102764-8

No. 851209

WASHINGTON COURT OF APPEALS, DIVISION I

SUPREME COURT OF THE STATE OF WASHINGTON

POWERCOM, INC., a Washington corporation,

Appellant,

v.

PORT OF SEATTLE; CLARK CONSTRUCTION GROUP, LLC; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; FEDERAL INSURANCE COMPANY; ZURICH AMERICAN INS. CO.(Bond Nos. 106308203/82298673/09190971) and (Bond Nos. 106356881/82298695/09207256); VALLEY ELECTRIC CO. OF MT. VERNON, INC; ARGONAUT INSURANCE COMPANY, (Bond No. SUR0043723-00),

Respondents.

APPELLANT POWERCOM, INC.'S PETITION FOR REVIEW OF THE COURT OF APPEALS' PUBLISHED DECISION FILED ON JANUARY 8, 2024

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I. IDENTITY OF PETITIONER

Petitioner PowerCom, Inc. ("PowerCom") asks this Court to accept review of the Washington Court of Appeals' published decision filed on January 8, 2024 ("Decision"). The Decision affirmed the trial court's stay of PowerCom's Little Miller Act statutory bond claims under RCW 39.08.030 against Respondents Clark Construction Group, LLC ("Clark") and its Sureties ("Clark Sureties"), and Valley Electric Co. of Mt. Vernon, Inc.'s ("Valley") and its Surety ("Valley's Surety"), pending a final resolution of Clark's separate lawsuit against the Port.

The Decision operates as an invalid waiver of PowerCom's rights under Washington's Little Miller Act. Not only does the disputes clause affect the timing of PowerCom's Little Miller Act claims, but the "final and binding" language may result in PowerCom losing its ability to return to court to enforce its statutory bond rights under Washington's Little Miller Act. The dispute clause operates as an implied waiver of PowerCom's rights under the Little Miller Act and is therefore unenforceable.

If the Court of Appeals' decision is not overturned, every contractor and material supplier in the State of Washington could lose its ability to pursue its statutory bond rights under Washington's Little Miller Act.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals published decision for which review is sought is *PowerCom, Inc. v. Valley Electric Co. of Mt. Vernon, Inc., et al*, 2024 Wash. App. LEXIS 18, filed on January 8, 2024. A copy of the Decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Like the Federal Miller Act, Washington's "Little Miller Act" (Chapters 18.27, 39.08, and 60.28 RCW) requires contractors to obtain payment bonds from a surety company on public works projects for the protection of laborers and materialmen because mechanics' liens are unavailable on such projects. The purpose of Washington's Little Miller Act is to provide security for those who furnish labor and material in the performance of public works projects and to protect a subcontractors' right to prompt and proper payment. Washington's Little Miller Act provides subcontractors a right of action in their own name in the state courts against the contractor's payment bond surety. Under RCW 39.08.030(1)(a), a sub-Subcontractor like PowerCom may seek payment directly from the payment bond surety if the general contractor or the Subcontractor fails to timely pay.

The Court of Appeals, in a published decision, affirmed the trial court's stay of PowerCom's Little Miller Act statutory bond claims against Clark's Sureties and Valley Electric's Surety on its pass-through claim pending a final resolution of Clark's lawsuit against the Port. The Court of Appeals found that the disputes clause in the subcontract which conditions payment on (1) resolution of the global dispute process between Clark and the Port (pay-when-paid) and (2) the amount of payment Clark receives from the Port and Valley receives from Clark (pay-if-paid), is a waiver of PowerCom's statutory right to sue under Washington's Little Miller Act. The Court of Appeal's decision affirming the stay of PowerCom's pass-through claim in favor of the Clark/Port proceedings will likely result in PowerCom losing its ability to return to court to enforce its statutory bond rights under Washington's Little Miller Act.

In numerous cases, the federal courts have refused to enforce dispute resolution clauses identical to this one that provide an administrative or court determination of the subcontractor statutory bond rights under the Miller Act in the absence of the subcontractor, requires suspension of the Subcontractor's statutory bond action until a final determination of any dispute resolution procedure between the contractor and the government, and requires the subcontractor to be bound by the decisions, findings, determinations, or awards which are relevant to the subcontractor's claim. The Federal courts have treated dispute clauses that affect the timing of recovery and entitlement to recovery the same way --- as an implied waiver of the subcontractor's rights under the Miller Act and therefore unenforceable. The Court of Appeals disregarded all of these cases in a published decision. Because the disputes clause affects both the timing of recovery and PowerCom's right of recovery, the stay provision goes against the plain text of Washington's Little Miller Act and operates as an implied waiver of PowerCom's statutory bond rights and is unenforceable.

IV. STATEMENT OF THE CASE

A. Background Facts

PowerCom is a sub-subcontractor of Valley on this large public works project for the Port of Seattle called the SeaTac International Arrivals Facility South Satellite Corridor Refurbishment Project ("Project"). The Port of Seattle contracted with Clark Construction Group, LLC ("Clark") as its prime contractor and design-builder on the Project. (CP at 544-545; 701, ¶¶ 4, 5). Clark subcontracted with Valley for the design, construction, and completion of all Special Systems, including all Division 27 - Communications, on the Project. (CP at 629-636). Valley entered into a sub-Subcontract with PowerCom for the Special Systems portion of the Project. (CP at 638-650).

As required under Washington's Little Miller Act (RCW

39.08 et seq.), Clark's Sureties, Travelers Casualty and Surety Company of America, Federal Insurance Company, Fidelity & Deposit Company of Maryland, and Zurich American Insurance Company ("Clark's Sureties") provided payment bonds for the Project, with Clark as the Principal. (CP at 12, ¶ 48). Valley's Surety, Argonaut Insurance Company ("Valley Surety"), also provided a payment bond for the Project, with Valley as the Principal. (CP at 12, ¶49). As required under RCW 39.08.030, PowerCom provided its Notice of Claim against Clark's payment bonds and Valley's payment bond on November 3, 2021, and Amended Notices of Claim on December 1, 2021, February 23, 2022, and April 22, 2022. (CP at 24-25; 83-84; 124-125; 168-169).

On July 5, 2022, PowerCom filed a lawsuit against the Port of Seattle, Clark and Clark's Sureties, and Valley and Valley's Surety for foreclosure of its statutory payment bond claims under Washington's Little Miller Act, RCW 39.08 et seq., and for breach of contract, violation of Washington's Prompt Pay Act, quantum meruit/unjust enrichment, and breach of the covenant of good faith and fair dealing. (CP at 739-966). PowerCom's Amended Complaint asserts no less than $2,643,330.11 for unpaid payment applications and for extra work, including its COVID-19 and Delay claim. (CP at 1-22). PowerCom's has not been paid for any of this work for over two years. (CP at 672-678). Clark's Sureties denied PowerCom's claim under their payment bonds. (CP at 975, ¶¶ 81, 82). Valley's Surety also denied PowerCom's claim under its payment bond. (CP at 984, ¶ 4.12).

On August 28, 2020, Clark submitted a Request for Change Order – Impacts Due to COVID-19 to the Port of Seattle in the amount of $30,351,416.00, which included Valley's Rev. 5 to its COVID-19 Claim dated August 5, 2020 in the amount of $4,523,803.00. (CP 427-437).

On September 24, 2021, the Port issued its Serial Letter SL0409 to Clark denying Clark's entire Request for Change Order on several bases, including its failure to follow the claim notice procedures in the Main Contract. (CP at 446-455). PowerCom was never advised of the Port's denial of Clark's Consolidated COVID-19 claim. (CP at 675, ¶7).

On October 20, 2021, PowerCom submitted its Final COVID-19 and IAF Delay Claim to Valley which totaled $1,306,250.00. (CP at 457-502). That same date, October 20, 2021, Valley submitted a "FULLY DOCUMENTED CLAIM" to Clark for the impacts from COVID-19 in the amount of $13,949,876.00. (CP at 504-537).

On May 25, 2022, through a public records request to the Port, PowerCom learned for the first time that on October 21, 2020, Clark had submitted a Consolidated Claim for cost and schedule impacts relating to multiple claims to the Port of Seattle. (CP at 539-573; 504-537; 674, ¶6). However, Clark's Consolidated Claim to the Port, which included Valley's COVID-19 Fully Documented Claim dated October 20, 2021, contains numerous handwritten deductions in red to PowerCom's October 20, 2021 COVID-19 and Delay Claim, which total over $600,000.00 (CP at 504-537; 672-678, ¶6).

On December 16, 2022, Clark filed a lawsuit against the Port for breach of contract in King County Superior Court. (CP at 700-703). On January 13, 2023, the Port filed its Answer to Clark's Complaint and asserted counterclaims which total over $99 million dollars. (CP at 705-735). The Port's Answer alleges that Clark's Consolidated COVID-19 claim is barred due to Clark's failure to comply with the notice and claim procedures in the Design-Build Contract. (CP at 711, Affirmative Defenses 4 and 5).

B. The Main Contract and Subcontract Dispute Resolution Clauses

The Port's Design Build Contract with Clark contains a Dispute Resolution Process at Article G-09.02(f) that requires the parties to meet and confer to try to resolve the claim (Level I), and if a mutually acceptable resolution has not been achieved, the Design-Builder (Clark) *may* initiate the Level 2 Process. (CP at 622-623). If the claim is not resolved in the Level II process, the matter *shall* be referred to a Dispute Solution Board (DRB) as set forth in G-09-03. (CP at 623, G-09.02(F)(3)). Under G-

09.02(F)(4), if the Claim is not resolved following conclusion of the DRB process, the Design-Builder may bring no claim against the Port in litigation unless the claim is first subject to mediation. (CP at 623). Neither the Port of Seattle nor Clark followed these Claim Resolution procedures. Clark's Claims were never referred to a Dispute Resolution Board and Clark and the Port never mediated Clark's Claim. (CP at 702, ¶18; 710, ¶23; 711, ¶6).

PowerCom's sub-Subcontract with Valley states at Paragraph 2:

> Subcontractor agrees as follows:
>
> 2. To be bound by all laws, governmental regulations, and orders and all terms and conditions of the Main Contract, to the extent of the work herein subcontracted, which provisions are hereby incorporated by reference, and all of the terms and conditions of this Subcontract, including paragraph A thru W of Subcontract General Conditions Incurred herewith.

(CP at 637-649, ¶2).

The sub-Subcontract General Conditions at Paragraph (a) state in pertinent part:

(a) <u>Obligations and Responsibilities</u>

> It is agreed that Subcontractor will assume toward Contractor [Valley] all obligations and responsibilities which Contractor [Valley] has assumed toward Owner under the Main Contract to the extent of the work herein subcontracted, and Subcontractor shall be entitled to all privileges and protections granted Contractor [Valley] by Owner under the Main Contract. In case of conflict between the terms of this Subcontract and the Main Contract, this Subcontract shall control… A copy of the Main Contract will be made available upon request.

(CP at 641). The sub-Subcontract General Conditions contain a dispute resolution clause at (t)(1) similar to the disputes clauses that numerous Federal Courts have found unenforceable with respect to actions under the Miller Act. General Conditions Section (t)(1) states in pertinent part:

(1) *<u>Pass-through Claims</u>*:

> In the event of any dispute or claim between contractor and Owner which directly or indirect involves the work performed or to be performed by Subcontractor, or in the event of any dispute or claim between Contractor and Subcontractor caused by or arising out of conduct for which Owner may be responsible, ***Subcontractor agrees to be bound to Contractor and Contractor agrees to be bound to Subcontractor to the same extent that Contactor is bound to Owner by the terms of the Main Contract and by any and all procedures and resulting decisions, findings, determinations, or awards made***

> ***thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent jurisdiction or arbitration.***
> ---
> Subcontractor agrees to be bound by the procedure and final determination as specified in the Main Contract and agrees that it will not take, or will suspend, any other action or actions with respect to any such claims and will pursue no independent litigation with respect thereto, ***pending final determination of any dispute resolution procedure between Owner and Contractor. It is expressly understood and agreed that, as to any and all claims asserted by Subcontractor in connection with this project arising from the actions or fault of Owner, Contractor shall not be liable to Subcontractor for any greater amount than Owner is liable to Contractor, less any markups or costs incurred by Contractor*****.**

(CP at 646, emphasis added).

C. PowerCom's Motion to Stay and Compel Arbitration of All Claims Against All Parties

On January 24, 2023, PowerCom filed a motion to stay and to compel arbitration of all claims against all parties. (CP at 309-678). In addition to PowerCom's "non-pass-through" claims, PowerCom argued that its pass-through COVID-19 claim should be arbitrated with its non-pass-through claims because the Port has denied all of Clark's claims, both Clark and Valley failed to present PowerCom's COVID-19 claim to the Port in good faith, and that the Dispute Resolution Process violates PowerCom's statutory bond rights under RCW 39.08 and is unenforceable. (CP 309-326; CP 682-694).

Valley did not file a response to PowerCom's Motion to Stay and Compel Arbitration. Clark and its Sureties agreed to a stay and to arbitrate PowerCom's "non-pass-through claims," but argued that PowerCom's COVID-19 claim should be treated differently, because Clark is already pursuing its own claim for additional costs arising out of COVID-19 in its lawsuit against the Port, which claim includes PowerCom's COVID-19 and Delay claim, and that it should not have to defend against PowerCom's COVID-19 and Delay claim while at the same time adjudicating its own COVID-19 claim in a different venue, which could lead to inconsistent ruling and judicial inefficiency. (CP at 989-993).

Contrary to the Court of Appeals Decision, Clark and its Sureties did ***not*** argue in the trial court in either their response to the motion or at oral argument that PowerCom waived its right to recover under Washington's Little Miller Act pending resolution of Clark's lawsuit against the Port. (CP at 989-993; RP 12:13-16:4). Clark argued for the first time on appeal that:

> Here, the Sub-subcontract's incorporation of the Main Contract's dispute process is express, and satisfies any plausible standard for intentionally waiving a Little Miller Act claim. PowerCom's Sub-subcontract states that PowerCom "agrees to be bound by the procedure and final determination as specified in the Main Contract." The contract specifies that PowerCom will be bound by the "decisions, findings, determinations, or awards made [under the Main Contract],"…The contract provides that PowerCom cannot recover more from Valley than the Port ultimately pays."

(See Appendix B, Page 26).

Clark did not make this argument below, and the Court of Appeals erred in not granting PowerCom's motion to strike Clark's new waiver arguments raised for the first time on appeal, and should have declined to consider it. (See Appendix C, Pages, 2-3).

