

No. 66453-1-I

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

KIMACO, LLC,

Respondent,

v.

WRIGHT DEVELOPMENT WEST COAST, LLC,

Appellant

2011 APR 11 PM 3:08  
COURT OF APPEALS  
DIVISION I

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RESPONSE BRIEF OF MUKILTEO HOTEL, LLC

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## **I. INTRODUCTION**

The trial court correctly held that there is no enforceable arbitration agreement between Mukilteo Hotel and Wright.<sup>1</sup> Nowhere in the parties' contracts or elsewhere is there any agreement by Mukilteo Hotel to arbitrate any dispute with Wright. Absent such an agreement, Mukilteo Hotel cannot be required to arbitrate. The trial court's order should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL BACKGROUND**

On April 8, 2010, plaintiff Kimaco LLC filed a lawsuit naming Mukilteo Hotel and Wright as defendants. *CP* at 288. On November 22, 2010, defendant Mukilteo Hotel and defendant Westchester Fire Insurance Company filed a Motion for Summary Judgment, requesting the trial court rule that the lien naming Wright Development West Coast, LLC as the claimant is invalid because at the time the lien was filed that company did not exist.<sup>2</sup>

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<sup>1</sup> For purposes of economy, Wright Development West Coast, LLC and Wright Hotel Development, Inc. are collectively referred to as "Wright" in this response, without waiver of any of Mukilteo Hotel's rights or defenses, including but not limited to its position that Wright Development West Coast, LLC ceased to exist on January 29, 2009, and that it cannot act or otherwise litigate after that date.

<sup>2</sup> Mukilteo Hotel's and Westchester Fire Insurance Company's Motion for Summary Judgment was included in Mukilteo Hotel's Supplemental Designation of Clerk's Papers, which was filed with the Court on April 11, 2011.

On December 7, 2010, Wright filed a motion to compel arbitration and noted it for January 18, 2010 [sic]. *CP* at 241-277. In response to Wright's arbitration demand, Mukilteo Hotel filed a Motion Re: No Obligation to Arbitrate, requesting the trial court find that there is no enforceable arbitration agreement between the parties. *CP* at 116-131.

On December 15, 2010, the trial court granted Mukilteo Hotel's motion and found that there was no enforceable arbitration agreement:

It is further ORDERED that Mukilteo Hotel, LLC never agreed to arbitrate this dispute and, therefore, there is no enforceable agreement to arbitrate the dispute between Wright Development West Coast, LLC and Mukilteo Hotel, LLC ...

*CP* at 13-14.

This order is the subject of this appeal.

**B. THE CONTRACTS DO NOT REQUIRE MUKILTEO HOTEL TO ARBITRATE THIS DISPUTE.**

On or about June 19, 2008, Mukilteo Hotel and Wright entered into a Fixed Sum Construction Contract and a Fixed Sum Grading Contract whereby Wright would provide general contractor services relating to the building of a hotel on property owned by Mukilteo Hotel in Snohomish County. *CP* at 174-220.

Both parties were represented by attorneys of their own choosing and multiple drafts of the contracts were exchanged with multiple changes being made to the initial drafts. *CP* at 174-175, 222.

Mukilteo Hotel never agreed to arbitrate any claims or disputes with Wright. In its brief, Wright fails to cite any provision in the parties' contracts or any other documents where Mukilteo Hotel agreed to arbitrate. Wright also fails to cite to any legal authority for the proposition that Wright's agreement to arbitrate somehow requires Mukilteo Hotel to arbitrate.

The contracts identify Wright as the "Contractor." *CP* at 177, 207. The Terms and Conditions in the relevant contracts contain a clause that provides that "Contractor" agrees to arbitrate but nowhere in the agreement is there any requirement that Mukilteo Hotel arbitrate. The provision relied on by Wright in its brief reads in pertinent part as follows:

**Contractor** agrees to resolve any disputes arising from the Agreement by binding arbitration to be held in King County, Washington, in accordance with the rules of the American Arbitration Association then in effect. Judgment on the arbitration may be entered in any court having jurisdiction over the subject matter of the controversy.

