No. 99838-8

(Court of Appeals No. 81218-1-I)

SUPREME COURT OF THE STATE OF WASHINGTON

BENJAMIN C. WOOLLEY, an individual residing in the State of Washington,

Plaintiff-Petitioner,

v.

EL TORO.COM, LLC, a Delaware limited liability company; HTTP HOLDINGS, LLC, a Wyoming corporation; and DANIEL KIMBALL, an individual residing in the State of Kentucky;

Defendant-Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

This case is about whether a person's agreement to arbitrate claims with *one* entity can be extrapolated to force that person to arbitrate claims (including employment claims) with *a different* entity.

The trial court correctly held that Mr. Woolley's claims against HTTP were subject to arbitration (because there was an agreement to arbitrate between the parties) but that his claims against El Toro were not subject to arbitration (because there was no agreement to arbitrate between the parties).

On appeal, HTTP, El Toro, and Mr. Kimball (who had moved the trial court for an order compelling arbitration) argued that the trial court was not entitled to decide the question of arbitrability as to disputes with El Toro.

The Court of Appeals reversed the trial court and held that – despite the fact that there is no arbitration agreement between Mr. Woolley and El Toro – the arbitration panel was entitled to decide the question of arbitrability as to Mr. Woolley's disputes with El Toro.

Unless the Washington State Supreme Court accepts review, Mr. Woolley will be forced to arbitrate claims – including wage claims arising out of his employment in Washington – against his former employer that he

did not agree to arbitrate. Such a result would violate the Uniform Arbitration Act (which has been adopted in Washington), and is contrary to opinions written by numerous Washington courts of appeal, including this Court. Such a result is also contrary to decisions by the United States Supreme Court.

Mr. Woolley therefore respectfully petitions this Court to accept review and reverse the Court of Appeals' erroneous and unjust decision.

II. IDENTITY OF PETITIONER

Petitioner Benjamin Woolley is an individual who resides in the State of Washington. He was the plaintiff in the trial court and the respondent in the Court of Appeals.

III. DECISION BEING APPEALED

On January 25, 2021 the Court of Appeals filed its decision, attached in Appendix A hereto.

On February 12, 2021, Mr. Woolley moved for reconsideration of the Court of Appeals' decision.

On April 30, 2021, the Court of Appeals denied Mr. Woolley's motion for reconsideration. A copy of the order denying reconsideration is attached in Appendix B hereto.

On May 3, 2021, the Court of Appeals filed an order withdrawing

its January 25, 2021 decision and filing a substitute decision.[1] The Court of Appeals' May 3 order and substitute decision are attached in Appendix C hereto.

Mr. Woolley seeks review of the Court of Appeals' May 3, 2021 decision.

IV. ISSUES PRESENTED FOR REVIEW

In the absence of an agreement to arbitrate, is it proper for the court (rather than an arbitration panel) to decide the question of arbitrability? **Yes**.

V. STATEMENT OF THE CASE

A. Factual Background.

In 2012, Mr. Woolley, Daniel Kimball, and others formed El Toro. CP 408. There is no arbitration agreement governing disputes between El Toro's members. *See generally* CP 306-309.

At the same time, Mr. Kimball and Mr. Woolley agreed that El Toro would employ Mr. Woolley as a software engineer. CP 408. There is no arbitration agreement governing Mr. Woolley's employment with El Toro. *See generally* CP 304-306.

[1] The substitute decision is almost identical to the January 25 decision, but with an updated citation and clarification that Mr. Woolley maintains that he retained an interest in El Toro that is entirely independent of his ownership interest in HTTP

Three years later, in 2015, Mr. Kimball asked Mr. Woolley to join him in a new venture called HTTP. CP 410. At that point, there was no arbitration agreement governing disputes between HTTP's members. CP 520-524. Then, in 2017, HTTP's operating agreement was amended and restated to include an arbitration provision ("HTTP Arbitration Agreement"). CP 329-360. The HTTP Arbitration Agreement states:

> [I]f any dispute shall arise **between the Interest Holders as to their respective rights or liabilities under this Agreement**, the dispute shall be exclusively determined, and the dispute shall be settled, by the arbitration in accordance with the commercial rules of the American Arbitration Association.

CP 556 (emphasis added).