PowerCom argued that whether and to what extent Clark recovers any money from the Port on its COVID-19 claim is irrelevant because PowerCom has a statutory right under Washington's Little Miller Act to pursue its claims against Clark's

Sureties and Valley's Surety in this lawsuit, and requiring a stay of PowerCom's pass-through claim until final resolution of Clark's lawsuit against the Port constitutes an implied waiver of PowerCom's statutory rights under Washington's Little Miller Act. (CP at 682-694).

On March 17, 2023, the trial court entered an Order Granting in Part and Denying in Part PowerCom's Motion to Stay and Compel Arbitration of all Claims Against All Parties. (CP at 736-738). The trial court granted PowerCom's motion to stay and compel arbitration of its non-pass-through claims. Id. However, the trial court stayed PowerCom's statutory bond claims against Clark's Sureties and Valley's Surety pending a final resolution of Clark's lawsuit against the Port. (CP 736-738).

The Court of Appeals affirmed ruling that PowerCom has waived its right to sue on its Little Miller Act claim citing *United States ex rel. Trans Coastal Roofing Co. v. David Boland, Inc*. and *United States v. Daniel, Urbahn, Seelye and Fuller,* 357 F. Supp. 853, 861, (N.D. III. 1973).

The Court of Appeals ignored the numerous Federal cases that have distinguished both *Bollard* and *Daniel* because the disputes clauses in both of those cases **did not** provide that the decision in the owner/contractor remedial proceedings would be final and binding on the subcontractor's claim. PowerCom's sub-Subcontract does contain the final and binding language, indicating that staying the litigation in favor of the Clark/Port lawsuit will result in PowerCom losing its ability to return to court to enforce its rights under Washington's Little Miller Act, and operates as an implied waiver of PowerCom's Little Miller Act rights and is therefore unenforceable.

V. ARGUMENT

A. This Court's Review is Justified Under RAP 13.4(b)(4)

PowerCom seeks discretionary review in this Court under RAP 13.4(b)(4) because this case involves an issue of substantial public interest and will have sweeping implications on the rights of every contractor and supplier in Washington State under Washington's Little Miller Act right, RCW 39.08. This case presents a prime example of an issue of substantial public interest. The Court of Appeals' decision, while affecting parties to this proceeding, also will affect the statutory rights of every single contractor and material supplier under Washington's Little Miller Act, RCW 39.08. As a result of the Court of Appeals' published decision, a Washington surety and its principal can now avoid liability and prevent a subcontractor from exercising its Little Miller Act statutory bond rights in the absence of a clear and explicit waiver of those rights, and can severely limit or even prevent a subcontractor's recovery against a payment bond surety under RCW 39.08.030.

This Court's review is appropriate in this case where an incorrect holding will have sweeping implications on the rights of every single contractor and material supplier under Washington's Little Miller Act, RCW 39.08.

B. The Court of Appeals Erred in Affirming the Stay of PowerCom's Little Miller Act Claims

Like the Federal Miller Act, Washington's "Little Miller Act" (Chapters 18.27, 39.08 and 60.28 RCW) requires contractors to obtain payment bonds on public works projects for the protection of laborers and materialmen because mechanics' liens are unavailable on such projects. *3A Industries, Inc. v. Turner Constr. Co.,* 71 Wn. App. 407, 411, 869 P.2d 65 (1993). The bond required by the Little Miller Act and the possibility of a suit on it often provides the subcontractor's only insurance against financial disaster due to a prime contractor's nonpayment or default. Upon nonpayment or default by the prime contractor, materialmen and laborers may sue on the payment bond in Washington state court under RCW 39.08.030(1)(a).

Under both the federal Miller Act and Washington's "Little Miller Act," if the subcontract terms affect the timing of recovery and the right of recovery under the Miller Act, enforcement of such terms preclude Miller Act liability and contradicts the express terms of the Miller Act. *Fanderlik-Locke*, 285 F.2d at 942. Accordingly, "the courts do not favor finding that a subcontractor has contractually abandoned his rights under the Miller act." *H.W. Caldwell & Sons, Inc. v. United States for Use & Benefit of John*

H. Moon & Songs, Inc., 407 F.2d 21, 23 (5th Cir. 1969).

Washington's "Little Miller Act" is very similar to the Federal Miller Act. *3A Industries, Inc. v. Turner Const. Co.*, 71 Wn. App. 407, 411, 869 P.2d 65 (1993). Thus, Washington courts turn to federal law to guide in the interpretation of this statute. *Id*. In a series of cases, the federal courts have considered whether a subcontractor's Miller Act right to sue on a payment bond was relinquished when the subcontract contained a disputes clause that would require the subcontractor to wait until a final determination of the prime contractor's claims against the Government, and would require the subcontractor to be bound by the result of the administrative decisions or lawsuit between the government and the primary contractor which are relevant to the subcontractor's claim. The courts have recognized that these dispute clauses would amount to a virtual forfeiture of the subcontractor's Miller Act rights and are unenforceable. *Fanderlik-Locke Co. v. United States*, 285 F.2d at 943.

Here, the Court of Appeals relied on two federal court decisions which it claimed have concluded that similar language in a disputes clause amounts to a waiver of a subcontractor's Miller Act Rights, citing *United States for Use and Benefit of Trans Costal Roofing Co. v. David Boland, Inc*., 922 F. Supp. 597, 598 (S.D. Fla. 1996) and *United States ex rel. R. Rudnick & Co. v. Daniel, Urbahn, Seelve & Fuller*, 357 F. Supp. 853, 860-62 (N.D. Ill. 1973). The Court of Appeals is incorrect, and both of these cases are distinguishable.

In *United States ex rel Trans Coastal Roofing Co. v. David Boland, Inc*., 922 F. Supp. 597 (S.E. Fla. 1996), the issue involved a subcontractor's claim against a general contractor under the Miller Act. *Id*. at 598. The question presented before the *Boland* court was whether the subcontractor's claim should be stayed pending the resolution of the prime contract between the government and the primary contractor. *Id*. The Court found in the affirmative, finding that the contract contained an express waiver of the subcontractor's Miller Act remedy. *Id*. at 599.

There is no such language here. Unlike *Boland,* the disputes clause in PowerCom's Sub-subcontract does not contain any clear or express language that PowerCom is waiving its Little Miller Act bond rights. Indeed, it is not even framed as a release or waiver of any claims. The disputes clause states that PowerCom's will not take or will "suspend" any other action with respect to any such claims… "pending final determination of any dispute resolution procedure between Owner and Contractor." Thus, the dispute clause language affects the timing of recovery of PowerCom's claims, but does not contain a clear and explicit waiver of PowerCom rights under the Little Miller Act payment bonds.

In *United States v. Daniel, Urbahn, Seelve & Fuller*, 357 F. Supp. 853, 860-62 (N.D. Ill. 1973), the disputes clauses at issue merely stayed the Miller Act claim pending completion of the administrative resolution process but did not bar or waive the subcontractor's right to bring subsequent Miller Act claims. Contrary to the Court of Appeals' Decision, the court in *Daniel* found that the dispute clause at issue there did ***not*** amount to a waiver of the subcontractor's Miller Act rights. *Daniel*, 357 F. Supp. at 861.

The Court of Appeals reliance on *Boland* and *Daniel* is unavailing. Unlike *Boland* and *Daniel*, PowerCom's sub-Subcontract not only requires a stay while the prime contract dispute resolution process is ongoing, it also limits PowerCom's right of recovery to the amount that Clark and Valley may ultimately recover from the Port. Thus, the disputes clause explicitly limits PowerCom's rights to "when and if" Clark is paid and Valley is paid, and constitutes an implied waiver of PowerCom's Little Miller Act rights.

Federal courts have interpreted identical or nearly identical disputes clauses under the Miller Act. The federal courts have held, in almost all cases, that a disputes clause that requires claims that may be "passed-through" to the Government, that the subcontractor will stay any "right or remedy that Subcontractor may have at law or in equity until the global dispute resolution and appeals have been exhausted", and that the owner's decision on the subcontractor’s compensation request would be “final and binding” constitutes an invalid waiver of the subcontractor’s Miller Act rights and are unenforceable. *See Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, No C17-1908JLR, 2018 U.S. Dist. LEXIS 67965, 2018 WL 1907569 at *5 (W.D. Wash. April 23, 2018) (finding that a similar subcontract violated the Miller Act because it purported to waiver the subcontractor’s right to sue under the Miller Act – not just the time of bringing such a suit.)

In *Walton Tech*, the Ninth Circuit held that dispute clauses that conditioned a subcontractor's payment on when and whether the prime contractor received payment from the Government—"pay when and if paid" clauses—are not enforceable against a surety because it conflicted with the Miller Act. The Ninth Circuit pointed out that the Miller Act granted a cause of action against the surety 90 days after performance, whereas the subcontract provide for payment only if and when the general contractor was paid. *United States for Use & Benefit of Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1208 (9th Cir. 2002). The court found that when the subcontract terms affect the timing of recovery or the right of recovery under the Miller Act, enforcement of such terms to preclude Miller Act liability contradict the express terms of the Miller Act. *Id*. at 1207.

In *Apply Valley Communs., Inc. v. Budget Elec. Contrs., Inc.*, 2020 U.S. Dist. LEXIS 250377, the dispute clause expressly conditions payment on (1) resolution of the global dispute process (pay-when-paid) and (2) the amount of payment Turner receives from the Government (pay-if-paid). *Apple Valley*, 2020 U.S. Dist. LEXIS 250377, *15-16. The court ruled that because the subcontract limits payments to "when and if" Turner is paid, it constitutes a waiver of the subcontractor's Miller Act rights and is unenforceable. *Id*. at *17-20.

In *Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965, the disputes clause in the SCI-Pinnacle subcontract states that:

> [SCI] agrees to be bound to [Cherokee] to the same extent that [Cherokee] is bound to [the Corps] both by the terms of the Prime Contract and by any and all

> decisions or determinations made as authorized in the Prime Contract. In the event the Prime Contract contains a 'Disputes' clause, where claims may be resolved under an administrative procedure or by arbitration, then as to any claims of [SCI] for acts or omissions of the [Corps] or [the Corps'] representative which are not disposed of by mutual agreement, Contractor agrees to present to the [Corps] . . . all of [SCI's] claims . . . and to further invoke, on behalf of [SCI], those provisions in the Prime Contract for determining disputes. . . . [SCI] agrees to be bound by the procedure and final determinations as specified in any such Disputes clause.

Id. *10.

The court ruled that the contractual provision is not sufficiently clear or explicit to constitute a valid waiver of SCI"s Miller Act rights, citing the Ninth Circuit's ruling in *Weststar Eng'g*, 290 F.3d 1199. The court held that the disputes clause in the Cherokee and SCI's subcontract contains no explicit statement that SCI is waiving its Miller Act right, and thus is not a waiver of SCI's Miller Act right to recover on a payment bond. *Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965, *10-11.

In *United States ex rel. Tusco, Inc. v. Clark Construction Group, LLC*, 235 F. Supp. 3d 745 (D. Md. 2016), the Court held that an identical resolution clause in the Subcontract that precludes the subcontractor's ability to sue Clark's surety until after Clark has completed its dispute resolution process with the Government, and limits a subcontractor's right of recover to "when and if" Clark is paid by the government, is unenforceable because it contravenes the rights afforded to subcontractor under the Miller Act. *Id*. at 759-760.

The *Tusco* court was troubled by the potential effect of a lengthy dispute resolution process on Tusco's right to reimbursement for the change order work, and the fact that the Government and Clark have no economic interest in how much Tusco is ultimately paid for the change order work. The Court pointed out this arrangement is especially troubling in the event of a settlement which leaves Tusco with a small percentage of what it is owed nearly two years after it completed its work. The Court denied Clark's and Traveler's motion to stay ruling that Tusco has not waived its Miller Act rights under the subcontract. *U.S. ex rel. Tusco, Inc*., 235 F. Supp. 3d at *34-36.

The *Tusco* court's concerns are equally applicable to PowerCom. Neither the Port, Clark, nor Valley have any economic interest in how much PowerCom is ultimately reimbursed on its COVID-19 claim. In the event of a settlement which leaves PowerCom with only a fraction of what it is owed, then PowerCom will have to wait an indefinite amount of time to contest this result against Clark and Valley in the trial court. Like *Tusco,* PowerCom has not waived its Little Miller Act rights and should be entitled to litigate its payment bond claims against Clark's Sureties and Valley's surety in the trial court.

VI. CONCLUSION

For the reasons set forth above, this Court should accept review of the Court of Appeals Decision, reverse the Court of Appeals' Decision, and remand this case to the trial court for litigation of PowerCom's statutory bond claims under Washington's Little Miller Act.

I certify that Appellant PowerCom, Inc.'s Petition for Review contains 4,750 words, which complies with the 5,000 word limit set forth in RAP 18.17(c)(10).

DATED this 29th day of January, 2024.

Respectfully submitted,

HAWKINS PARNELL & YOUNG LLP

By: *<u>/s/ Eileen I. McKillop</u>*
Eileen I. McKillop, WSBA 21602
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APPENDIX A

Powercom, Inc. v. Valley Elec. Co. of Mt. Vernon, Inc.

Court of Appeals of Washington, Division One

September 26, 2023, Oral Argument; January 8, 2024, Filed

No. 85120-9-I

Reporter
2024 Wash. App. LEXIS 18 *

POWERCOM, INC., *Appellant*, v. VALLEY ELECTRIC CO. OF MT. VERNON, INC., ET AL., *Respondents*.

Prior History: [*1] Judge signing: Honorable Annette Messitt. Judgment or order under review. Date filed: 03/17/2023.

Core Terms

subcontractor, pass-through, subcontract, Little Miller Act, dispute resolution, right to sue, arbitration, contractor, pending resolution, Miller Act, lawsuit, waive, non-pass-through, final determination, trial court, argues

Case Summary

Overview
HOLDINGS: [1]-The trial court's stay of the subcontractor's pass-through claims against the port, its prime contractor, and their sureties pending final resolution of the prime contractor's lawsuit against the port was proper because the plain language of the subcontract explicitly waived the subcontractor's right to sue under the Little Miller Act, Wash. Rev. Code ch. 39.08, pending resolution of pass-through claims.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1[] **Standards of Review, Abuse of Discretion**

A trial court has inherent power to stay its proceedings where the interest of justice so requires. An appellate court reviews a trial court's stay of proceedings for an abuse of discretion. A trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds or reasons. A court's decision is manifestly unreasonable if, despite applying the correct legal standard to the supported facts, the court adopts a view that no reasonable person would take. A trial court bases its decision on untenable grounds or untenable reasons if it relies on unsupported facts or applies the wrong legal standard.