*CP* at 202-203, 218 (emphasis added.) Wright’s argument that this Court should require Mukilteo Hotel to arbitrate falls flat because the language in the contracts simply does not require Mukilteo Hotel to arbitrate. In addition, the Terms and Conditions in both contracts contain an Attorneys’ Fees provision that refers to “trial”:

22. ATTORNEYS’ FEES. In the event either party breaches it (sic) obligations under this Agreement, the prevailing party shall be entitled to all costs and expenses incurred, including reasonable attorneys’ fees, as a result of the breach. In addition, in the event an action is instituted to enforce any of the terms of this Agreement, the prevailing party shall be entitled to recover from the other party such sum as the court or arbitrator may adjudge reasonable as attorneys’ fees in arbitration, **at trial**, and on appeal of such action, in addition to all other sums provided by law.

*CP* at 203. (Emphasis added.)

Nowhere in any of the contracts or elsewhere did Mukilteo Hotel ever agree to arbitrate and the fact that the parties contemplated the possibility of a trial also demonstrates that Mukilteo Hotel was not bound to arbitrate. If arbitration of all disputes was a certainty, then there would have been no need to include the words “at trial” in paragraph 2.2

**C. THE CONTRACTS WERE MUTUALLY DRAFTED.**

The contracts were mutually drafted by the parties. Wright was represented by attorney Stuart Cohen from the law firm of Landye Bennett Blumstein LLP. *CP* at 174, 222. Mukilteo Hotel was represented by Stephen H. Goodman from the law firm of Graham & Dunn PC. *CP* at 175, 222.

Prior to June 19, 2008, the date the contracts were signed, Wright's attorney made edits, redlines, and markups to the contracts that became part of the agreements. *CP* at 175, 222. On June 18, 2008, Mr. Goodman (attorney for Mukilteo Hotel) sent an email to Mr. Cohen (attorney for Wright) sending over the latest set of draft contracts. *CP* at 175, 222. The parties met the next day without attorneys and additional changes to the documents were made by Robert Wright of Wright. *CP* at 175, 222.

Wright and its attorney fully participated in the drafting of the contracts at issue and had more than enough opportunities to propose changes and edit the contracts. If Wright and its attorneys expected Mukilteo Hotel to be bound to arbitrate, they could have insisted on inserting the phrase "Owner agrees to arbitrate." They failed to do so.

**D. WRIGHT KNEW THE DIFFERENCE BETWEEN A ONE-SIDED AND TWO-SIDED ARBITRATION CLAUSE.**

Unlike the arbitration provision in its agreements with Mukilteo Hotel, Wright entered arbitration agreements with subcontractors that were binding on both parties to the subcontract.

Wright's subcontracts contain the following language:

**Arbitration.** Any controversy, dispute or claim arising out of or related to this Agreement or any other agreement concerning the Project shall be settled by final and binding arbitration in accordance with the Arbitration Act of the State in which the project is located or any successor provisions governing arbitration....

*CP* at 132-133, 143, 164.

Wright was aware of the difference between a two-sided arbitration clause where both parties were bound to arbitrate and the clause found in the contracts with Mukilteo Hotel that did not require Mukilteo Hotel to arbitrate.

Wright entered into a contract with Mukilteo Hotel that did not bind Mukilteo Hotel to arbitrate. Wright and its attorney had the opportunity to insist upon a two-sided arbitration provision, like it did in its subcontracts, but failed to do so.

### III. ARGUMENT

Mukilteo Hotel's Motion Re: No Obligation to Arbitrate was brought pursuant to RCW 7.04A.070(2). That statute provides:

On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. **If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.**

(Emphasis added). After Wright threatened to initiate arbitration, Mukilteo Hotel brought its motion requesting the trial court find that there is no enforceable arbitration agreement and that the parties must resolve their disputes in the trial court. The trial court granted Mukilteo Hotel's motion and Wright appealed.