Respondents contend that in 2015 Mr. Woolley ceded a 2.61% interest in El Toro in exchange for a 3% ownership interest in HTTP. CP at 387. Even if that were true, Mr. Woolley still had at least a 7% interest in El Toro and was separately employed by El Toro. CP 171-173; 176. Thus, Mr. Woolley still owns an approximately 4% interest in El Toro that is entirely independent of his interest in HTTP. CP 171-173; 176; 387. The dispute about the 4% is a dispute Mr. Woolley has with El Toro, not HTTP. CP 171-173; 176; 387.

Further, as the HTTP Contribution Agreement demonstrates, the interests in El Toro that were purportedly ceded in exchange for interests in

HTTP do not equal 100%:

SCHEDULE A to the Contribution Agreement
Dated as of January 2, 2015
(El Toro.com LLC Interests contributed to HTTP Holdings, LLC by Contributors;
HTTP Holdings, LLC common units received by Contributors)

CONTRIBUTOR	EL TORO.COM LLC UNITS/INTEREST	HTTP HOLDINGS, LLC. COMMON UNITS
DANIEL KIMBALL	2,827,500 Common (56.55%)	6,500 (65.00%)
SEAN STAFFORD	391,500 (7.83%)	900 (9.00%)
DAVID STADLER	478,500 (9.57%)	1,100 (11.00%)
BENJAMIN C. WOOLLEY	130,500 (2.61%)	300 (3.00%)
STACY GRIGGS	217,500 (4.35%)	500 (5.00%)
DAVID VRONA	130,500 (2.61%)	300 (3.00%)
JEFF SPARROW	87,000 (1.74%)	200 (2.00%)
MARTIN P. MEYER	43,500 (0.87%)	100 (1.00%)
CHRISTOPHER S. MONTAGUE	43,500 (0.87%)	100 (1.00%)
Total:	4,350,000 (87%)	10,000

CP at 387.

B. Procedural Background.

In 2019, Mr. Woolley initiated a civil action in Snohomish County Superior Court to resolve disputes he has with El Toro and Mr. Kimball related to (i) his ownership interest in El Toro; and (ii) his employment with El Toro. CP 642-650. In the same action, Mr. Woolley also sought declaratory judgment as to his ownership interest in HTTP. *Id*.

Respondents filed a motion to dismiss Mr. Woolley's claims and compel arbitration. CP 629-640. Respondents also initiated an arbitration action in Kentucky (where El Toro and HTTP are headquartered and where Mr. Kimball resides). CP 572-579. El Toro is not a party to the pending

arbitration action that HTTP initiated in Kentucky. CP 572-579.

The trial court entered a finding that Mr. Woolley signed the HTTP Arbitration Agreement and, pursuant to that agreement, the trial court held that an arbitration panel was entitled to decide the issue of arbitrability as to Mr. Woolley's disputes against HTTP. CP 118-119. But the court correctly recognized that there was no agreement to arbitrate between Mr. Woolley and El Toro. CP 118-119. Thus, the trial court had jurisdiction and authority to decide the question of arbitrability as to Mr. Woolley's disputes with El Toro. CP 118-119.

Respondents appealed the trial court's order, arguing that Arbitration Agreement between Mr. Woolley and HTTP compelled arbitration between Mr. Woolley and El Toro. The Court of Appeals agreed with the Respondents and failed to recognize that (1) El Toro and HTTP are separate entities (2) Mr. Woolley was employed by El Toro, not HTTP; and (3) no arbitration agreement existed as between Mr. Woolley and El Toro, nonetheless one to arbitrate employment claims. *See* Appendix A, C. As a result, the Court of Appeals held that an arbitration panel was entitled to decide whether Mr. Woolley's disputes with El Toro are subject to arbitration. Appendix A, C.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Case Falls Squarely Within the Narrow Criteria Required for this Court to Accept Review.

Under RAP 13.4(b), the Supreme Court may accept a petition for review in limited circumstances. These include:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1)-(4).

Review should be accepted because (1) the decision below conflicts with decisions of the Washington State Supreme Court; (2) the decision below is in conflict with a published decision of the Court of Appeals; and (3) this case presents issues of substantial public interest with respect to an employee being forced to arbitrate employment disputes absent an arbitration agreement.

B. The Court of Appeals Decision Is in Conflict with Decisions of the Washington State Supreme Court and the Court of Appeals.

The Uniform Arbitration Act, adopted by Washington, plainly states that "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2)

(attached in Appendix D hereto).