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > Subcontract Requirements

Public Contracts Law > Contract Performance > Subcontractors & Subcontracts

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > Surety Bonds

HN2[] **Subcontractors & Subcontracts, Subcontract Requirements**

Washington's Little Miller Act, Wash. Rev. Code ch. 39.08, requires contractors to obtain bonds on public works projects. *Wash. Rev. Code § 39.08.010*. The Act is intended to provide security for those who furnish labor and material in the performance of government contracts' where liens are unavailable. The Act also provides subcontractors a right of action in their own name against the bond for work done or materials or goods furnished in the project. *Wash. Rev. Code § 39.08.030(1)(a)*.

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > Subcontract Requirements

Public Contracts Law > Contract Performance > Subcontractors & Subcontracts

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > Surety Bonds

HN3[] **Subcontractors & Subcontracts, Subcontract Requirements**

The federal Miller Act, 40 U.S.C.S. §§ 3131 to 3134, provides security for subcontractors who furnish labor and material under government contracts by requiring prime contractors to secure a payment bond. 40 U.S.C.S. § 3131. It then grants a civil right of action to those subcontractors to recover unpaid labor or material costs from the payment bond. 40 U.S.C.S. § 3133. Because the Little Miller Act, Wash. Rev. Code ch. 39.08, generally parallels the federal Miller Act, Washington courts rely on Miller Act cases to interpret the Little Miller Act.

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > Subcontract Requirements

Public Contracts Law > Contract Performance > Subcontractors & Subcontracts

HN4[] **Subcontractors & Subcontracts, Subcontract Requirements**

A subcontractor may waive its right to sue under the Little Miller Act, Wash. Rev. Code ch. 39.08. But courts do not favor finding that a subcontractor has contractually abandoned its rights under the Little Miller Act. A subcontractor waives its right to sue under the Little Miller Act only where a subcontract explicitly contains such a waiver. The waiver must be manifest by the plain language of the contract.

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Judges: Authored by Bill Bowman. Concurring: Michael Diaz, Lori Smith.

Opinion by: Bill Bowman

Opinion

¶1 BOWMAN, J. — PowerCom Inc., a subcontractor on a renovation project at the Seattle-Tacoma International Airport, appeals the trial court's stay of its pass-through claims against the Port of Seattle (Port), its prime contractor Clark Construction Group LLC (Clark), and their sureties pending the final resolution of Clark's lawsuit against the Port. PowerCom argues the trial court's stay violated its right to sue under chapter 39.08 RCW, Washington's "Little Miller Act." Because the plain **[*2]** language of PowerCom's subcontract explicitly waives its right to sue under the Little Miller Act pending resolution of pass-through claims, we affirm.

FACTS

¶2 In 2015, the Port hired Clark to renovate the "International Arrivals Facility South Satellite Corridor" at Seattle-Tacoma International Airport. The Port and Clark executed a design-build contract under which Clark was the prime contractor (Main Contract). In 2017, Clark executed a subcontract with Valley Electric Co. of Mt. Vernon Inc. (Valley) to install electric security, surveillance, and monitoring systems. And in 2018, Valley subcontracted with PowerCom to provide, install, and test certain electrical cables within Valley's scope of work.[1]

¶3 All three contracts contain dispute resolution provisions. The Main Contract has a multistep dispute resolution process. First, the Port and Clark must meet to try to resolve any claims. If they do not resolve their dispute, they must submit the claim to a dispute

[1] Clark and Valley each posted bonds with surety companies to ensure payment to laborers, subcontractors, and material suppliers as required for public works contracts under RCW 39.08.010.

resolution board. If they still cannot resolve their claim, the Port and Clark must mediate the claim under the voluntary construction mediation rules of the American Arbitration Association. And finally, having exhausted those **[*3]** avenues, the Port or Clark may file a lawsuit to resolve the claim.

¶4 The Main Contract applies to claims not only between the Port and Clark but also to claims Clark "assert[s] on behalf of [a] Subcontractor, Sub-subcontractor, or Supplier." Claims asserted by Clark for subcontractors are called "pass-through claims." The contract between Clark and Valley incorporates the dispute resolution procedures of the Main Contract for any pass-through claims but authorizes arbitration of non-pass-through claims "at Clark's sole option."

¶5 The subcontract between Valley and PowerCom provides different processes for dispute resolution depending on the type of claim. For all pass-through claims, the contract binds PowerCom to "the procedure and final determination as specified in the Main Contract." And PowerCom agreed that

> it will not take, or will suspend, any other action or actions with respect to any such claims and will pursue no independent litigation with respect thereto, pending final determination of any dispute resolution procedure between [the Port] and [Clark].

All other claims—that is, non-pass-through claims—"shall be decided by arbitration."[2]

¶6 PowerCom began its electrical work in late 2018, **[*4]** but between March 2020 and October 2021, it experienced delays because of the COVID-19[3] protocols that the Port, Clark, and Valley implemented at the project site. In October 2021, PowerCom submitted a pass-through claim to Valley, seeking payment of $1,306,250 for its total increased costs from the COVID-19 restrictions.[4] Valley passed PowerCom's and their own COVID-19-related claims to Clark. Clark then submitted both claims along with its own COVID-19-related claims to the Port.

¶7 The Port disputed the claims, so the Port and Clark engaged in the dispute resolution process described in the Main Contract. That process failed to resolve the claims. So, in December 2022, Clark sued the Port for recovery of its, Valley's, and PowerCom's losses.

¶8 On October 19, 2022, PowerCom sued the Port, Clark and its sureties, and Valley and its sureties, seeking compensation for its COVID-19-related costs and costs associated with its non-pass-through claims. It asserted claims of breach of contract; breach of the covenant of good faith and fair dealing; violation of the *Prompt Payment Act, chapter 39.76 RCW*; unjust enrichment; and payment for its "account stated." PowerCom also sought foreclosure on Clark's and Valley's sureties' bonds under **[*5]** the Little Miller Act.

¶9 In January 2023, PowerCom moved to compel arbitration of its claims against all parties. PowerCom argued that the arbitration clause in its subcontract applies to both pass-through and non-pass-through claims and asked that the claims be arbitrated together. It also asked for a stay pending that arbitration. Clark agreed to stay and arbitrate PowerCom's non-pass-through claims. But it argued that the trial court should stay PowerCom's COVID-19-related claim pending resolution of its lawsuit against the Port.

¶10 The court granted PowerCom's motion to compel arbitration for its non-pass-through claims against Clark but denied it as to the pass-through claims. The court stayed PowerCom's COVID-19-related claim "pending resolution of Clark's lawsuit against [the] Port" because that "lawsuit includes [PowerCom]'s pass-through COVID-19 claim."

¶11 PowerCom appeals.[5]

ANALYSIS

¶12 PowerCom argues the court erred by staying its pass-through COVID-19-related claim "pending resolution of Clark's lawsuit against [the] Port."

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[2] For non-pass-through claims, the contract also requires the parties to attend at least four hours of mediation before arbitration. And if PowerCom's subcontract and the Main Contract conflict, PowerCom's subcontract controls.

[3] Coronavirus disease 2019.

[4] PowerCom also submitted non-pass-through claims to Valley for extra work and unpaid change orders. In total, PowerCom sought a judgment of $2,643,330 plus sales tax and prejudgment interest.

[5] The Port and Clark filed response briefs to PowerCom's appeal. We issued a letter instructing Valley to also file a response brief. Valley responded, joining the Port and Clark's arguments. PowerCom moved to strike Valley's joinder, arguing that it "attempts to raise new issues and arguments for the first time on appeal" and that it is "not [a] respondent[ ] or necessary part[y] to PowerCom's appeal under *RAP 5.3(i)*." We deny PowerCom's motion to strike Valley's response, which was submitted at the direction of this court and raised no new issues.

According to PowerCom, the court's stay "indefinitely postponed" its ability to recover payment on its claim in violation of the Little Miller Act. Clark argues that **[*6]** PowerCom contractually waived by "'clear and explicit' language" its right to recover under the Little Miller Act pending resolution of Clark's lawsuit against the Port.[6] We agree with Clark.

¶13 *HN1*[] A trial court has inherent power to stay its proceedings where the interest of justice so requires. *King v. Olympic Pipeline Co., 104 Wn. App. 338, 350, 16 P.3d 45 (2000)*. We review a trial court's stay of proceedings for an abuse of discretion. *Id. at 348*. A trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds or reasons. *Id.* A court's decision is manifestly unreasonable if, despite applying the correct legal standard to the supported facts, the court adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)*. A trial court bases its decision on untenable grounds or untenable reasons if it relies on unsupported facts or applies the wrong legal standard. *Id.*

¶14 *HN2*[] Washington's Little Miller Act requires contractors to obtain bonds on public works projects. *3A Indus., Inc. v. Turner Constr. Co., 71 Wn. App. 407, 411, 869 P.2d 65 (1993)*; *RCW 39.08.010*. The act is intended to "'provide security for those who furnish labor and material in the performance of government contracts'" where liens are unavailable. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 176 Wn.2d 502, 523-24, 296 P.3d 821 (2013)* (quoting *Fanderlik-Locke Co. v. United States ex rel. Morgan, 285 F.2d 939, 942 (10th Cir. 1960)*). The Little Miller Act also provides subcontractors "a right of action in their own name against the bond for work **[*7]** done or materials or goods furnished in the project." *3A Indus., 71 Wn. App. at 411*; *RCW 39.08.030(1)(a)*.[7]

¶15 *HN4*[] A subcontractor may waive its right to sue under the Little Miller Act. *H. W. Caldwell & Son, Inc. v. United States ex rel. John H. Moon & Sons, Inc., 407 F.2d 21, 23 (5th Cir. 1969)*; ***see*** *3A Indus., 71 Wn. App. at 411, 418-19* (language of subcontract bound subcontractor to arbitration at contractor's demand despite its right to sue under the Little Miller Act). But courts do not favor finding that a subcontractor has contractually abandoned its rights under the Little Miller Act. *H. W. Caldwell, 407 F.2d at 23*; ***see*** *3A Indus., 71 Wn. App. at 418* (vague references to dispute resolution processes are not enough to waive a subcontractor's right to sue under the Little Miller Act); ***see also*** *United States ex rel. Walton Tech., Inc. v. Weststar Eng'g, Inc., 290 F.3d 1199, 1205 (9th Cir. 2002)* (courts liberally construe the Miller Act "'to effectuate the Congressional intent to protect those whose labor and materials go into public projects'") (quoting *United States ex rel. Sherman v. Carter, 353 U.S. 210, 216, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957)*). A subcontractor waives its right to sue under the Little Miller Act only where a subcontract explicitly contains such a waiver. *H. W. Caldwell, 407 F.2d at 23*; ***see*** *3A Indus., 71 Wn. App. at 418-19* (subcontractor's "explicit agreement" to arbitration bound it to that remedy). The waiver must be "'manifest by [the] plain language' of the contract." *3A Indus., 71 Wn. App. at 413*[8] (quoting *Fanderlik-Locke, 285 F.2d at 943*).

¶16 Citing *Fanderlik-Locke*, PowerCom argues it did not explicitly waive its right to sue under the Little Miller Act. In that case, a subcontractor sued the prime contractor and the bondsman under the federal Miller Act for **[*8]** the value of labor performed and materials installed beyond that provided for in the subcontract. *Fanderlik-Locke, 285 F.2d at 941*. The prime contractor argued the subcontractor could not sue until it followed an exhaustive dispute resolution process provided in the prime contract that was incorporated by reference in the subcontract. *Id. at 941-42*. The subcontract provided that the subcontractor was bound to the contractor by the "'general conditions'" of the prime contract, but it did not specifically reference the settlement of disputes or the subcontractor's right to sue under the Miller Act. *Id.* The court determined that the language did not amount to an explicit waiver of the subcontractor's right to sue

[6] PowerCom argues that we should refuse to consider Clark's waiver argument because it did not argue the theory below. But the record shows that Clark did argue below that PowerCom waived its right to sue under the Little Miller Act.

[7] Washington's Little Miller Act is similar to the federal "Miller Act," *40 U.S.C. §§ 3131 to 3134*. *HN3*[] The Miller Act *provides security for subcontractors who furnish labor and material under government contracts by requiring prime contractors to secure a payment bond.* *40 U.S.C. § 3131*. It then grants a civil right of action to those subcontractors to recover unpaid labor or material costs from the payment bond. *40 U.S.C. § 3133*. Because the Little Miller Act generally parallels the federal Miller Act, Washington courts rely on Miller Act cases to interpret the Little Miller Act. *See 3A Indus., 71 Wn. App. at 411, 418*.

[8] Internal quotation marks omitted.

under the Miller Act. *Id. at 943*.

¶17 This case is different than *Fanderlik-Locke*. PowerCom's contract does more than just incorporate by reference a dispute resolution process in the Main Contract. It notifies PowerCom that its claims against the Port will pass through to Clark to be resolved with the Port on its behalf. And it states that for those pass-through claims, PowerCom is "bound by the procedure and final determination as specified in the Main Contract." Finally, the plain language of PowerCom's contract states that it will surrender its right to independently **[*9]** sue for recovery of those claims pending resolution of any dispute between Clark and the Port:

> [PowerCom] agrees that it will not take, or will suspend, any other action or actions with respect to any such claims and will pursue no independent litigation with respect thereto, pending final determination of any dispute resolution procedure between [the Port] and [Clark].

This language explicitly manifests PowerCom's agreement to relinquish the right to resolve pass-through claims in the first instance to Clark and to pursue no independent litigation until that process is complete.

¶18 PowerCom argues the language in its contract does not amount to an explicit waiver of its right to immediately sue under the Little Miller Act because it does not specifically reference that act. But the language says PowerCom relinquishes its right to sue or pursue any independent litigation for pass-through claims pending resolution of "any dispute" between Clark and the Port. This unambiguous language clearly includes claims under the Little Miller Act.

¶19 Indeed, federal courts have concluded that similar language amounts to a waiver of a subcontractor's Miller Act rights. For example, in *United States for Use and Benefit of Trans Costal Roofing Co. v. David Boland, Inc., 922 F. Supp. 597, 598 (S.D. Fla. 1996)*.[9] *aff'd, 226 F.3d 646 (11th Cir. 2000)*, the court held that **[*10]** a subcontractor waived its right to a Miller Act remedy where the subcontract provided that

> the "[s]ubcontractor shall first pursue and fully exhaust [the procedures set forth in the standard disputes clause of the primary contract] before commencing *any other action* against Contractor for any claims it may have arising out of its performance of the Work herein."

The court determined that the language "clearly encompasses both the Miller Act and common law claims." *Id.*; ***see also*** *United States ex rel. R. Rudnick & Co. v. Daniel, Urbahn, Seelye & Fuller, 357 F. Supp. 853, 860-62 (N.D. Ill. 1973)*[10] (language in a subcontract that "'***any dispute*** concerning a question of fact arising under this Subcontract which is not disposed of by agreement shall be decided by [an alternative dispute process]'" bars suit under the Miller Act).