#### A. **MUKILTEO HOTEL CANNOT BE REQUIRED TO ARBITRATE A DISPUTE THAT IT DID NOT AGREE TO ARBITRATE.**

Under Washington law, a party cannot be required to submit to arbitration any dispute which he or she has not expressly agreed to submit. *See* RCW 7.04A.070(2); *see also Satomi Owners Ass'n v. Satomi*, 167 Wn.2d 781, 810 (2009). The issue for the Court is: Did Mukilteo Hotel agree to arbitrate this

dispute? The answer is no. Wright completely fails, both in its appellate brief, and in briefing to the trial court below, to point to any language in the parties' contracts where Mukilteo Hotel agreed to arbitrate this dispute. It also fails to point to any case law which supports the proposition that one party's contractual agreement to arbitrate mandates that the other party to the contract has also automatically agreed to arbitrate.

The subject contracts state that only "Contractor [Wright] agrees to resolve any disputes arising from the Agreement by binding arbitration...." *CP* at 202-203, 218. Absent mutual assent between both parties to arbitrate, an arbitrator does not have jurisdiction to hear this matter and the Court cannot order Mukilteo Hotel to arbitrate.

First, in deciding whether the parties have an obligation to arbitrate, the threshold question for the Court is whether or not there is a contract that exists between the parties in which both parties have agreed to submit to arbitration. *Satomi*, 167 Wn.2d at 810. Even though Washington state has a strong policy in favor of arbitration, there still must be an agreement by both parties to arbitrate before arbitration can be required. As explained by the Washington Supreme Court:

While a strong public policy favoring arbitration is recognized under both federal and Washington law, *Howsam*, 537 U.S. at 83 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25); *Preston*, 128 S. Ct. at 983 (quoting *Southland*, 465 U.S. at 10); *Scott*, 160 Wn.2d at 858 (citing *Zuver*, 153 Wn.2d at 301 n.2), **“arbitration 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.”** *Howsam*, 537 U.S. at 83 (quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); citing *First Options*, 514 U.S. at 942-43); *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (“Washington law generally favors the use of alternative dispute resolution such as arbitration *where the parties agree by contract to submit their disputes to an arbitrator.*” (emphasis added)) (citing *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)).

*Satomi*, 167 Wn.2d at 810 (emphasis added).

Only disputes that both parties have expressly agreed to arbitrate can be submitted to arbitration:

***“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 956, 962 (9th Cir. 2007) (quoting *AT&T Tech., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). ***Consequently, only disputes that the parties have agreed to submit to arbitration may be so submitted.*** *First Options v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 992 (1995). Issues concerning the

existence of a contract or the existence of an agreement to arbitrate are for the district court to decide. *Sanford*, 483 F.3d at 962. ***In ruling on such issues, the courts generally "should apply ordinary state-law principles that govern the formation of contracts."*** *Kaplan*, 514 U.S. at 944, 115 S. Ct. at 1924, 131 L. Ed. 2d at 993 (1995).

*Olsen v. United States*, 546 F. Supp. 2d 1122, 1126 (E.D. Wash. 2008) (emphasis added). An arbitrator does not have jurisdiction to litigate a dispute unless both parties have expressly agreed.

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). He or she "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*, 483 F.3d at 962. Similarly, challenges to the validity of an agreement to arbitrate must be resolved by a court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2005).

*Olsen*, 546 F. Supp. 2d at 1129.

Second, in deciding whether the parties have contracted to arbitrate, the court applies ordinary contract principles. "When the validity of an agreement to arbitrate is challenged, courts apply

ordinary state contract law.” *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383 (2008); *see also, Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 325 (2010); *see also, Olsen*, 546 F. Supp. 2d at 1126. Under Washington contract law in order to have an enforceable arbitration agreement, both parties must have mutually assented to submit to arbitration:

Washington follows the objective manifestation test for contracts. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Moreover, the terms assented to must be sufficiently definite. *Sandeman*, 50 Wn.2d at 541 (observing if a term is so "indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties," there cannot be an enforceable agreement).

*Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 178 (2004).

As tacitly admitted by Wright in its brief, nowhere in either of the contracts did Mukilteo Hotel agree to arbitration. Rather, only the “Contractor” Wright agreed to arbitrate. The contracts read:

**Contractor** agrees to resolve any disputes arising from the Agreement by binding

arbitration to be held in King County, Washington, in accordance with the rules of the American Arbitration Association then in effect.