The Washington State Supreme Court has consistently affirmed the rule enunciated in RCW 7.04A.060(2) that courts, rather than arbitrators, decide whether an agreement to arbitrate exists. *See Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (holding **courts "determine the threshold matter of whether an arbitration clause is valid** and enforceable." (Emphasis added)); *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486, 491 (2020) (holding that **Washington law "requires courts to determine whether there is an agreement to arbitrate** and, if so, whether it is enforceable." (Emphasis added)).

Other appellate courts in this state have affirmed the rule enunciated in RCW 7.04A.060(2) and by this Court. *See, e.g.*, *Romney v. Franciscan Med. Grp.*, 199 Wn. App 589, 595, 399 P.3d 1220 (2017) ("**the courts should usually decide threshold questions of arbitrability**." (Emphasis added)).

The Washington courts are in good company: the United States Supreme Court follows the very same rule. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 141, 589 L.Ed.2d 648 (1986) (holding "**the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator**." (Emphasis added)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

944, 15 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) ("**a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide**." (Emphasis added)).

This rule makes good sense: a contrary rule would force non-consenting parties into arbitration to decide the question of arbitrability, which is unjust and incompatible with Washington precedent. As the Washington State Supreme Court has recognized, a public policy in favor of enforcing arbitration agreements does not amount to a license to force disputes into arbitration in the absence of an agreement. *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635, 637 (2013) (recognizing the public policy in favor of arbitration but declining to force the claimants to arbitrate their dispute). The "policy [also] does not… lessen the court's responsibility to determine whether the arbitration contract is valid." *Pagliacci Pizza, Inc.*, 196 Wn.2d at 46.

The Washington State Supreme Court has joined many other courts, including the United States Supreme Court, in holding 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**." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009)

(emphasis added) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 83) (additional citation omitted).

In other cases, Court of Appeals has followed the Washington State Supreme Court's lead. *See Woodall v. Avalon Care Ctr.–Federal Way, LLC*, 155 Wn. App. 919, 934-35, 231 P.3d 1252 (2010) citing *Satomi Owners*, 167 Wn.2d at 810 ("As an important policy of contract, **one who has not agreed to arbitrate cannot generally be required to do so**." (Emphasis added))

Washington courts have exercised a high degree of precision when considering whether an agreement to arbitrate exists. In *Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn. App. 347, 35 P.3d 389 (2001), the Court of Appeals (Division III) held that an arbitration provision in a collective bargaining agreement ("CBA") did not bind the individual employees that were collectively covered by the agreement. *Id*. at 352. In that case, the arbitration provision broadly required arbitration of any disputes "aris[ing] out of the interpretation or application" of the CBA, which governed the employees' employment. *Id*. at 356. However, despite the expansive language of the arbitration provision, and despite the fact that the individual employees were parties to the CBA in a collective capacity, the Court of Appeals held that the individual employees did not "clearly and unmistakably" waive their right to a judicial forum. *Id*. Thus, the Court

held that the employees were not required to arbitrate their wrongful discharge claims. *Id*.

In accordance with *Brundridge*, the trial court in this case correctly declined to extrapolate the HTTP arbitration provision to pull into arbitration Mr. Woolley's claims with El Toro (which he did not agree to arbitrate). In *Brundridge*, there was a close nexus between the claims that were covered by the applicable arbitration provision and the claims that the employees were making. *Id*. at 352; 356. Further, in that case, the employees, in their collective capacity, were party to the relevant agreement. *Id*. Yet even in *Brundrige*, the court declined to extrapolate the applicable arbitration provision to govern the employees' claims. *Id*. Notably, in *Brundridge*, the issue of arbitrability was decided by a Washington court instead of an arbitrator.

However, this case is even clearer than *Brundridge*. Unlike the claimants' claims in *Brundridge*, Mr. Woolley's claims are against an entity (El Toro) that is not even a party to the allegedly applicable arbitration provision. Likewise, there is no nexus between Mr. Woolley's ownership claim against El Toro and the disputes covered by the arbitration provision because, as explained above, Mr. Woolley has a claim to ownership of El Toro that is entirely independent of his ownership interest in HTTP.

Like in *Brundridge*, the trial court was entitled to decide the issue of

arbitrability and correctly held that the HTTP arbitration provision should not be extrapolated to pull in Mr. Woolley's claims against El Toro.