¶20 The language in PowerCom's subcontract consists of a waiver of its right to sue under the Little Miller Act pending a final determination of Clark's pass-through claims against the Port. The trial court did not abuse its discretion by staying PowerCom's pass-through COVID-19-related claim.[11]

¶21 We affirm.

SMITH, C.J., and DIAZ, J., concur.

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[9] Emphasis added; alterations in original.

[10] Emphasis added.

[11] Because we conclude PowerCom waived its right to sue under the Little Miller Act as to its pass-through claim pending resolution of the lawsuit between Clark and the Port, we do not reach PowerCom's argument that the trial court erred by refusing to compel arbitration on that claim.

APPENDIX B

FILED
Court of Appeals
Division I
State of Washington
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No. 851209

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

POWERCOM, INC., a Washington corporation,

Appellant,

v.

VALLEY ELECTRIC CO. OF MT. VERNON, INC., a Washington corporation; ARGONAUT INSURANCE COMPANY, a foreign insurer (Bond No. SUR0043723-00) CLARK CONSTRUCTION GROUP, LLC, a foreign limited liability company; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurer; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a foreign insurer; FEDERAL INSURANCE COMPANY, a foreign insurer; ZURICH AMERICAN INS. CO., a foreign insurer (Bond Nos. 106308203/82298673/09190971 and Bond Nos. 106356881/82298695/09207256); and PORT OF SEATTLE, a Washington State municipal corporation.

Respondents.

BRIEF OF RESPONDENT CLARK CONSTRUCTION GROUP, LLC

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I. INTRODUCTION

PowerCom's effort to force its "pass-through" claim into arbitration faces two insurmountable hurdles. First, Clark has never agreed to mandatory arbitration with PowerCom or any other party in this case. Black letter law forbids imposing arbitration upon a party that has not agreed to it. And second, the only mandatory arbitration agreement in this case—to which Clark is not a party—*specifically excludes* pass-through claims. PowerCom's appeal thus seeks to enforce an arbitration agreement that does not exist against a party that has not signed it. Nothing in PowerCom's winding brief justifies such an extraordinary result.

Indeed, PowerCom raises arbitrability so parenthetically it is difficult to tell whether it intends to raise it at all. PowerCom abandons the only arbitrability arguments it made below, briefly raising an unpreserved, but equally meritless new argument. Instead, PowerCom trains its fire on the trial court's decision to stay PowerCom's pass-through claim. But PowerCom fails even to acknowledge the trial court's broad discretion to stay proceedings, much less to identify any abuse. That is because the trial court acted properly. PowerCom has submitted the same claim to a binding dispute resolution process that is playing out in parallel, and promised not to pursue independent litigation. The court merely held PowerCom to its contractual arrangements.

The trial court got it right. This Court should affirm.

II. STATEMENT OF THE ISSUES

1. Whether the trial court correctly denied PowerCom's motion to compel arbitration on PowerCom's pass-through claim.

2. Whether the trial court correctly stayed PowerCom's pass-through claim pending the resolution of a related case that would resolve the claim.

III. STATEMENT OF THE CASE

A. The Parties' Agreements

This case arises from construction of the International

Arrivals Facility at the Seattle-Tacoma International Airport (the "Project"). CP 3.

In 2015, the Port of Seattle hired Clark as the Project's design-builder and prime contractor. CP 3. In 2017, Clark subcontracted with Valley Electric to install security, alarm, video surveillance, and other systems. CP 3. And in 2018, Valley sub-subcontracted with PowerCom, including to install and test various electrical cables within Valley's scope of work. CP 5. This tiered contracting system is typical of large, complex construction projects.

At each stage, the contracting parties entered into written agreements that govern their relationships. As relevant here, each contract contains dispute resolution procedures.

The top-level contract between the Port and Clark ("Main Contract") includes a multi-step "Dispute Resolution Process." CP 622-23. The process governs not only Clark's own claims against the Port, but any claims Clark asserts against the Port "on behalf of [a] Subcontractor, Sub-subcontractor, or Supplier." CP

621. These latter claims are known as "pass-through claims." Because subcontractors lack contractual privity with the Port, they *pass* their claims against the Port *through* intervening parties that do have contractual relationships with the Port and can assert the claims on the subcontractors' behalf. CP 321.

Under the Main Contract, all claims against the Port go through several stages of contractual dispute resolution, followed by litigation. CP 622-26. The Main Contract does not provide for mandatory arbitration under any circumstances.

The contract between Clark and Valley (the "Subcontract") likewise contains dispute resolution procedures. The Subcontract includes an arbitration provision—but only "at Clark's sole option." CP 631. In other words, Clark did not agree to be bound to arbitrate *any* claim with Valley or any other party. And in addition, the Subcontract specifically carves pass-through claims against the Port—i.e. "any dispute between Clark and [Valley], in any way relating to or arising from any act or omission of the [Port]"—*out* of the optional arbitration clause.

CP 631. For pass-through claims, Valley "agree[d] to be bound to Clark to the same extent that Clark is bound to the [Port], by the terms of the [Main Contract]." CP 631. Valley would submit pass-through claims to Clark, and Clark would either itself present the claims to the Port or "authorize [Valley] to present" the claims in Clark's stead. CP 631. Either way, on its pass-through claims, Valley expressly agreed to be bound "by any and all preliminary and final decisions or determinations made [under the Main Contract] by the party, board or court so authorized in the [Main Contract] or by law." CP 631.

Finally, the contract between Valley and PowerCom (the "Sub-subcontract") also contains dispute resolution procedures that distinguish between pass-through and non-pass-through claims. All claims between Valley and PowerCom *except "Pass-through Claims"* "shall be decided by arbitration." CP 646. But for pass-through claims, PowerCom, like Valley, agreed to be bound by the Main Contract's dispute resolution process. CP 646. And PowerCom specifically agreed to be bound "by any and all … resulting decisions, findings, determinations or awards made thereunder by the person so authorized in the Main Contract, or by an administrative agency, board, court of competent jurisdiction or arbitration." CP 646. In other words, PowerCom specifically agreed that its claims against the Port would be passed through to Clark for resolution under the Main Contract, and that the results of that process would bind PowerCom on its pass-through claims.

PowerCom also "agree[d] that it will not take, or will suspend, any other action or actions with respect to any [pass-through] claims and will pursue no independent litigation with respect thereto, pending final determination" of its pass-through claims under the Main Contract. CP 646. In other words, PowerCom expressly waived the right to bring any other litigation to vindicate pass-through claims, and agreed to stay any such litigation.

These three, interlocking contracts created a consistent scheme governing claims against the Port related to the Project:

subcontractors' claims against the Port must be passed up the chain—from PowerCom, to Valley, to Clark—and asserted by Clark against the Port as contemplated by the Main Contract. The results of that process would bind all the parties on the pass-through claims. This general system of pass-through claim adjudication is frequently employed in large construction projects across the nation.

B. Proceedings Below

1. On October 19, 2022, PowerCom filed the operative complaint against Valley, Clark, the Port, and the sureties that Valley and Clark engaged to provide payment bonds for the Project. CP 1. PowerCom's claims arise from a smattering of disputes that occurred during the Project. *See, e.g.*, CP 6-8.[1]

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[1] Most of PowerCom's claims are non-pass-through claims asserted against Valley. For example, PowerCom has sued Valley for failing to pay amounts due under the Sub-subcontract, for violating Washington's Prompt Payment Act, for quantum meruit, and for breach of the covenant of good faith and fair dealing. CP 13-18. PowerCom also asserts the quantum meruit claim against Clark and the Port. CP 15. As explained below, none of these non-pass-through claims are at issue in this appeal.

Clark—like each of the defendants—denies all of PowerCom's claims.

The only claim at issue in this appeal is PowerCom's pass-through claim to recoup costs and expenses that it claims it incurred as a result of the COVID-19 pandemic. PowerCom has asserted that COVID-19 protocols implemented on the Project "caused inefficiencies for PowerCom and its crews for a period of over a year and a half," including by shutting down the work site, requiring social distancing, creating temperature check-in stations, and eliminating tool sharing. CP 9-10.

PowerCom concedes this claim was originally submitted as a pass-through claim against the Port for resolution under the Main Contract. Its complaint alleges that PowerCom submitted this claim to Valley as a pass-through claim against the Port; that Valley submitted the claim (along with its own COVID-19 claim) to Clark; and that Clark submitted those claims (along with its own COVID-19 claim) to the Port for resolution. CP 10-11. The Port has so far denied these claims, but litigation of these claims remains ongoing. Clark strongly disagrees with the Port's position, and is working to bring all the pass-through COVID-19 claims to a favorable resolution.

2. On January 18, 2023, PowerCom moved to compel arbitration on all claims against all parties, and to stay its claims in the trial court. CP 312-13. As to the non-pass-through claims, PowerCom invoked the arbitration agreement in its Sub-subcontract with Valley. That arbitration provision allows for arbitration of all claims between PowerCom and Valley *except* pass-through claims. CP 321.

Clark and the Port argued that they are not party to PowerCom's arbitration agreement with Valley, and therefore are not bound to arbitrate *any* claim with PowerCom. CP 990, 1004-05. Clark agreed—solely as a matter of convenience—to participate in the arbitration as to the non-pass-through claims only. CP 990. The Port declined to arbitrate any claims. PowerCom argued in reply that the Port was "equitably estopped" from refusing to arbitrate. CP 691.

As to PowerCom's COVID-19 pass-through claim—the only claim at issue here—PowerCom conceded that its arbitration agreement with Valley *did not apply* to pass-through claims. CP 321. PowerCom argued, however, that the claim should be "[c]onsolidated" with the other claims because it will "involve the same or similar evidence." CP 321, 323. PowerCom argued that parties should not be allowed to "split claims involving the same core facts into two forums," and again argued vaguely for "equitable estoppel" because "PowerCom's claims are sufficiently tied to" the Port, Clark, Valley, and their contracts. CP 323.

Clark opposed arbitration of PowerCom's COVID-19 pass-through claim, and asked the court to stay the claim in the trial court. CP 990-91. Clark argued that the claim was not arbitrable because there was no arbitration agreement between PowerCom and Clark. CP 990. Moreover, the binding dispute resolution process set forth in the Main Contract remained (and remains) ongoing: as contemplated by the Main Contract, Clark had filed a lawsuit against the Port asserting its own claims and subcontractors' pass-through claims. CP 990; *see Clark Constr. Grp. v. Port of Seattle*, King County Cause No. 22-2-20747-7 SEA. Clark's, Valley's, and PowerCom's COVID-19 claims were being actively adjudicated in that lawsuit, and the results would bind PowerCom and resolve the pass-through claim it is asserting in this case. CP 990-91; *see also* CP 646.

Clark thus argued that in accordance with the parties' contracts, and in the interests of judicial economy, PowerCom's pass-through claim in this case should be stayed pending the binding resolution of that claim between Clark and the Port. CP 991; RP 7-8 (PowerCom acknowledging at oral argument that Clark had requested a stay of PowerCom's pass-through claim).

In reply, PowerCom asserted for the first time that its contractual obligation to abide by the results of the Main Contract's dispute resolution process was void, and that it should be allowed to proceed with its pass-through claim regardless of the ongoing dispute between Clark and the Port. CP 684-89. At oral argument, Clark responded to this new point, arguing that PowerCom had misapplied the case law it cited, and that PowerCom's contract clearly waived its right to bring a separate action on its pass-through claim. RP 13-15.

3. On March 17, 2023, the trial court granted PowerCom's motion in part, denied it in part, and stayed the pass-through claim. CP 736-38. Based on Clark's consent, the court granted the motion to compel arbitration of the claims against Clark "*but only* with respect to the non-pass-through claims … as agreed to by the parties in the interest of judicial economy." CP 737. The so-called "non-pass-through claims" are now in arbitration.

As to PowerCom's pass-through claim, the court denied the motion to compel arbitration, and stayed the claim "pending resolution of Clark's lawsuit against Port of Seattle …, which such lawsuit includes Plaintiff's pass-through COVID-19 claim." CP 737.

4. On March 20, 2023, PowerCom noticed this appeal.

IV. ARGUMENT

"A reviewing court reviews de novo a trial court's decision to compel or deny arbitration." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 46, 470 P.3d 486, 490 (2020).

"A court's determination on a motion to stay proceedings … is discretionary, and is reviewed only for abuse of discretion. A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons." *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000) (footnote omitted).

A. The Trial Court Correctly Denied PowerCom's Motion To Compel Arbitration as to the Pass-Through Claim

1. The trial court correctly denied arbitration of PowerCom's pass-through claim.

The foundational principle of arbitration law is that "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." *Burnett*, 196 Wn.2d at 48 (citation omitted). "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648-49 (1986).

Washington's Uniform Arbitration Act thus allows a court to compel arbitration only "[o]n motion of a person showing an agreement to arbitrate." RCW 7.04A.070(1). If "there is no enforceable agreement, [the court] may not order the parties to arbitrate." *Id.*; *see also* RCW 7.04A.230 (requiring vacatur of arbitration award if arbitration "exceeded the arbitrator's powers").

It is undisputed that Clark has no arbitration agreement—nor any contract whatsoever—with PowerCom. Indeed, Clark has not agreed to binding arbitration with any party in this case. The absence of an arbitration agreement between PowerCom and Clark resolves the arbitrability issue. It is not relevant, as PowerCom argued below, that a separate arbitration may "involve the same or similar evidence." CP 323. PowerCom points to no authority allowing a court to "[c]onsolidate[]," *see* CP 321, an otherwise unarbitrable claim in arbitration solely on the basis of judicial economy. Indeed, PowerCom has not renewed this consolidation argument on appeal, and thus has waived it.

Moreover, PowerCom does not point to any arbitration agreement in this case—between any parties—that allows arbitration of a pass-through claim. The Main Contract omits any arbitration provision, and both the Subcontract and Sub-subcontract carve pass-through claims out of their arbitration provisions. CP 631, 646. No party's contract contemplates any arbitration of pass-through claims.

The absence of an arbitration agreement between PowerCom and Clark concerning the pass-through claim required the trial court to deny PowerCom's motion to compel. This Court should affirm that decision.

2. On appeal, PowerCom abandons the only two arguments it made below for arbitration of the pass-through

claim: (1) consolidation for convenience, and (2) equitable estoppel. PowerCom has failed to renew these arguments in its brief on appeal, and therefore waived these arguments.