*CP* at 202-203, 218. (Emphasis added.) Because Mukilteo Hotel never agreed to arbitration, there is no mutual assent to arbitrate and no enforceable arbitration agreement. An arbitrator has no independent source of jurisdiction over this dispute apart from the consent of the parties. There is no consent and the Court cannot force Mukilteo Hotel to submit to arbitration. Where only one party has agreed, the non-agreeing party cannot be forced to arbitrate. *Satomi*, 167 Wn.2d at 810.

Third, Washington recognizes and allows one-sided arbitration agreements. In *Satomi*, the Washington Supreme Court recently held:

A unilateral provision in an arbitration agreement is substantively unconscionable only if it is shown that “the disputed provision is so ‘one-sided’ and ‘overly harsh’ as to render it unconscionable.” *Zuver*, 153 Wn.2d at 319 n.18, 318 (holding unilateral remedies limitation provision in arbitration agreement was substantively unconscionable because the provision “blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse”). Here, the arbitration clause lacks mutuality as to forum selection because it gives Blakeley Village alone the option of requiring arbitration. The clause is therefore unilateral in that respect.

Blakeley Association has not shown, however, that the clause is “so ‘one-sided’ and ‘overly harsh’” as to render it substantively unconscionable. *Id.* at 319 n.18; *cf. Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1186 (Alaska 1983) (“Arbitration is not so clearly more or less fair than litigation that it is unconscionable to give one party the right of forum selection.”). Thus, we hold that Blakeley Association has failed to meet its burden of proof.

167 Wn.2d 781, 815-816.

And to the extent the Court finds that the obligations of the parties is indefinite, “there cannot be an enforceable agreement” to arbitrate. *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 178 (2004).

Fourth, even if the Court were to determine that the one-sided arbitration agreement contained in the agreements is invalid, the result is the same. The contract provides that if any of the provisions of the agreements are found to be unenforceable or invalid, then such provisions will be ineffective and all remaining portions remain in effect. Specifically:

24. MISCELLANEOUS. If any of the provisions of this Agreement are held by a court of competent jurisdiction to be unenforceable or invalid, then such provisions will be ineffective to the extent of the court’s ruling, and all remaining portions of the Agreement shall remain in full force and effect...

*CP* at 203.

Thus, even if this Court were to find the arbitration provision invalid or unenforceable because it is unilateral, the contract provides that that provision would be deleted from the agreements. In that case, there would be no arbitration provision binding either Mukilteo Hotel or Wright and the trial court's ruling denying arbitration should still be upheld.

Finally, the Attorneys' Fees provision that follows the unilateral arbitration provision further supports the fact that there was no agreement which compelled Mukilteo Hotel to arbitrate. It provides for the award of attorney fees at "trial." If arbitration was agreed to by both parties, then there would be no need for the word "trial" in this clause.

**B. WRIGHT'S ARGUMENTS FAIL.**

The arguments set forth in Wright's brief are either misplaced or support the trial court's finding that there is no agreement to arbitrate. Wright's arguments boil down to the following: (1) public policy favors arbitration in this case; (2) interpreting the arbitration provision to create an option to arbitrate in favor of Mukilteo Hotel is irreconcilable with the

remainder of the contract; and (3) Wright is mandated to resolve its disputes by binding arbitration.

Wright's arguments intentionally ignore the key issue in this case. That issue is whether Mukilteo Hotel agreed to arbitrate. Absent an agreement by Mukilteo Hotel to arbitrate, the Court cannot order arbitration, an arbitrator cannot hear the dispute, and Mukilteo Hotel is free to pursue its claims in superior court. The Court cannot re-write the parties' contract and add an agreement to arbitrate on behalf of Mukilteo Hotel where none exists. *See Satomi*, 167 Wn.2d at 810; *see also Keystone Land*, 152 Wn.2d at 178. As a result, all of Wright's arguments fail.