Pursuant to RCW 7.04A.060(2), *Hill*, *Satomi Owners*, *Saleemi*, *Pagliacci Pizza, Inc.*, *Romney*, *Woodall*, *Brundridge*, and a long line of cases from the United States Supreme Court, the trial court was entitled to determine whether an agreement to arbitrate existed between Mr. Woolley and El Toro. The trial court correctly determined that there was no agreement to arbitrate between Mr. Woolley and El Toro and that disputes between the two parties were not subject to arbitration.

Respondents may argue that the trial court was not entitled to decide the question of arbitrability because the HTTP Arbitration Agreement delegates the question of arbitration to the arbitrator. However, since El Toro is not a party to the HTTP Arbitration Agreement, and the HTTP Arbitration Agreement does not purport to govern claims against El Toro, the delegation does not apply to Mr. Woolley's claims against El Toro. Accordingly, the trial court was entitled to decide the issue of arbitrability with regard to claims against El Toro.

The Court of Appeals missed this critical distinction and incorrectly assumed that a valid arbitration agreement exists between El Toro and Mr. Woolley. Appendix C at 6. In missing the distinction, the Court of Appeals reversed the trial court's implicit factual determination that El Toro is a

separate party.

In its decision, the Court of Appeals wrote that the issue was simply whether "the parties' agreement delegated the question of arbitrability to an arbitrator." *Id*. However, since there was no agreement to arbitrate between Mr. Woolley and El Toro, the Court of Appeals' framing of the issue is incorrect and puts the cart before the horse. There can be no delegation of the question of arbitrability when there is no agreement to arbitrate between the parties.

C. The Court of Appeals Misapplied its Holding in *Healy*.

In the instant case, despite controlling authority to the contrary, the Court of Appeals held Mr. Woolley must arbitrate his claims against El Toro despite the absence of an arbitration agreement. In support of its holding, the Court of Appeals cites to *Healy v. Seattle Rugby, LLC*, 15 Wn. App. 2d 539, 476 P.3d 583 (2020) for the proposition that it would "not entertain the use of a gateway issue to circumvent arbitration." Appendix C at 8. However, in *Healy*, the Court held that gateway issues are resolvable by the court: "Courts may resolve the threshold question of whether a claim is arbitrable as a gateway dispute. This avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id*. at 547 (internal quotations and citations omitted). The Court of Appeals misapplied *Healy*.

In *Healy*, there was no dispute that an arbitration agreement governed disputes between the parties. *Id*. at 541. However, there was a dispute as to which venue provision in the agreement governed. *Id*. In *Healy*, the Court of Appeals held that, "Because venue is a not a gateway issue, this dispute must be resolved by the arbitrator, not the superior court." *Id*.

In other words, *Healy* differentiated the venue issue from "gateway" issues which are properly decided by courts instead of arbitrators. In doing so, the Court of Appeals cited to *Howsam*, 537 U.S. at 84 (2002), which Mr. Woolley cited in his appellate brief for the proposition that "**a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide**." (Emphasis added).

Healy is consistent with RCW 7.04A.060(2), *Hill*, *Satomi Owners*, *Saleemi*, *Burnett*, *Romney*, *Woodall*, *Brundridge, supra*. Pursuant to *Healy*, it was proper for the trial court to determine the gateway issue of whether there was a valid agreement to arbitrate between the parties. The Court of Appeals reached a contrary conclusion because it misapplied the holding in *Healy*.

D. This Case Presents Issues of Substantial Public Interest that Should Be Decided by the Supreme Court.

As articulated by this Court, "[a] decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Flippo*, 185 Wn.2d 132, 414, 380 P.3d 413 (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)).

Although the Court of Appeals' decision is unpublished, under GR 14.1, it may still be cited by lower courts as persuasive authority and confuse Washington's strong and well-established position on arbitrability (particularly since the Court of Appeals completely misapplied its own holding in *Healy*). Employers may see this as an opening to force employees into private arbitrations without the ability to seek judicial review making this an access-to-justice issue and one of public importance. As case law makes clear, "[t]he first principle that underscores all [Washington courts'] arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" *Pagliacci Pizza, Inc.*, 196 Wn.2d at 48 (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010)).

The right to resolution in a judicial forum can only be abridged when

parties have "clearly and unmistakably" agreed to arbitrate their disputes. *Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn. App. 347, 352, 35 P.3d 389 (2001). Washington courts take care to ensure that parties are not "required to submit to arbitration any dispute which [they have] not agreed so to submit." *Satomi Owners Ass'n*, 167 Wn.2d at 810. In fact, the Washington State Supreme Court has gone so far as to say that Washington courts have "a responsibility to determine whether the arbitration contract is valid." *Pagliacci Pizza, Inc.*, 196 Wn.2d at 46.