Instead, PowerCom (at 36) now appears to argue that because both the Subcontract and Sub-subcontract "contain an arbitration clause," these clauses collectively "express an intention by Clark, Valley, and PowerCom to arbitrate all disputes between them." Although it provides little to no reasoning, PowerCom (at 35-36) seems to suggest that these arbitration provisions are somehow incorporated against each party, allowing any party with an arbitration agreement to arbitrate against any other.

PowerCom did not make this argument below, and this Court should decline to consider it. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."). But at any rate, this argument fails at the outset for the fundamental reason that Clark never signed any binding arbitration agreement with any party. The arbitration agreement between Clark and Valley provides for arbitration "at Clark's sole option." CP 631. Clark's agreement to *optional* arbitration with Valley expresses no intent to be bound to arbitrate any issue with any party.

Moreover, even if the arbitration agreements in each contract ran against every other party—which they do not—the arbitration agreements themselves *do not apply to pass-through claims*. Both the Subcontract and the Sub-subcontract carve pass-through claims *out* of the arbitration clauses. CP 631, 646. In other words, even in a world in which PowerCom could enforce its arbitration clause with Valley against Clark, that arbitration clause does not reach the pass-through claim at issue here. Contrary to PowerCom's suggestion (at 36), the contracts do not "express an intention … to arbitrate all disputes between" the parties; at least with respect to pass-through claims, they express the clear intention *not* to.

In addition, PowerCom points to no language in either the

Subcontract or the Sub-subcontract that incorporates any arbitration agreement against any party other than the specific contract counterparties to each arbitration agreement. In fact, both contracts limit their arbitration provisions to the specific parties who signed them. CP 631 ("dispute[s] between Clark and [Valley]"); CP 646 ("matters in question between [Valley] and [PowerCom]").

PowerCom (at 33-36) cites a line of cases in which courts found that contracts *had* incorporated arbitration clauses by reference. But none of those cases helps PowerCom. Several of the cases involve disputes between contract counterparties, where the court found that the *counterparties* had incorporated an enforceable arbitration agreement by reference to another contract. *3A Indus. v. Turner Constr. Co.*, 71 Wn. App. 407, 418, 869 P.2d 65 (1993); *Maxum Founds. v. Salus Corp.*, 779 F.2d 974, 979-80 (4th Cir. 1985); *J. S. & H. Constr. Co. v. Richmond Cnty. Hosp. Auth.*, 473 F.2d 212, 214, 216 (5th Cir. 1973). Here, however, Clark and PowerCom are not contract counterparties at all—so there is no contract between them into which an arbitration clause could be read.

In the other cases PowerCom cites, courts found that a contract counterparty's *surety* had been bound by its principal's arbitration agreement with a claimant. *J & S Constr. Co. v. Travelers Indem. Co.*, 520 F.2d 809, 810 (1st Cir. 1975); *Exchange Mut. Ins. Co. v. Haskell Co.*, 742 F.2d 274, 276 (6th Cir. 1984); *Hoffman v. Fid. & Dep. Co. of Md.*, 734 F. Supp. 192, 194 (D.N.J. 1990). As the First Circuit explained in *J & S Construction*, suits against sureties are "based on [the] [suing party's] contractual and quasi-contractual rights against the [surety's] principal." 520 F.2d at 810. Where the surety has incorporated by reference a contract with an arbitration agreement, that "obligation to arbitrate cannot be rendered meaningless" by suing the surety rather than the principal. *Id.* That reasoning has no relevance here: The only party with which PowerCom has any form of arbitration agreement is Valley. But neither Clark nor its sureties serve as *Valley's* sureties. The cases binding a surety to its principal's incorporated contract thus do not apply.

The trial court correctly denied PowerCom's motion to compel arbitration.

B. The Trial Court Correctly Stayed the Pass-Through Claim

1. The trial court did not abuse its discretion in staying PowerCom's pass-through claim.

This Court affirms a trial court's stay of proceedings so long as it is not "manifestly unreasonable or … based upon untenable grounds or reasons." *King*, 104 Wn. App. at 348. The trial court may consider "the interests affected and the reasons for and against the decision," as well as "the interest of justice." *Id.* at 348, 350. PowerCom's brief does not acknowledge this Court's deferential abuse-of-discretion standard.

The trial court's decision to stay litigation on PowerCom's pass-through claim was eminently reasonable based on judicial economy, the interest of justice, and the balance of the parties' interests.

Judicial economy. For "Pass-through Claims," PowerCom's Sub-subcontract expressly binds it to accept all "decisions, findings, determinations, or awards made [under the Main Contract]," including in a "court of competent jurisdiction." CP 646; *see also id.* ("Subcontractor agrees to be bound by the … final determination as specified in the Main Contract."). As the trial court noted, Clark's lawsuit against the Port "includes Plaintiff's pass-through COVID-19 claim." CP 737. Under the Sub-subcontract's express terms, that parallel litigation will therefore finally resolve PowerCom's pass-through claim in this case. Allowing the claim to proceed here would waste judicial resources—and the defendants' resources—by forcing parallel adjudication of the same issues, particularly because an adjudication in this case would be rendered ineffective by a resolution in Clark's lawsuit against the Port.

Interest of justice. The interest of justice points the same way. Allowing parallel adjudications of the same claim raises the prospect of inconsistent results, contrary to the interest of justice. Moreover, the Sub-subcontract requires PowerCom to "pursue no independent litigation with respect [to pass-through claims], pending final determination of any dispute resolution procedure" under the Main Contract. CP 646. PowerCom concedes that the plain language of its Sub-subcontract "requires suspension of PowerCom's action until a final determination of any dispute resolution procedure between Clark and the [Port]." PowerCom Br. 31. The interests of justice are served by holding PowerCom to its promises.

Balance of interests. Finally, the balance of the parties' interests weighs heavily in favor of a stay. For defendants, proceeding with the pass-through claim represents a significant waste of resources when the same claim is already being adjudicated in Clark's lawsuit against the Port. For PowerCom, the upside to proceeding is marginal to nonexistent, because any recovery it could obtain in this case will be superseded by the resolution of Clark's lawsuit against the Port. *See* CP 646. In light of PowerCom's contractual promises, the trial court did not abuse its discretion in staying PowerCom's pass-through claim.

2. PowerCom's arguments against the stay are meritless.

a. PowerCom's primary argument is that, contrary to the plain language of its Sub-subcontract, PowerCom is "not bound by any final decision or settlement between Clark and the Port of Seattle" on its pass-through claim. PowerCom Br. 3; *see also* PowerCom Br. 5, 25-33. PowerCom points out that it brings its court claim pursuant to Washington's "Little Miller Act"—a law that gives subcontractors a statutory cause of action to sue against a contractor's surety bond. *See 3A Indus.*, 71 Wn. App. at 410-11. PowerCom argues that its claim to collect against Clark's bond is "separate and independent" from Clark's ongoing litigation, so there is no reason to stay this case. It further argues that a stay effectively strips PowerCom of the statutory right to its "Little Miller Act" remedy. PowerCom Br. 3-4

PowerCom thus argues that the language in its subcontract—which, PowerCom (at 33) concedes, "surrender[s] … PowerCom's right to the benefits of the Little Miller Act"—does not suffice to override PowerCom's statutory cause of action.

PowerCom bases this argument on *Fanderlik-Locke Co. v. United States*, 285 F.2d 939 (10th Cir. 1960), which involved the federal government's similar "Miller Act" statute. *See* PowerCom Br. 27-31. But that case stands for the limited proposition that the mere, *general* incorporation of another contract by reference does not suffice to waive a subcontractor's right to bring a separate Miller Act claim simply because that generally incorporated contract includes a binding dispute resolution provision. *Fanderlik-Locke*, 285 F.2d at 943. In that case, the subcontractor's agreement vaguely incorporated by reference the prime contract's "general conditions." *Id.* One of the terms in the prime contract, however, was a dispute resolution term that, like the provisions in PowerCom's contract, would have led to the subcontractor "surrender[ing] his right to the benefits of the Miller Act provisions." *Id.*

The court held that a contract should not be interpreted to waive a subcontractor's right to bring a Miller Act claim "unless it be manifest by plain language of the contract." *Id.* (quotation marks omitted). Because the subcontract at issue only vaguely incorporated the prime contract's "general conditions," the court concluded that "[t]he language of the subcontract manifests no such intention." *Id.*

PowerCom is differently situated. As the Washington Supreme Court has explained, *Fanderlik-Locke* stands only for the proposition that when incorporation by reference would waive a subcontractor's right to bring a Miller Act lawsuit, a "stricter standard for incorporation [is] required." *Wash. State Major League Baseball Stad. Pub. Fac. Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 526, 296 P.3d 821 (2013). But as that Court has also acknowledged, "courts have found incorporation of disputes clauses in the prime contract … where there is 'a provision in the [relevant subcontract] making the 'disputes' clause expressly applicable.'" *Id.* (citation omitted). Even PowerCom concedes that a subcontractor can waive its Miller Act rights through "clear and explicit" language. PowerCom Br. 32 (quoting *United States v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1208 (9th Cir. 2002)).

Here, the Sub-subcontract's incorporation of the Main Contract's dispute process is express, and satisfies any plausible standard for intentionally waiving a Little Miller Act claim. PowerCom's Sub-subcontract states that PowerCom "agrees to be bound by the procedure and final determination as specified in the Main Contract." CP 646. The contract specifies that PowerCom will be bound by the "decisions, findings, determinations, or awards made [under the Main Contract]," whether during the contractual dispute resolution process or in Clark's litigation in a "court of competent jurisdiction." CP 646. The contract provides that PowerCom cannot recover more from Valley than the Port ultimately pays. CP 646. And PowerCom covenants in the contract not to "pursue … independent litigation with respect" to pass-through claims. CP 646. Unlike the general incorporation by reference in *Fanderlik-Locke*, PowerCom's contract extensively incorporates the Main Contract's dispute resolution procedures over the course of three paragraphs. Cases reciting "judicial skepticism toward incorporation *by general reference*," PowerCom Br. 31 (emphasis added), are irrelevant where the subcontract at issue expressly incorporates the prime contract's disputes clause and specifically binds the subcontractor to follow it.

Indeed, PowerCom (at 30-31) concedes that the "the disputes clause in PowerCom's sub-Subcontract" is "similar to the disputes resolution clause in *Fanderlik-Locke*" that that court found would have the effect of waiving a Miller Act claim. The difference is that the disputes clause appears in PowerCom's *own* contract—not only in a separate contract generally incorporated by reference.

Courts around the country have found that when a disputes process "is explicitly set forth in the subcontracts themselves" rather than incorporated "by way of a general incorporation clause," that disputes process is enforceable even as a waiver of the right to bring a separate Miller Act lawsuit. *United States v. Dick/Morganti*, No. C 07-02564CRB, 2007 WL 3231717, at *2 (N.D. Cal. Oct. 30, 2007); *see also, e.g.*, *United States v. Daniel, Urbahn, Seelye & Fuller*, 357 F. Supp. 853, 861 (N.D. Ill. 1973); *United States v. David Boland, Inc.*, 922 F. Supp. 597, 598 (S.D. Fla. 1996), *aff'd sub nom. Trans Coastal Roofing v. Boland*, 226 F.3d 646 (11th Cir. 2000) (Table); *United States v. FEDCON Joint Venture*, No. CV 16-13022, 2017 WL 897852, at *3-4 (E.D. La. Mar. 7, 2017). PowerCom's contract meets and exceeds that standard. Because PowerCom waived its right to bring a separate Miller Act lawsuit, the trial court did not abuse its discretion by staying PowerCom's pass-through claim.

b. PowerCom (at 39) next argues that a stay is improper because "[t]he fact that Clark is litigating on multiple fronts is a result of the contractual position it assumed" as prime contractor. But that argument ignores that the parties' interlocking contracts attempt to prevent exactly the result PowerCom seeks here. Clark, Valley, and PowerCom each agreed to channel pass-through claims through the Main Contract's dispute resolution process, and PowerCom expressly agreed to "pursue no independent litigation with respect thereto." CP 646. This case is therefore unlike *United States v. Clark Construction Group, LLC*, 235 F. Supp. 3d 745 (D. Md. 1006), in which the court found that the subcontractor had *not* expressly waived its Miller Act rights. *Id.* at 761 & n.21.

c. Finally, PowerCom (at 40-41) argues that "a stay will not conserve the judicial resources of the Court and the parties" because "PowerCom has a statutory right to bring its claims against Clark," Valley, and their sureties, and "is not required to live with or be bound by the result of Clark's lawsuit against the Port of Seattle."

This argument merely repeats PowerCom's meritless argument that it is not bound by the Main Contract's dispute resolution procedures. For the reasons stated above, that argument fails.

PowerCom fails to identify any way in which the trial court's stay ruling is "manifestly unreasonable." *King*, 104 Wn. App. at 348. For that reason, it was not an abuse of discretion, and should be affirmed.

V. CONCLUSION

This Court should affirm the trial court's order denying PowerCom's motion to compel arbitration as to PowerCom's pass-through claim; and also affirm the trial court's order staying PowerCom's pass-through claim pending the resolution of Clark's lawsuit against the Port.

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I hereby certify that on June 12, 2023, I caused a true and correct copy of the foregoing to be served on the following counsel of record in the manner indicated below:

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

DATED: June 12, 2023, at Seattle, Washington.

<u>*s/ Christy A. Nelson*</u>
Christy A. Nelson

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APPENDIX C

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No. 851209

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

POWERCOM, INC., a Washington corporation,

Appellant,

v.

PORT OF SEATTLE, a Washington State municipal corporation; CLARK CONSTRUCTION GROUP, LLC, a foreign limited liability company; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurer; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a foreign insurer; FEDERAL INSURANCE COMPANY, a foreign insurer, ZURICH AMERICAN INS. CO., a foreign insurer (Bond Nos. 106308203/82298673/09190971) and (Bond Nos. 106356881/82298695/09207256); VALLEY ELECTRIC CO. OF MT. VERNON, INC., a Washington corporation; ARGONAUT INSURANCE COMPANY, a foreign insurer (Bond No. SUR0043723-00)

Respondents.

JOINT REPLY BRIEF OF APPELLANT POWERCOM, INC. TO BRIEFS OF RESPONDENTS PORT OF SEATTLE AND CLARK CONSTRUCTION GROUP, LLC

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I. INTRODUCTION

The only question before this court is whether the trial court erred in issuing a stay of Appellant PowerCom, Inc.'s ("PowerCom") statutory Little Miller Act claims against the Defendants and their sureties for its COVID-19 damages pending resolution of Clark Construction Group, LLC's ("Clark") separate lawsuit against the Port of Seattle ("Port"), and based solely on that stay, denied PowerCom's motion to compel arbitration.