**1. The public policy in favor of arbitration does not create an obligation to arbitrate if one party has not agreed to arbitrate.**

First, Wright cites to *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400 (2009), for the proposition that in deciding "arbitrability," disagreements should be found in favor of arbitration. However, the *Heights at Issaquah* case does not stand for the proposition that a party that has not agreed to arbitrate can be compelled to arbitrate, it in fact stands for the opposite proposition. While there is a public policy

favoring arbitration, the Court does not apply such policy unless the parties have agreed to submit their disputes to arbitration:

While a strong public policy favoring arbitration is recognized under both federal and Washington law, *Howsam*, 537 U.S. at 83 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25); *Preston*, 128 S. Ct. at 983 (quoting *Southland*, 465 U.S. at 10); *Scott*, 160 Wn.2d at 858 (citing *Zuver*, 153 Wn.2d at 301 n.2), **“arbitration 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.”** *Howsam*, 537 U.S. at 83 (quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); citing *First Options*, 514 U.S. at 942-43 *Options*, 514 U.S. at 942-43).

*Satomi*, 167 Wn.2d at 810 (emphasis added). Division One recognizes this longstanding rule:

We begin our analysis by considering our supreme court's recent observation in *Satomi Owners Association v. Satomi, LLC* that **“ ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit.’”** **The court stated this long-standing principle of contract law notwithstanding its acknowledgement that there is a strong public policy favoring arbitration recognized under both federal and state law.**

*Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 925 (2010). (Emphasis added.)

Wright's public policy argument only comes into play after the Court has found an enforceable arbitration agreement. As explained above, there is no agreement in this case by Mukilteo Hotel to arbitrate. Wright has failed to identify one in its brief because none exists. Because no agreement exists which compels Mukilteo Hotel to arbitrate, the public policy favoring arbitration does not come into play. Further, to the extent public policy were relevant, it favors Mukilteo Hotel's argument in that arbitration is a matter of contract and a party cannot be forced to arbitrate where it never consented to arbitration in the first place.

Here, it is undisputed that Mukilteo Hotel did not "agree" to arbitrate. Without proof of such an agreement, Mukilteo Hotel cannot be compelled to arbitrate.

**2. The other provisions in the contract relied upon by Wright support Mukilteo Hotel's position, not Wright's**

Second, Wright claims that there are at least 48 times in the agreements that Mukilteo Hotel reserved an option for itself to do something. (However, none of these are related to arbitration and none of them require Mukilteo Hotel to arbitrate.) Wright uses these alleged option provisions to argue that had Mukilteo Hotel wished to bargain for the option to choose arbitration, it could have

done so. Wright's attempts to rely on these provisions highlight the fact that despite scrutinizing the contracts, Wright cannot find even one provision within them whereby Mukilteo Hotel agreed to arbitrate. It is instead forced to cite to provisions of the contracts which are unrelated to arbitration and no way obligate Mukilteo Hotel to arbitrate. The contractual language in the agreements relating to arbitration is unambiguous. Only Wright agreed to arbitration.

In addition, Wright's argument that because Wright agreed to arbitration Mukilteo Hotel must have also agreed to arbitration is also not well taken and not supported by the language of the contracts. There are numerous provisions in the contracts where only one party agrees to act or to do something, just like paragraph 21, where only Wright agreed to arbitrate. For Wright's argument to have merit, all of these provisions would somehow automatically become reciprocal and binding on both parties. Such a holding would lead to an absurd result. Contracts, between sophisticated parties, especially those extensively negotiated with attorneys involved on both sides, are simply not subject to being re-written by the court. If the parties wanted to bind Mukilteo Hotel to arbitrate, it would have been a simple matter for the

parties and their attorneys to add language to the contracts stating “Owner agrees to arbitrate ...” or “the Parties agree to arbitrate ...” This did not occur. Wright’s citation to other unrelated contract provisions does not and cannot change this fact.

Wright’s interpretation would require the Court to re-write the contract and insert an affirmative agreement on behalf of Mukilteo Hotel where no such obligation exists. To rule in Wright’s favor, the Court would have to insert the words “Owner agrees to arbitrate” into the contracts. Wright provides no authority which supports or allows the Court to do so.

