against Headwaters to arbitration but retained jurisdiction as to all remaining claims and parties. (*Id.*).

In light of the decision to keep the majority of this case in the Spokane County Superior Court, the trial court then granted Plaintiffs' motion to compel discovery (CP 368-370), and motion to amend the complaint to add Laura Koger as a party. (CP 371-373).

#### **IV. ARGUMENT**

The Court should affirm the trial court's ruling on Defendants' motion to compel arbitration because: (1) the arbitration clauses of the Joint Venture Agreements are narrow in scope and only encompass disputes "over" the specific agreements and cannot encompass non-parties; (2) the claims asserted against Defendants for fraud, unjust enrichment, and conversion are not "over" the Joint Venture Agreements; (3) the Court need not reach the equitable estoppel argument made by Defendants if the arbitration clauses do not encompass fraud, unjust enrichment, and conversion, but Plaintiffs are not relying on the Joint Venture Agreements' terms anyway to assert these claims against the nonsignatory-Defendants; and (4) although the Court need not reach the

agency question if the arbitration clauses do not encompass claims for fraud, unjust enrichment, and conversion, there is still no indication that the claims against the alleged agents have anything to do with the Joint Venture Agreements.

**A. Standard of Review**

The Court of Appeals reviews a trial court's denial of a motion to compel arbitration *de novo*. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004).

**B. The Joint Venture Agreements' arbitration language is narrow in scope and does not encompass claims for fraud, unjust enrichment, and conversion because those claims are not "over" the agreements.**

The arbitration clauses of the Joint Venture Agreements are narrow in scope and only encompass disputes "over" the agreements. In this case, the only dispute "over" the agreements is the breach of contract claim against Headwaters. Therefore, the trial court correctly compelled arbitration of that aspect of the First Amended Complaint and kept the remaining claims in Spokane County Superior Court.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213, 229 (2009) (internal citations and quotation marks omitted). Washington

law generally favors the use of alternative dispute resolution such as arbitration but only “*where the parties agree by contract to submit their disputes to an arbitrator.*” *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (emphasis added) (citing *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)).

“Whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties.” *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 117, 163 P.3d 807, 814-15 (2007). “The parties’ chosen language provides the basis for this determination.” *Id.* “In interpreting an arbitration clause, the intentions of the parties as expressed in the agreement control.” *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn. App. 203, 216, 156 P.3d 293 (2007).

The foregoing authorities make clear that Washington courts must pay careful attention to the specific language of arbitration clauses. For example, Washington courts afford broad scope and effect to arbitration clauses requiring arbitration of any dispute “related to” or “relating to” a contract. *See, e.g., Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887, 224 P.3d 818 (2009) (finding arbitration clause that contained “relating to” language suggested clause had broad scope).

On the other hand, arbitration clauses requiring arbitration of disputes “arising out of” a contract have far narrower effect. *See, e.g., McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 314, 890 P.2d 466, 467 (1995); *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 118, 163 P.3d 807, 815 (2007). Arbitration language such as “arising hereunder” and “arising under the agreement” are similar to “arising out of” and are likewise construed narrowly. *See Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). The court in *Mediterranean* determined that arbitration language such as this restricts arbitration to disputes relating to the interpretation and performance of the specific contract itself and does not encompass disputes collateral or in some way “related to” an agreement. *See Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (citing *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961)). *Mediterranean* was cited with approval by Division 2 in *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 117, 163 P.3d 807 (2007).

“An arbitration clause which encompasses any controversy ‘relating to’ a contract is broader than language covering only claims ‘arising out’ of a contract.” *McClure*, 77 Wn. App. at 315. (“The term ‘relating to’ is sufficiently broad to include a claim for breach of fiduciary duty.”) When an arbitration clause omits “relating to” language, this is

significant and reflects a much more limited scope. *Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994).