A. Clark Construction Group, LLC's Arguments

Both Washington law and the Federal Courts have ruled that similar or identical dispute resolution provisions in Section 11(b) of Clark's Subcontract and Section t(1) of PowerCom's sub-Subcontract are invalid and unenforceable because they constitute an implied waiver of a subcontractor's statutory right to payment under the Miller Act or Little Miller Act. Because the dispute resolution clauses are invalid and unenforceable, the parties are obligated to arbitrate PowerCom's COVID-19 claim under Section

11(c) of Clark's Subcontract and Section t(2) of PowerCom's sub-Subcontract.

It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Clark is equitably estopped from refusing to arbitrate PowerCom's COVID-19 claim because Clark has asserted cross-claims in this lawsuit against Valley Electric Co. of Mt. Vernon ("Valley") for breach of contract and indemnity for any damages it may be found owing to PowerCom on its COVID-19 claim, which is a claim that must be resolved by arbitration under Section 11(c) of the Clark Subcontract.

Clark makes a conclusory allegation for the first time on appeal that PowerCom has waived its right to bring a statutory Little Miller Act claim because the disputes clause at Section t(1) of PowerCom's sub-Subcontract, which binds it "by the terms of the Main Contract and by any and all procedures and resulting decision, findings, determination, or awards made there under" and also requires that "Contractor shall not be liable to Subcontractor for any greater amount than Owner is liable to Contractor", is in the subcontract itself rather than being incorporated "by way of a general incorporation clause." The Court should not consider Clark's arguments raised for the first time on appeal.

Even assuming Clark had raised its arguments to the trial court, it makes no difference whether the dispute clause is incorporated by reference or is set out in the subcontract. *See Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965 *11-12 (W.D. Wash. Apr. 23, 2018). Furthermore, as a result of the significantly high bar for waiver of Miller Act rights which require such waiver to be clear and explicit, and the strong public policy in favor of protecting subcontractor's rights to payment, Federal Courts have consistently rejected prime contractors' and sureties' attempts to dismiss (and/or stay) a subcontractor's Miller Act claim under identical or similar pass-through dispute resolution and/or payment provisions in the subcontract itself. The dispute clause in PowerCom's sub-Subcontract does not even mention PowerCom's statutory Little Miller Act claims, much less contain a clear and explicit waiver of

PowerCom's Little Miller Act rights. Both Washington courts and Federal Court have ruled that the same or similar dispute resolution clauses are invalid and unenforceable.

Clark cites to *United States v. Dick/Morganti*, *United States v. David Bolland, Inc.*, *United States v. Daniel,* and *United States v. FEDCON* as supporting its new arguments. Each of these cases, however, have been distinguished by numerous courts. Unlike Section t(1) of the Sub-subcontract, the subcontract in *Dick/Morganti* merely stayed the Miller Act claim pending completion of the administrative process. There is no indication that the subcontract at issue in *Dick/Morganti* provided that the owner's decision on the subcontract's compensation request would be "final and binding." Unlike in *Dick/Morganti*, the sub-Subcontract at issue here *does* constitute a complete waiver of PowerCom's rights under the Little Miller Act. The sub-Subcontract not only requires a stay while the Main Contract dispute resolution process is ongoing, but it also binds PowerCom's recovery to what Clark ultimately recovers from the Port.

Similarly, unlike Section t(1) in the sub-Subcontract, the disputes clause at issue in *David Boland* left the subcontractor's Miller Act "remedies … intact pending exhaustion of the contractual remedial procedure." Here, the sub-Subcontract precludes PowerCom from taking any further action on its Little Miller Act claims and binds PowerCom to any decision or recovery that Clark and Valley ultimately may recover from the Port. Thus, the sub-Subcontract effects both the timing of recovery and PowerCom's right to sue under the Little Miller Act.

Moreover, the disputes clauses at issue in *United States v. Daniel* and *United States v. FEDCON* merely stayed the Miller Act claim pending completion of the administrative resolution process but did not bar or waive the subcontractor's right to bring subsequent Miller Act claims. Here, PowerCom's sub-Subcontract requires that PowerCom be bound by the procedures and resulting decisions or awards in Clark's lawsuit against the Port, indicating that staying PowerCom's litigation in favor of Clark's proceedings will result in PowerCom losing its right to pursue its claims under the Little Miller Act.

Contrary to Clark's contention, this case is similar to *United States ex rel. Tusco, Inc. v. Clark Construction Group, LLC*, 235 F. Supp. 3d 745 (D. Md. 2016), where the Court held that an identical resolution clause in the Subcontract that precludes the subcontractor's ability to sue Travelers until after Clark has completed its dispute resolution process with the Government, and limits a subcontractor's right of recover to "when and if" Clark is paid by the government, is unenforceable because it contravenes the rights afforded to subcontractors under the Miller Act. Additionally, in *United States v. Clark Construction Group, LLC*, the Court rejected Clark's and Traveler's arguments also made here that allowing the litigation to proceed could lead to inconsistent decisions and duplicative, costly litigation. The Court found that there is reason why a dispute resolution process between Clark and the Government should delay the subcontractor's ability to litigate its statutory entitlement to seek payment, and that the risk of inconsistent results between that process and this litigation/arbitration is a risk that Clark must bear---transferring the risk of nonpayment for work performed from the subcontractor to the prime contractor is one of the purpose of the Miller Act.

B. Port of Seattle's Arguments

Contrary to Port's conclusory allegation, the trial court did not determine the merits of PowerCom's motion to compel arbitration against the Port, but rather deferred its ruling and denied arbitration based solely on its stay of PowerCom's claim pending resolution of Clark's lawsuit against the Port.

The Port has provided no evidence that the trial court rejected PowerCom's argument that as a non-signatory, the Port may be compelled to arbitrate under the doctrine of equitable estoppel. The trial court's order makes it clear that it denied PowerCom's motion to compel arbitration: "Because Plaintiff's pass-through COVID-19 claim is stayed, Plaintiff's request to compel arbitration of that claim is denied." The Port attempts to conjure up a new legal ruling by the trial court to support its new argument raised for the first time on appeal that PowerCom has waived its argument that the trial court erred in denying its motion to compel arbitration of its COVID-19 claim.

The fact that the trial court agreed to hear the Port's motion for summary judgment does not support the Port's argument. The Ninth Circuit cases that have addressed the issue have held that an appeal of an interlocutory order denying a motion to compel arbitration does not deprive the court of jurisdiction except with regard to the matters that are the subject of the appeal. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). However, the Port later took the position that an automatic stay applies and decided not to have the trial court hear its motion for summary judgment.

The fact that the Port later sought clarification that the trial court's order compelling arbitration of PowerCom's *non-pass-through claims* did not apply to the Port, but did not seek clarification as to whether the trial court ruled that the Port cannot be compelled to arbitrate PowerCom's COVID-19 on the merits, further supports a finding that the trial court denied PowerCom's motion to compel arbitration of its COVID-19 claim based solely on the trial court's stay of that claim pending a final resolution of Clark's lawsuit against the Port. The Court should reject the Port's attempt to rewrite the trial court's ruling and its arguments based on an alleged waiver.

The Port did not address the central issue in this appeal, which is whether the trial court's stay of PowerCom's COVID-19 claim until final resolution of Clark's lawsuit against the Port amounts to an invalid implied waiver of PowerCom's statutory rights under Washington's Little Miller Act. The Port admits that it took no position on this issue in the trial court, and therefore has no right to raise any arguments on this issue on appeal.

II. COUNTER STATEMENT OF FACTS

Contrary to Clark's assertions, the only arguments it raised in response to PowerCom's motion to stay and compel arbitration of its COVID-19 claim is that (1) Clark has no contractual relationship with PowerCom and there is no contractual mechanism by which Clark and its sureties can be brought into a separate arbitration proceeding with PowerCom; and (2) to have an arbitration panel adjudicate Plaintiff's pass-through COVID-19 claim at the same time Clark's COVID-19 claim against the Port is proceeding in a different venue, will no doubt lead to inconsistent rulings and judicial efficiency. (CP 990:4-25). Clark attempts to raise new arguments for the first time on appeal that (1) PowerCom has waived its right to bring a separate Miller Act lawsuit based on the disputes clause in its sub-Subcontract; and (2) the trial court denied PowerCom's motion to compel based on the absence of an arbitration agreement between PowerCom and Clark. Clark never raised these arguments to the trial court in its three-page Response to Plaintiff's Motion to Stay and Compel Arbitration and should be stricken. (CP 989-991).

As the trial court's order clearly shows, the sole basis for the trial court's denial of PowerCom's motion to compel arbitration was because it issued a stay of its COVID-19 claim pending resolution of Clark's lawsuit against the Port. There is no evidence that trial court ruled that Clark cannot be compelled to arbitrate based on the absence of an arbitration agreement between PowerCom and Clark.

The Port claims that PowerCom did not seek to compel arbitration of its pass-through COVID-19 claim against the Port. However, it is clear from PowerCom's "Motion to Stay and Compel Arbitration of All Claims Against All Parties" that PowerCom's motion to stay and compel arbitration includes all its claims against all of the Defendants, including the Port. (CP 312-324) PowerCom argued in its motion to compel arbitration that the disputes clause at Section (t)(1) of PowerCom's sub-Subcontract with Valley is unenforceable and constitute a complete and invalid waiver of PowerCom's Little Miller Act rights. (CP 321-3214; CP 684-692). PowerCom's sub-Subcontract not only requires that PowerCom be bound by the terms and conditions of the Main Contract, but it also requires a stay of PowerCom's "pass-through" claims while the Prime Contract dispute resolution process is ongoing, and limits PowerCom's right to recovery to the amount that Clark may recover from the Port. PowerCom argued that these clauses are unenforceable and contradict the text and purpose of the Little Miller Act. (CP 684-689). PowerCom also argued that the trial court's stay of its COVID-19 claim against the Defendants and their sureties will result in PowerCom losing its ability to enforce its statutory rights under Washington's Little Miller Act, citing *Fanderlik-Locke C. v. United States for Use of Morgan*, 285 F2d 939 (10th Cir. 1960) and *3A Industries, Inc. v. Turner Const. Co.*, 71 Wn. App. 407, 869 P.2d 65 (1993). (CP 684-689).

PowerCom argued that equitable estoppel precludes the Port from refusing to arbitrate its COVID-19 claim because it is seeking a direct benefit from PowerCom's sub-Subcontract by asserting an affirmative defense of collateral estoppel against Clark in its separate lawsuit against the Port, while simultaneously refusing to arbitrate that same claim in this lawsuit. PowerCom also argued that its COVID-19 claim is based on the same facts and is intertwined with the Main Contract, and the underlying subcontracts between the parties and is inherently inseparable from its arbitrable claims against Valley and Clark, and that its COVID-19 claim should be consolidated with the arbitration of PowerCom's non-pass-through claims. (CP 321:14-324:5).

The Port's only arguments in response to PowerCom's motion to compel arbitration was that (1) it has no contract with PowerCom and no arbitration agreement with the Port; and (2) the equitable estoppel doctrine only applies to a non-signatory if that party "knowingly exploits" the contract which contains the arbitration clause. (CP 1009:7-27). Here, the Port is attempting to obtain a direct benefit from PowerCom's sub-Subcontract by exploiting the contractual relationship of the parties by asserting an affirmative defense in Clark's lawsuit against it that Clark is "precluded from relitigating any issue decision in a separate action, or taking any position inconsistent with a position taken, or ruling provided in a separate action, including PowerCom, Inc. v. Clark Construction Group, LLC, et al King County Superior Court Case #22-210351-5..." Yet, the Port does not exploit (and thereby assume) the agreement itself, including the burden of arbitrating.

Contrary to the Port's argument, cases that address the "direct benefit" estoppel theory relate to non-signatories that are seeking to avoid, as opposed to compel, arbitration. PowerCom argued that the trial court should compel the Port to arbitrate based on equitable estoppel and because of the close relationship between the entities, as well as the relationship of PowerCom's COVID-19 claim and the Port's obligation to pay that pass-through claim, and the fact that the claim is intimately intertwined with the Main Contract and the underlying subcontract obligations between all of the Defendants. (CP 589:6-692:4).

The trial court's order clearly states that it denied PowerCom's motion to compel arbitration of its COVID-19 claim based solely on its stay of that claim pending a final resolution of Clark's lawsuit against the Port. The Port has provided no evidence that the trial court denied PowerCom's motion to compel arbitration against the Port based on the merits.

III. ARGUMENT

A. The Trial Court's Stay Constitutes an Invalid Waiver of PowerCom's Little Miller Act Rights.

Clark argues for the first time on appeal that at oral argument on PowerCom's motion to stay and compel arbitration, it argued that based on the disputes clause in PowerCom's sub-Subcontract, it waived its right to bring a separate action on its Little Miller Act claims. Clark cites to the report of proceedings at pages 13-14 to support this assertion. However, the report of proceedings confirm that Clark never raised its waiver argument in oral argument. In general, an appellate court will not review an issue, theory, argument, or claim of error that was not presented at the trial court level. *Mukilteo Ret. Apts., LLC v. Mukilteo Inv'rs LP*, 176 Wn. App. 244, 258, 310 P.3d 814 (2013). Failure to raise the issue before the trial court "precludes raising the error on appeal." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322

P.3d 6 (2014). The Court should not consider Clark's new arguments based on waiver.

Even assuming Clark had raised its waiver argument to the trial court, Clark's arguments are without merit. Courts construe the Miller Act liberally to protect subcontractors, and any waiver of Miller Act rights must be clear and explicit. *See U.S. for Use & Benefit of Walton Tech, Inc. v. Westar Eng'g, Inc.*, 290 F.3d 1199, 1209 (9th Cir. 2002). The Miller Act provides that a waiver of Miller Act rights must be in writing and clearly and expressly waive Miller Act rights. *See United States v. McCarthy Building Cos., Inc.*, 2015 U.S. Dist. LEXIS 90052, at *5-6 (N.D. Cal. July 10, 2015).

In *Foundation Fence, Inc. v. Kiewit Pacific Co.*, 2010 U.S. Dist. LEXIS 108915 (S.E. Cal. Oct. 13 2010), the court reviewed a dispute resolution provisions in a subcontract similar to that found here. The subcontractor and general contractor had agreed that any claims by the subcontractor for an adjustment in compensation had to be submitted by the general contractor to the owner. The subcontractor agreed to be bound to any final determination on its claim. The court determined that these subcontract provisions "operated as an implied waiver of Plaintiff's claims," and were therefore invalid and unenforceable under the Miller Act. *Id.* at *4-5.