**3. Wright is only mandated to arbitrate if Mukilteo Hotel agreed to arbitrate, which it has not.**

Wright argues that the parties’ contracts obligate Wright to arbitrate all disputes and, therefore, Wright is mandated to resolve its dispute in arbitration. The contracts do not obligate Wright to arbitrate nor do they prevent Wright from litigating its claims. Rather, pursuant to the terms of the contracts, Wright agreed to arbitration, meaning that it cannot object to the dispute being arbitrated. However, the contract does not require that all disputes between Wright and Mukilteo Hotel be arbitrated. There is nothing confounding or ambiguous about the situation. If

Mukilteo Hotel agreed to arbitration, which has not happened, then pursuant to the language of the contracts the parties would arbitrate the dispute since Wright has already agreed to arbitrate. Since Mukilteo Hotel has not agreed to arbitrate, a binding agreement to arbitrate has not been formed and Wright is free to litigate. Wright clearly understood this as it has filed numerous pleadings in the trial court already.

**C. LIEN CLAIMS ARE NEVER SUBJECT TO ARBITRATION.**

Here, the Court need never reach the question of whether or not Wright's ability to enforce its lien is "arbitrable" since Mukilteo Hotel has never agreed to arbitrate *any* dispute. However, even if the parties had agreed to arbitration—which Mukilteo Hotel did not—**lien foreclosure actions are never arbitrable.**

RCW 60.04.171 requires all liens related to the same property be dealt with in the same action:

A person shall not begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to the prior action, he or she may apply to the court to be joined as a party thereto, and his or her lien may be foreclosed in the same action.

In addition, RCW 60.04.141 requires a lien claimant foreclose on a claim of lien within eight months after the lien was recorded and that it must do so in superior court in the county where the property at issue is located. RCW 60.04.141 reads as follows:

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded ***unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located*** to enforce the lien....

(Emphasis added). Therefore, even if other issues were arbitrable, issues surrounding the enforceability of Wright's lien (and Mukilteo Hotel's motion for summary judgment regarding the validity of Wright's lien) must be decided in the trial court action. To hold otherwise would undermine the statutory requirement of having all liens filed against the same property decided in the same proceeding. That is why the lien statutes require all liens be foreclosed in superior court and that all liens be foreclosed in the same lawsuit. If lien claims were arbitrable, there would be no ability to compel all parties to arbitrate in the same arbitration and no ability to decide, in the same form, priority, validity and other competing issues between lien claimants. This would be directly

contrary to the legislature's intent as expressed in RCW 60.04.171 and RCW 60.04.141.

**D. COSTS AND EXPENSES.**

Pursuant to RAP 18.1, Mukilteo Hotel requests an award of its reasonable attorney fees and expenses. Attorney fees may be awarded when authorized by a contract, statute, or recognized ground in equity. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70 (1993). Here, the contracts between the parties authorize an award of all costs and expenses, including reasonable attorneys' fees, to the prevailing party. This specifically applies when an action is instituted to enforce any of the terms of the agreements **and specifically covers fees incurred on appeal:**

22. ATTORNEYS' FEES. In the event either party breaches its obligations under this Agreement, the prevailing party shall be entitled to all costs and expenses incurred, including reasonable attorneys' fees, as a result of the breach. In addition, in the event an action is instituted to enforce any of the terms of this Agreement, the prevailing party shall be entitled to recover from the other party such sum as the court or arbitrator may adjudge reasonable as attorneys' fees in arbitration, at trial, **and on appeal of such action**, in addition to all other sums provided by law.

CP at 203 (emphasis added.)

Here, Wright initiated this appeal in an attempt to enforce a provision of the contracts and, if Mukilteo Hotel prevails, it is entitled to all of its reasonable attorney fees and to all other sums provided by law.

Mukilteo Hotel will submit an affidavit of fees and expenses pursuant to RAP 18.1(d) in the event there is the filing of a decision awarding it the right to its reasonable attorney fees and expenses.

#### IV. CONCLUSION

It is undisputed that nowhere in the parties' contracts (or elsewhere) is there any agreement by Mukilteo Hotel to arbitrate any dispute. As such, the Court may not order the parties to arbitrate under RCW 7.04A.070 or applicable case law. Mukilteo Hotel respectfully requests that the Court affirm the trial court's finding that there is no enforceable arbitration agreement between the parties; that this dispute must go forward in the trial court; that any arbitration demand filed by any party based on the contracts here at issue be stricken with prejudice; and that Mukilteo Hotel be awarded its costs and expenses incurred, including reasonable attorney fees.

Dated this 11<sup>th</sup> day of April, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Skalbania', written over a horizontal line.

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