Here, the arbitration language in the Joint Venture Agreements states: "In a dispute *over this Agreement* ..." (CP 33-39, CP 49-56, CP 69-76) (emphasis added). The arbitration clauses do not provide for arbitration of disputes "relating to" or "related to" the agreements. (CP 27-31, CP 41-45, CP 60-64, CP 33-39, CP 49-56, CP 69-76). This omission is significant. It is the best evidence of the DTI's and Headwaters' intent regarding the scope of arbitration.

Further, the phrase "over this agreement" is similar to phrases such as "arising hereunder" and "arising under this agreement," which have been given narrow effect by courts. A plain reading of "over this agreement," like "arising hereunder" and "arising under this agreement," indicates a desire to restrict arbitration to disputes specifically "over" the specific agreements, rather than disputes "related to" or collateral to the agreements.

Here, it is clear that the arbitration clauses at issue require the narrower interpretation set forth in *McClure, Nelson, Townsend, Tracer Research Corp.*, and *Mediterranean*. In other words, the clauses in the Joint Venture Agreements only apply to disputes "over" the specific agreements. As such, they specifically do not apply to disputes that are in

any way “related to” the agreements or collateral. Thus, by their very language, these clauses can only apply to the breach of contract claims against Headwaters because that is the only claim “over” any of the agreements at issue in this lawsuit. In other words, consistent with *Satomi*, it is not possible to compel arbitration of the claims against any Defendants except for Headwaters. This fact, without more, demonstrates that the trial court made the correct decision on Defendants’ motion to compel arbitration.

There should be no dispute that the other claims are not “over” the agreements.

**Fraud:** The First Amended Complaint alleges fraud against Spady and Headwaters through conduct that took place both before and after the Joint Venture Agreements were entered into by the parties. (CP 99-107). This claim is not “over” the specific Joint Venture Agreements, as it is not over interpretation or performance of those agreements. Rather, this claim is over fraudulent conduct on the part of Spady and Headwaters.

**Unjust Enrichment and Conversion:** The causes of action for unjust enrichment and conversion against all Defendants are not “over” the specific Joint Venture Agreements either.

In *Nelson*, a shareholder’s claim against a closely-held corporation for breach of fiduciary duties and minority shareholder oppression was not

subject to arbitration under the arbitration clause of the parties' shareholder agreement, which required arbitration of disputes "arising out of" the shareholders agreement. 140 Wn. App. at 117-19. The parties' shareholder agreement embodied the parties' intentions for the transfer of shares. *Id.* It did not cover other relationships between the parties and did not purport to cover their employment and other business relationships. *Id.* Accordingly, the shareholder agreement did not generally encompass a cause of action for the directors' breach of fiduciary duties and minority shareholder oppression. *Id.*

Here, the Joint Venture Agreements between Headwaters and DTI embody only the relationship between the two parties with respect to certain aspects of property development. The Joint Venture Agreements do not cover any other relationship between the parties to this lawsuit, and these agreements do not purport to cover other aspects of the parties' relationships. These agreements do not mention all of the other Defendants. Because the agreements do not address these other relationships, it is impossible to interpret the various Defendants' actions under the Joint Venture Agreements with respect to these claims. Thus, the claims for unjust enrichment and conversion against all Defendants cannot possibly be "over" interpretation or performance of these agreements.

Additionally, relief for unjust enrichment is grounded upon the idea of an implied contract, which by definition means it is not over interpretation or performance of the Joint Venture Agreements.<sup>2</sup>

**C. A plain reading of the First Amended Complaint indicates the Consulting Agreements are not part of this dispute, meaning that the claims for fraud, unjust enrichment, and conversion cannot be “over” those agreements.**

DTI and SG Spady signed three separate Consulting Agreements in July and October 2013, each having to do with a separate Headwaters’ property located in Spokane, providing that SG Spady would help negotiate on behalf of Headwaters and DTI to formulate separate Joint Venture Agreements between Headwaters and DTI for each of the three separate properties. (CP 27-31, CP 41-45, CP 60-64). The signatories to the Consulting Agreements are DTI and SG Spady. (CP 27-31, CP 41-45, CP 60-64). Headwaters did not sign those agreements and there is no mention of Stoneridge or Park Road. (CP 27-31, CP 41-45, CP 60-64).