In *Apple Valley Communs., Inc. v. Budget Elec. Contractors*, Inc., 2020 U.S. Dist. LEXIS 250377 (C.D. Cal, Dec. 8, 2020), the prime contractor had failed to diligently pursue the pass-through claim of its subcontractor and the government had already denied the claim because the delays were attributable to the prime contractor and other subcontractors. The Court addressed the issue of whether the disputes clause in the Subcontract constitutes an invalid waiver of the subcontractor's rights under the Miller Act. The dispute clause in the Subcontract contained a delays clause that provided that BEC is not entitled to payment or reimbursement unless Turner has recovered such payment or reimbursement from the Government. The disputes clause also provided that all subcontractor claims that "originate with the Owner or are related to the acts or omissions of the Owner or the Contract Documents, or that may otherwise be passed through to the Owner" shall be resolved pursuant to the Contract Disputes Act of 1978, and that any decision will be binding on the subcontractor. The Court rejected the defendants' reliance on *United States v. Dick/Morganti*, 2007 U.S. Dist. LEXIS 84750, (N.D. Cal. Oct. 30, 2007) for two reasons. First, unlike in *Dick/Morganti*, the Subcontract at issue in *Apple Valley* did constitute a complete waiver of rights under the Miller Act, and not just a stay while the Prime Contract disputes resolution process is ongoing. The Subcontract at issue in *Apple Valley* also limited BEC's recovery to the amount Turner ultimately recovers from the Government. The Court in *Apple Valley* found that staying the proceeding in favor of the CDA proceedings constitutes an invalid waiver of BEC's rights under the Miller Act. *Id*.

Thus, whether the dispute clause is incorporated by reference or set out in the Subcontract makes no difference. The Ninth Circuit agrees, stating that "[w]here subcontract terms affect the timing or recovery or the right to recovery under the Miller Act, enforcement of such terms to preclude Miller Act liability contradicts the express terms of the Miller Act." *United States for Use & Benefit of Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1207 (9th Cir. 2002). Because the dispute clause in PowerCom's sub-Subcontract clearly affects the time of recovery and the right of recovery, their enforcement goes against the plain text of the Miller Act and Washington's Little Miller Act. The disputes clause in PowerCom sub-Subcontract constitutes an invalid waiver of PowerCom's rights under the Little Miller Act.

Clark attempts to distinguish *Fanderlik-Locke* by contending that this case stands for the limited proposition that the *mere general incorporation* of another contract that contains a binding dispute resolution clause does not waive a subcontractor's right to bring a separate Miller Act claim. Clark ignores the numerous cases that have applied the *Fanderlik-Locke* court's analysis and rejected prime contractors' and sureties' attempts to dismiss (and/or stay) a subcontractor's Miller Act claim as not ripe under a subcontractor's pass-through dispute resolution and/or payment provisions.[1]

Clark relies on *United States v. Dick/Morganti*, U.S. Dist. LEXIS 84750, (N.D. Cal. Oct. 30, 2007); *United States v. Daniel, Urbahn, Seelye & Fuller*, 357 F. Supp. 853 (N.D. Ill. 1973); *United States ex rel. Trans Coastal Roofing Co. v. David Boland, Inc.*, 922 F.Supp. 597 (S.E. Fla. 1996) and *United States v. FEDCON Joint Venture,* 2017 U.S. Dist. LEXIS 32043 (E.D. La. March 7, 2017), to support their argument that "[C]ourts around the country

[1] See e.g. *U.S. for Use & Benefit of Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1209 (9th Cir. 2022)("Allowing Defendants to avoid liability under the Miller Act based on the unsatisfied "pay when and if paid" clause in the subcontract between subcontractor and prime contractor would prevent subcontractor from exercising its Miller Act right in the absence of a "clear and explicit" waiver of those right."); *Foundation Fence, Inc., v. Kiewit Pac. Co.*, 2010 U.S. Dist. LEXIS 108915, at *4 (S.D. Cal. October 13, 2010)("The Court agrees with subcontractor that these pass-through dispute resolution Sections in the subcontract operate as an implied waiver of subcontractor's Miller Act claims."); *United States of Am. For the Use & Benefit of Unlimited Envtl., Inc. v. Century Sur. Co.*, 2012 U.S. Dist. LEXIS 199110, at *7 (C.D. Cal. Oct. 29, 2012)("Keeping in mind the Supreme Court's admonition that the Miller Act is 'entitled to a liberal construction and application in order property to effectuate the Congressional intent to protect those whose labor and materials to into public projects,' the court concludes that if Article 6(e) [subcontract pass-through dispute resolution clause] applies, it operates as an implied waiver of subcontractor's rights under the Miller Act and is therefore unenforceable."); *Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, No C17-1908JLR, 2018 U.S. Dist. LEXIS 67965, at *4, (W.D. Wash., April 23, 2018)(finding that a similar subcontract dispute clause violated the Miller Act because it "purported to waive the subcontractor's right to sue under the Miller Act – and not just to waive the timing or bringing such a suit.")

have found that when a disputes process 'is explicitly set forth in the subcontract themselves" rather than by way of a general incorporation clause, Courts routinely enforce the dispute process even as a waiver of the right to bring a separate Miller Act lawsuit. Clark's argument is legally incorrect, and these four cases are inapposite.[2]

In *Dick/Morganti*, the District Court for the Northern District of California issued a stay of a subcontractor's Miller Act claims after concluding that the temporary stay at issue does not affect a "complete waiver" of the Subcontractor's right to later bring a Miller Act claim within the meaning of 40 U.S.C. § 3133(c). *United States v. Dick/Morganti*, 2007 U.S. Dist. LEXIS 84750, *12 (N.D. Cal. Oct. 30, 2007). Unlike in *Dick/Morganti*, the sub-Subcontract at issue here *does* constitute a complete waiver of PowerCom's rights under the Little Miller Act. The sub-Subcontract not only requires a stay while the Prime Contract

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[2] *See United States ex Rel. Unlimited Envtl., Inc. v. Century Sur. Co.*, 2012 U.S. Dist. LEXIS 199110 (C.D. Cal., October 29, 2012).

dispute resolution process is ongoing, but it also limits PowerCom's recovery to the amount Clark ultimately recovers from the Port. The "final and binding" language of Section t(1) leaves no room for judicial review of the Port's decision. Under the sub-Subcontract, if the Port prevails on its defense to Clark's Consolidated COVID-19 claim and pays nothing, Defendants argue that the decision binds not only Clark but PowerCom as well. As numerous courts have found, the subcontract at issue in *Dick/Morganti* did not provide that the owner's decision on a subcontractor's compensation request would be 'final and binding.'" Thus, staying these proceedings in favor of the Clark v. Port proceedings will result in PowerCom losing its ability to enforce its rights under the Little Miller Act. *See Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965, at *15)(W.D. Wash. April 23, 2018)(distinguishing *Dick/Morganti* because "there is no indication that the subcontract at issue in *Dick/Morganti* provided that the owner's decision on a subcontractor's compensation request would be final and binding.";

United States ex rel. Unlimited Envtl., Inc. v. Century Surety Co., 2012 U.S. Dist. LEXIS 199110, *15 (C.D. Cal. Oct. 29, 2012)(finding that the subcontract at issue in *Dick/Morganti* appears only to have provided a stay of proceedings but does not provide that the owner's decision on a subcontractor's compensation request would be "final and binding".); *Foundation Fence, Inc. v. Kiewit Pac. Co.*, 2010 U.S. Dist. LEXIS 108915, at 4 (S.D. Cal. Oct. 13, 2010)(the subcontract in *Dick/Morganti* merely stayed the Miller Act claim pending completion of the administrative resolution process); *Apple Valley Communs., Inc. v. Budget Elec. Constrs., Inc.*, 2020 U.S. Dist. LEXIS 250377, at *18 (C.D. Cal. Dec. 8, 2020)(the court found the Defendants' reliance on *Dick/Morganti* unavailing because unlike in *Dick/Morganti*, the subcontract at issue in that case *does* constitute a complete waiver of rights under the Miller Act, and not just a stay while the prime contract resolution process is ongoing).

Also, unlike this case, the court in *Daniel* found the disputes clause at issue there also did not amount to a waiver of the subcontractors' Miller Act Rights. *United States v. Daniel, Urbahn, Seelye and Fuller*, 357 F. Supp. 853, 861, (N.D. Ill. 1973). Unlike the dispute clause at Section t(1) of PowerCom's sub-Subcontract, which precludes PowerCom from taking any action on its claims, the dispute clause at issue in *Daniel* specifically provided for judicial review of any decision that was "fraudulent or capricious, or arbitrary, or so grossly erroneous as necessary to imply bad faith, or not supported by substantial evidence …" *Id.* For this reason, the Court in *Foundation Fence* distinguished *Daniel*, as well as *Bollard* and *Dick/Morganti,* and found that because the disputes clause in that case affected both the timing of a subcontractor's claim and entitlement to payment it amounts to an implied waiver of the subcontractor's rights under the Miller Act. *Foundation Fence, Inc. v. Kiewit Pac. Co.*, 2010 U.S. Dist. LEXIS 109815, *15 (S.D. Cal. Oct. 13, 2010).

Lastly, *United States v. FEDCON Joint Venture*, 2017 U.S. Dist. LEXIS 32043 (E.D. La. Mar. 7, 2017), involved a subcontract provision in which the subcontractor agreed to stay any Miller Act claims pending the outcome of the prime contractor's dispute resolution process. Unlike this case, the FEDCON Court found that if the dispute resolution procedure does not resolve GLF Construction's claims, its Miller Act claims will not be barred or waived. *Id.* *9. Here, by contrast, Section t(1) mentions nothing about PowerCom's Little Miller Act claims, and the dispute resolution clause in PowerCom's sub-Subcontract precludes it from taking further action on its Little Miller Act claims, and the Main Contract dispute resolution result is "binding" on PowerCom. These clauses explicitly limit PowerCom's rights regarding (1) when it can seek payment and (2) whether it can fully recover for its Little Miller Act claim. Clark and the Port acknowledge as much by admitting that PowerCom is obligated under its sub-Subcontract to whatever damages that Clark receives from the Port. Thus, the sub-Subcontract limits payment to "when and if" Clark is paid and constitutes an invalid waiver of PowerCom's Little Miller Act Rights. *See Pinnacle Crushing & Const. LLC v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965, *14-15 (W.D. Wash. April. 23, 2018)(finding that a similar subcontract violated the Miller Act because it purported to waiver the subcontractor's right to sue under the Miller Act – and not just the timing of bringing such a suit).

B. The Trial Court Denied PowerCom's Motion to Compel Arbitration Based Solely on its Stay of its COVID-19 Claim Pending Resolution of Clark's Lawsuit Against the Port.

Clark claims that the trial court denied PowerCom's motion to compel arbitration against it based on the absence of an arbitration agreement between PowerCom and Clark. The Port argues that the trial court denied PowerCom's motion to compel arbitration on the merits based on an equitable estoppel theory. These allegations are not supported by any evidence. The trial court's order makes it clear that its denial of PowerCom's motion to compel arbitration of its COVID-19 claim against the Defendants was based solely on its stay of that claim pending resolution of Clark's lawsuit against the Port. The trial court's order states:

> 2. Plaintiff's Motion is granted in part and denied in part with respect to the pass-through COVID-19 claim (identified on p. 9 of Plaintiff's Motion), and that

> claim is stayed as requested by Plaintiff[3] pending resolution of Clark's lawsuit against Port of Seattle (Case No. 22-2-20747-7 SEA, pending in the Superior Court of Washington for King County), which such lawsuit includes Plaintiff's pass-through COVID-19 claim; and
>
> 3. Because Plaintiff's pass-through COVID-19 claim is stayed, Plaintiff's request to compel arbitration of that claim is denied.

(CP 737-738).

Clark and the Port have not provided any evidence that the trial court denied PowerCom's motion to compel arbitration based on the merits, much less ruling that Clark is not compelled to arbitrate based on a lack of contract with PowerCom, or that the Port is not compelled to arbitrate under the doctrine of equitable estoppel.

C. The Port's Argument that PowerCom Never Moved to Compel Arbitration of its COVID-19 Claim Against the Port is Flawed.

[3] Plaintiff's motion to stay and compel arbitration requested a stay of its arbitrable claims pursuant to RCW 7.04A.070. Contrary to the trial court's order, Plaintiff did not request a stay of its COVID-19 claim pending resolution of Clark's lawsuit against the Port. Clark's counsel made this request for the first time at oral argument on the motion to compel arbitration. (RP 13:7-16:3). The trial court used the language proposed by Clark in its order on the motion.

The Port argues that PowerCom did not seek to compel arbitration of its COVID-19 claim against the Port is without merit. The evidence clearly refutes the Port's allegation. PowerCom filed its motion to stay and compel arbitration of all claims against all of the Defendants, including the Port. PowerCom argued that the Port should be compelled to arbitrate PowerCom's claims under an estoppel theory, and based on the relationship of the parties, the Port's obligation to pay PowerCom's pass-through COVID-19 damages, and the fact that the claims are intertwined with the Main Contract and the parties' underlying contract obligations. The Port's response to PowerCom's motion argued that there is no basis to compel the Port to arbitrate because it has no contract with PowerCom.

The trial court's order confirms that the sole basis for denying PowerCom's motion to compel arbitration of its COVID-19 claims is because the court stayed the claims pending resolution of Clark's lawsuit against the Port. The Port provides no evidence, much less clear evidence, to support their assertion that the trial court denied PowerCom's motion to compel arbitration of its claims against the Port "on the merits." The trial court's order clearly refutes the Port's assertion. The trial court's order states under Paragraph 2 that PowerCom's COVID-19 claim is stayed pending resolution of Clark's lawsuit against the Port of Seattle[4], "Because Plaintiff's pass-through COVID-19 claim is stayed, Plaintiff's request to compel arbitration of that claim is denied." The Court's order incorrectly stated that this stay was requested by Plaintiff. PowerCom requested a stay of the judicial proceedings of its claims subject to arbitration pursuant to RCW 7.04A.070(6). Clark's counsel requested a stay of PowerCom's COVID-19 claim pending resolution of Clark's lawsuit against the Port for the first time at oral argument on the motion to compel arbitration. (RP 13:7-16:3).

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[4] The trial court's order states that the COVID-19 claim is stayed as requested by Plaintiff pending resolution of Clark's lawsuit against the Port of Seattle. However, Plaintiff's motion to stay and compel arbitration was filed pursuant to RCW 7.04A.070, which requires a stay of any judicial proceedings that involves a claim subject to the arbitration. PowerCom did not request a stay of its COVID-19 claim pending resolution of Clark's lawsuit against the Port. This request was made by Clark's counsel for the first time during oral argument on the motion.