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<sup>2</sup> The court in *Mediterranean* held that “[a]n action does not lie on an implied contract where there exists between the parties a valid express contract which covers the identical subject matter.” *Mediterranean*, 708 F.2d at 1464-65. Thus, by definition, the claim for quantum meruit did not directly relate to interpretation or performance of the agreement itself. *Id.* (omitting citation). In *Young v. Young*, 164 Wn.2d 477, 483-84, 191 P.3d 1258 (2008), the Washington Supreme Court noted that although quantum meruit and unjust enrichment are distinct approaches founded on discrete legal theories, they are nonetheless based on the notion of implied contracts. Accordingly, the unjust enrichment claim cannot be “over” interpretation or performance of the agreements.

Subsequent to those agreements, DTI and Headwaters signed the three Joint Venture Agreements. (CP 33-39, CP 49-56, CP 69-76).

A plain reading of the First Amended Complaint indicates the Consulting Agreements are not at issue in this lawsuit. However, even if the Consulting Agreements were at issue, these agreements contain identical arbitration clause language, *i.e.*, “over this agreement,” as the Joint Venture Agreements. (CP 27-31, CP 41-45, CP 60-64). Accordingly, the claims for fraud, unjust enrichment, and conversion could not be “over” interpretation or performance of the Consulting Agreements for the reasons discussed above.

**D. The Court need not consider Defendants’ equitable estoppel argument.**

Defendants argue that the claims of fraud, unjust enrichment, and conversion should be subject to arbitration because of the principal of equitable estoppel.

Like the agency argument below, the Court should only consider equitable estoppel if it determines the arbitration clauses encompass fraud, unjust enrichment, and conversion – which they do not. Further, equitable estoppel is an exception to the rule that nonsignatories are not bound by arbitration clauses. *Townsend*, 173 Wn.2d at 461. “[M]erely ‘mak[ing] reference to’ an agreement with an arbitration clause is not enough.

Equitable estoppel applies ‘when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting [its] claims against the nonsignatory.’” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1129 (9th Cir. 2013) (quoting *Jones v. Jacobson*, 195 Cal.App.4th 1, 20, 125 Cal.Rptr.3d 522 (2011)).

Here, Plaintiffs are not relying upon the Joint Venture Agreements’ terms to assert claims of fraud, unjust enrichment, or conversion against the nonsignatory-Defendants. These claims are not intertwined with the Joint Venture Agreements’ terms, meaning that equitable estoppel does not apply here.

**E. The Court need not consider Defendants’ agency argument because the trial court properly construed the arbitration provisions and, in any case, the agreements provide no evidence of agency.**

The Court need not consider Defendants’ argument regarding agency if it determines the arbitration clauses are narrow in scope and do not encompass claims of fraud, unjust enrichment, and conversion. As addressed above, the arbitration clauses are narrow in scope and the claims, aside from the breach of contract claim against Headwaters, should not be subject to arbitration under the agreements. The Court could only reach the agency argument if it determines the arbitration language is sufficiently broad to encompass fraud, unjust enrichment, and conversion.

At the outset, the only parties to the Joint Venture Agreements are DTI and Headwaters. *Satomi*, 167 Wn.2d at 810. The general rule regarding arbitration clauses is that “a nonsignator to an arbitration agreement cannot be compelled to arbitrate.” *Id.* There are, however, exceptions to the general rule. *Id.* Courts have held that nonsignatories of arbitration agreements may be bound under ordinary contract and agency principles. *See, e.g., Powell v. Sphere Drake Ins. PLC*, 97 Wn. App. 890, 892, 988 P.2d 12 (1999) (citing *Thomson-CSF, SA v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995)).