Contrary to the Port's argument, the trial court did not reject PowerCom's argument that as a non-signatory, the Port may be compelled to arbitration under the doctrine of equitable estoppel. Instead, the trial court denied PowerCom's motion to compel arbitration: "Because Plaintiff's pass-through COVID-19 claim is stayed, Plaintiff's request to compel arbitration of that claim is denied." The Port's attempt to conjure up a new legal ruling that the trial court denied PowerCom's motion to compel arbitration against the Port on the merits to support its waiver argument, is without merit. The Port has failed to submit any evidence that the trial court denied on PowerCom's motion to compel arbitration as to the Port on the merits.

The fact that the trial court agreed to hear the Port's motion for summary judgment pending PowerCom's interlocutory appeal of the order denying arbitration is consistent with the Ninth Circuit cases that hold that an appeal of an interlocutory order denying a motion to compel arbitration does not deprive the court of jurisdiction except with regard to the matters that are the subject of the appeal. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). The mere fact that the trial court agreed to hear the Port's motion for summary judgment, which the Port later withdrew, does not support a finding that the trial court denied PowerCom's motion to compel arbitration of its claims against the Port on the merits.

The Port later sought clarification of only the trial court's order that "Plaintiff's Motion is granted, but only with respect to the non-pass-through claims (identified on pp. 8-9 of Plaintiff's Motion) as agreed to by the parties in the interest of judicial economy." (CP 237). Since PowerCom moved to compel arbitration of all its claims against all the Defendants, a reasonable interpretation of the trial court's order was that Plaintiff's motion to compel arbitration of its non-pass-through claims was granted as to all defendants, including the Port. The Port's criticism of PowerCom's interpretation of the trial court's order as "antics" is unfair and unreasonable given the wording of the trial court's order.

There is nothing in the trial court's order indicating that it denied PowerCom's motion to compel arbitration of its COVID-19 claim against the Port on the merits. Instead, the trial court's order makes it clear that it granted Clark's request for a stay of PowerCom's COVID-19 claim pending resolution of Clark's lawsuit against the Port and denied PowerCom's motion to compel based solely on the stay.

The Court should reject the Port's attempt to rewrite the trial court's ruling and its argument that PowerCom has waived its right to challenge the trial court's denial of its motion to compel arbitration of its COVID-19 claim against the Port.

D. The Port Should be Ordered to Arbitrate PowerCom's COVID-19 Claim.

The Port argues that the doctrine of equitable estoppel does not provide a basis for the court to grant PowerCom's motion to compel arbitration against the Port because the doctrine only applies to a non-signatory when he knowingly exploits the contract which contains the arbitration agreement. (CP 1009:9-22). The

Port argues that there is no evidence it knowingly exploited PowerCom's sub-Subcontract and thus it cannot be compelled to arbitrate PowerCom's claims of unjust enrichment and quantum meruit for its COVID-19 damages. The Port's arguments are without merit.

A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document. Federal Courts and Washington Courts has recognized six theories arising out of common principles of contract and agency law, which may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009); *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999); *Choctaw Generation Ltd. P'ship*, 271 F.3d 403, 406 (2nd Cir. 2001); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 315, 320-21 (4th Cir. 1988); *Grigson v. Creative Artists*

Agency, LLC, 210 F.3d 524, 527 (5th Cir. 2000); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838-39 (7th Cir. 1981); *In re Boon Glob. Ltd.*, 923 F.3d 643, 654 n.5 (9th Cir. 2019); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342 (11th Cir. 1984); *Powell v. Sphere Drake Ins. PLC,* 97 Wn. App. 890, 892, 988 P.2d 12 (1999); *McClure v. Davis Wright Tremaine,* 77 Wn. App. 312, 315, 890 P.2d 466 (1995) ("[E]ven when it is not explicitly provided for in an arbitration agreement, some non-signatories can be compelled to arbitrate under the doctrine of equitable estoppel or under normal contract and agency principles.").

A non-signatory of a contract containing an arbitration clause who claims the benefits of the contract while simultaneously attempting to avoid the burdens that contract imposed, may be equitably estopped from avoiding arbitration. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012). The rational for permitting enforcement of an arbitration agreement against a non-signatory is equity—fairness.

In *Townsend*, our Supreme Court held that the children of homeowners were bound by an arbitration clause in their parents' purchase and sale agreement where the children were attempting to enforce the terms of that agreement, including its warranties. *Townsend v. Quadrant Corp.*, 173 Wn.2d at 461-462, 268 P.3d 917 (2012). Under the direct benefits theory of estoppel, a company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration despite having never signed the agreement.

Here, the Port has asserted an affirmative defense against Clark in its separate lawsuit that Clark is collaterally estopped from relitigating any issue or ruling decided in PowerCom's lawsuit, including any arbitration. A party asserting collateral estoppel must prove: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. *Reeves v. Mason County*, 22 Wn. App. 99, 103, 509 P.3d 859 (2022).

Estoppel has been applied to cases that involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract. *Corner v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006); *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185 (9th Cir. 1986). Nonsignatories have been held to arbitration clauses where the nonsignatory knowingly exploits the agreement containing the arbitration cause despite having never signed the agreement. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)(quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001); *accord Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999). In *Tencara*, a group of investors ("the Owners") contracted with Tencara Shipyard to build a racing yacht. *Id.* at 351. That agreement required that the yacht would be "classed" as approved by the American Bureau of Shipping ("ABS"). Tencara entered into an agreement with ABS for classification, and that agreement included an arbitration clause. *Id.* When the yacht was damaged, allegedly due to poor design and construction, the Owners and Tencara sued ABS. *Id.* ABS then brought suit to compel Tencara, the Owners, and their insurers to arbitrate the claims, which was granted as to Tencara only. *Id.* at 352. On appeal, the Second Circuit concluded that the Owners were estopped from denying the contract containing the arbitration clause because they had received direct benefits from the contract. *Id.* at 353. Specifically, the court found that the owners were allowed to sail under the French flag because the yacht was "classed" pursuant to the contract. *Id.*

Here, the Port received the direct benefit of PowerCom's labor and materials supplied during the COVID-19 pandemic under its sub-Subcontract with Valley. The Port admits that PowerCom's COVID-19 claim is a "pass-through" claim, which the Port as the Owner is responsible to pay. However, the Port has refused to pay Clark, Valley and PowerCom for the millions of dollars these parties incurred on the Port's Project because of the COVID-19 pandemic protocols, based on Clark's alleged failure to comply with the contract notice and claim procedures in the Main Contract. The Port is now seeking to benefit from PowerCom's sub-Subcontract by seeking to estop Clark from relitigating any issues or rulings decided in this lawsuit, while at the same time refusing to arbitrate that claim to avoid any direct liability to pay for PowerCom's COVID-19 claim.

Similarly, the test for equitable estoppel considers the legal nexus between the plaintiff's claims and the underlying contract. Specifically, courts must determine whether resolution of the claims will require examining any provisions of the underlying contract. *Mundi*, 555 F.3d at 1047. Here, PowerCom's COVID-19 claim is founded in and inextricably tied to the Port's Main Contract with Clark, Clark's subcontract with Valley, and Valley's sub-Subcontract agreement with PowerCom. PowerCom's

COVID-19 claim necessarily turns on the interpretation of the Main Contract, Clark's subcontract with Valley, Valley's subcontract with PowerCom, and whether the Port is liable to pay COVID-19 claims on the Project. Any resolution of PowerCom's COVID-19 claim will require the presence of the Port. The Port, as the Owner of the Project, is the entity that is responsible to pay for COVID-19 related pandemic expenses. However, the Port is seeking to prevent Clark from even litigating its Consolidated COVID-19 claim (by asserting collateral estoppel), but on the other hand is refusing to arbitrate PowerCom's COVID-19 claim in this lawsuit, thereby avoiding any direct liability for PowerCom's COVID-19 claim. The Port's accountability is a serious concern. Any arbitration award or judgment attained by PowerCom on its COVID-19 claim will have no binding effect on the Port unless the Port is a party to the arbitration. The Port took advantage of PowerCom's services knowing they were incurring thousands of dollars in COVID-19 expenses and delays and should be estopped from refusing to arbitrate PowerCom's COVID-19 pass-through claim.

E. Clark Should be Ordered to Arbitrate PowerCom's COVID-19 Claim and its Cross-Claims Against Valley Electric.

Clark failed to timely submit its Consolidated COVID-19 claim to the Port, which deducted hundreds of thousands of dollars from PowerCom's COVID-19 claim without its knowledge or consent. Clark did not take the steps necessary to protect PowerCom's right to recovery, resulting in the Port denying the claim and deeming Clark's Claims time barred and/or otherwise waived due to its failure to comply with the contract notice and dispute clauses. As previously discussed, Section t(1) of PowerCom's sub-Subcontract and Article 11(b) of Clark's Subcontract with Valley Electric are invalid and unenforceable because these clauses constitute an implied waiver of statutory Little Miller Act rights.

Clark has filed cross-claims against Valley Electric and its surety for breach of contract and indemnity for any damages it may found owing to PowerCom on its COVID-19 claim. (CP 976-977). Clark asserts that it cannot be compelled to arbitrate either

PowerCom's COVID-19 claim or its cross-claims against Valley Electric because its Subcontract includes an arbitration clause, but only "at Clark's sole option." Clark admits that the arbitration clause is not bilateral. Clark reserves to itself the right to seek arbitration of any dispute between Clark and Valley Electric, but Valley Electric does not enjoy the same benefit. It would be ludicrous to suggest that Clark is on equal footing with Valley Electric. According to Clark's own website, it is one of the largest building and infrastructure companies in the United States, with over $6 billion of annual revenue. Clark is also the drafter of the Subcontract. Article 11(b) of Clark's Subcontract is invalid and unenforceable for the same reasons that Section t(1) of PowerCom's sub-Subcontract is invalid and unenforceable. Thus, Article 11(c) of Clark's Subcontract applies to all disputes between Clark and Valley relating to PowerCom's COVID-19 claim.

An arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 120 (2000). Thus, arbitration agreements must have a "modicum of bilaterality." *Id.* at 118. Here, Article 11(c) of Clark's Subcontract heavily favors Clark. The one-sided arbitration clause blatantly and excessively favors Clark in that it allows Clark alone access to arbitration, which is an inexpensive and efficient resolution of disputes between Clark and Valley. The Court should apply the arbitration clause bilaterally and require Clark to arbitrate PowerCom's COVID-19 Claim and its cross-claims against Valley Electric.

Washington has a strong public policy that favors arbitration, and this policy supports broadly construing arbitration clause in contracts when such construction is reasonable and consistent with the parties' intent. *David Terry Invs., LLC PRC v. Headwaters Dev. Grp., LLC*, 13 Wn. App. 2d 159, 463 P.3d 117 (2020). Washington's Uniform Arbitration Act, RCW 7.04A.901 requires courts, when construing the Uniform Arbitration Act, "to consider the need to promote uniformity of the law with respect to its subject matter among states that enact it." Both Federal and Washington law presumes a dispute is arbitrable, so any doubt must be resolved in favor of arbitration. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). Parties select arbitration to achieve an inexpensive and efficient resolution of their disputes. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001). Here, PowerCom's claims against the Port, Clark, and Valley Electric and Clark's cross-claims against Valley Electric are inherently tied to the Main Contract, Clark's Subcontract, and PowerCom's sub-subcontract, and turn on the construction of the contracts. The resolution of these claims will require resolution of potential contract defenses that the Port, Clark, and Valley Electric may have.

The Ninth Circuit in *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013) acknowledged that compelling the arbitration for claims against a non-signatory is proper under the following two circumstances:

> (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are 'intimately founded in and intertwined with' the underlying contract'; and
> (2) When the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory, and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.

Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128-29 (9th Cir. 2013). Here, PowerCom's claims against the Port, Clark and Valley Electric are sufficiently related to the Main Contract, Clark's Subcontract and PowerCom's sub-Subcontract. Moreover, PowerCom's claims allege that Clark and Valley Electric breached their contracts and violated their duty of good faith and fair dealing relating to PowerCom's COVID-19 claim, including their unauthorized deductions of thousands of dollars from PowerCom's COVID-19 claim, and in failing to timely submit PowerCom's COVID-19 claim to the Port. Because the parties' claims and defenses are founded in and intertwined with the underlying contracts, Clark should be equitably estopped from refusing to arbitrate PowerCom's COVID-19 claim and its cross-claim against Valley Electric.

Clark's remaining arguments that the court should affirm the stay of PowerCom's COVID-19 claim to avoid duplicative litigation in parallel proceedings, the possibility of inconsistent results, and waste judicial resources is a policy-oriented critique that Clark fails to support with any citation to controlling Washington or Ninth Circuit authority. To be clear, a stay would not benefit PowerCom and to suggest otherwise is irresponsible. Should the Court stay this matter indefinitely until the final resolution of the Main Contract dispute process between the Port and Clark, the stay would cause extreme and unnecessary harm and prejudice to PowerCom. PowerCom has already waited over two and half years to be paid the over one million dollars it had to fund to comply with the COVID-19 protocols implemented on this Project, years longer than it was required to wait under the sub-

Subcontract and Washington's Prompt Pay Act. The dispute between the Port and Clark does not involve any allegations that PowerCom caused any of the delays and extra costs incurred as a result of the COVID-19 protocols implemented on the Project. PowerCom simply followed Clark's COVID-19 protocols, and the Port, Clark and Valley Electric and their sureties now refuse to pay.

Even if the disputes will undoubtedly result in some duplication, "[t]he risk of inconsistent results between that process and this litigation is a risk that the prime contractor must bear – transferring the risk of nonpayment for work performed from the subcontractor to the prime contractor is one of the purposes of the Miller Act." *Pinnacle Crushing & Const. v. Hartford Fire Ins. Co.*, 2018 U.S. Dist. LEXIS 67965, *15-16 (W.D. Wash. April 23, 2018). The disputes clause of the Main Contract and the sub-Subcontract are not binding on PowerCom and there is no equitable reason for staying the proceedings pending a final resolution of Clark's lawsuit against the Port.

IV. CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's stay of PowerCom's COVID-19 claim and remand this case to the trial court to compel the Defendants to arbitrate PowerCom's COVID-19 claim. If the Court believes that arbitration is not the correct forum for this claim, then the claim should be referred back to the trial court for litigation.

I certify that the Joint Reply Brief of Appellant PowerCom, Inc. contains 8,233 words, which exceeds the 6,000 word limit set forth in RAP 18.17(c)(3). However, PowerCom has filed a motion for leave to file an overlength joint reply brief consisting of 8,233 words.

DATED this 30th day of June, 2023.

Respectfully submitted,

HAWKINS PARNELL & YOUNG LLP

By: *\/s/ Eileen I. McKillop*
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this day, I served a true and correct copy of the foregoing document on the following:

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Signed at Seattle, Washington this 30th day of June, 2023.

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Signed at Seattle, Washington this 29th day of January 2024.

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