Consent between the agent and principal and control are key elements of an agency relationship. *Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807, 82 P.3d 244 (2003).

Here, even assuming the nonsignatory-Defendants are agents, the claims asserted against the nonsignatory-Defendants are still not “over” the agreement. The nonsignatory-Defendants have no rights, duties, or obligations under the Joint Venture Agreements. And the claims against the nonsignatories make no reference to the Joint Venture Agreements. As a result, any claims asserted against them cannot possibly be “over” the Joint Venture Agreements.

Even if the Court were to somehow overlook the narrow arbitration language and accept Defendants’ attempt to rewrite the First Amended

Complaint, there is still no evidence of an agency relationship between Defendants to carry out the purpose of these agreements. With the exception of conclusory statements in both the Brief of Appellants and Spady's declarations that nonsignatory-Defendants are agents, the record is devoid of evidence that Stoneridge, SG Spady, and Park Road are agents of Spady or Headwaters, or vice versa, under the agreements.<sup>3</sup> There is no evidence of consent to an agency relationship, nor is there evidence of control, outside of conclusory statements.

The Joint Venture Agreements do not mention Stoneridge and Park Road – and give only passing mention of SG Spady. Nowhere do the Joint Venture Agreements allude that Headwaters would be using the nonsignatory-Defendants for purposes of the Joint Venture Agreements. Defendants fail to point to any independent contract or document between Defendants establishing agency for the purpose of developing the properties at issue under the Joint Venture Agreements outside of their conclusory statements.

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<sup>3</sup> As far as the Consulting Agreements are concerned, each of those agreements expressly provide that SG Spady is “an independent” with respect to DTI and Headwaters and not an employee or owner of DTI or Headwaters for the benefit of the Consulting Agreement. (CP 28, CP 42, CP 61). This language undercuts the argument, at least with regard to the Consulting Agreements, that there was an agency relationship between SG Spady and Headwaters.

Again, the Joint Venture Agreements are silent on the Defendants' business relationships. Thus, it is impossible for any disputes involving these nonsignatory-Defendants to be "over" the agreements. Further, because of this silence, it is impossible to determine whether nonsignatory-Defendants are agents under the agreements.

**F. The Trial Court did not err when it reached the motion to amend and the motion to compel discovery.**

The trial court did not err when it reached the motions to compel discovery and to amend the complaint to add Laura Koger as the trial court's ruling with respect to denying arbitration was appropriate and had the effect of continuing the litigation in court with regard to fraud, unjust enrichment, and conversion.

**G. Costs**

Costs on appeal will be awarded to the party that substantially prevails on review. RAP 14.2. In accordance with this authority, Plaintiffs request an award of costs incurred for defending this appeal.

**V. CONCLUSION**

For the foregoing reasons, the Court must affirm the trial court's ruling granting in part and denying in part Defendants' motion to compel arbitration because the claims for fraud, unjust enrichment, and conversion fall outside the scope of the Joint Venture Agreements' arbitration clauses

on which Defendants rely. Plaintiffs request costs pursuant to RAP 14.2  
for defending this appeal.

RESPECTFULLY SUBMITTED this 1st day of November, 2019.

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**DECLARATION OF SERVICE**

I hereby declare that on ~~October~~ <sup>November</sup> 1<sup>st</sup>, 2019, in Spokane Washington, I caused the foregoing affixed document (and appendix) to be served on the following parties in the manner indicated:

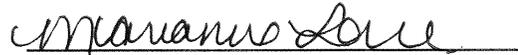
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VIA FIRST CLASS MAIL   
VIA CERTIFIED MAIL   
VIA HAND DELIVERY   
VIA FACSIMILE   
VIA EMAIL

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

Dated this 1<sup>st</sup> day of November, 2019



Marianne Love,  
Legal Assistant