In this case, the Court of Appeals' decision forces an employee to arbitrate wage claims against his former employer despite the fact that there is no arbitration agreement between the two.

The absurdity of this result is demonstrated by the fact that El Toro is not a party to the arbitration action and cannot be haled into the arbitration action because it is not party to an arbitration agreement.

With the Court of Appeals' decision, Mr. Woolley was deprived of judicial resolution of his claims against El Toro without his consent. This is an access-to-justice issue that is a matter of substantial public concern.

VII. CONCLUSION

The Washington State Supreme Court has enunciated a clear, simple rule: "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Satomi Owners Ass'n v. Satomi, LLC*, 167

Wn.2d at 810. The Court of Appeals' decision in this case violates that rule and forces Mr. Woolley to arbitrate his disputes with El Toro, which he never agreed to do.

The Court of Appeals' decision in this case was in conflict with prior decisions of the Washington State Supreme Court (*Hill*; *Satomi Owners*; *Saleemi*; *Pagliacci Pizza, Inc.*) and the Court of Appeals (*Romney; Woodall*; *Healy*; *Brundridge*). It also implicates an area of substantial public interest: that is, under what circumstances a party may be forced to forfeit their right to judicial resolution.

Accordingly, review of the Court of Appeals' decision should be accepted pursuant to RAP 13(b)(1), (2), and (4).

Mr. Woolley respectfully asks this Court to accept review and reverse the Court of Appeals' May 3, 2021 decision in order to save him from being forced to arbitrate claims – including wage claims – that he did not agree to arbitrate.

Respectfully submitted this 1st day of June, 2021.

HELSELL FETTERMAN LLP

s/Emma Kazaryan

By _____
Debra M. Akhbari, WSBA #47500
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Attorneys for Plaintiff-Petitioner Benjamin C. Woolley

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Woolley v El Toro, et al., I did on the date listed below, (1) cause to be filed with this Court a Petition for Review; and (2) to be delivered via electronic service to Stephanie Berntsen, Allison Krashan, Farron Curry of Schwabe, Williamson & Wyatt, P.C., 1420 5th Ave, Suite 3400, Seattle, WA 98101, sberntsen@schwabe.com; akrashan@schwabe.com; fcurry@schwabe.com, who are counsel of record of Appellant.

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

DATED: June 1, 2021

s/Kyna Gonzalez
KYNA GONZALEZ

Appendix A

FILED
1/25/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAMIN WOOLLEY, an individual residing in the State of Washington, Respondent, v. EL TORO.COM, LLC, a Delaware limited liability company; HTTP HOLDINGS, LLC, a Wyoming corporation; and DANIEL KIMBALL, an individual residing in the state of Kentucky, Appellant.	)	No. 81218-1-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Appellants challenge the trial court's determination that only some claims at issue in this case are subject to arbitration. The written agreement between the parties expressly incorporates the American Arbitration Association's commercial rules and provides that an arbitrator is to determine whether claims are subject to arbitration. Therefore, the trial court erred in determining the arbitrability of the parties' claims and we reverse.

FACTS

Due to the procedural posture of this case, many of the facts remain disputed by the parties. Those set out in this opinion are derived from the briefing

and record on appeal, but with the understanding that this is not a fact finding court and proper findings of fact will be determined in future proceedings after remand.

El Toro.com, LLC (El Toro) and HTTP Holdings, LLC (HTTP),[1] both based in Kentucky, are in the business of developing, marketing, and licensing an online platform that implements a proprietary data sharing model that allows for a marketplace to utilize the value of personally identifiable information, without the need for the information to leave the source.

Around June 2012, Daniel Kimball reached out to Benjamin Woolley about joining him at El Toro, a new business venture he had undertaken. The two contemplated that Woolley would receive an ownership interest in exchange for his work with the business. Woolley also began working as an independent contractor for El Toro. Effective January 1, 2015, the executives of El Toro, including Woolley, formed HTTP for the purpose of owning their collective interest in and managing El Toro. All the executives voluntarily ceded their shares in El Toro to HTTP and, in return, were provided HTTP membership interests and became interest holders in HTTP. As a result, no individuals own interest in El Toro; it is entirely owned by HTTP.

In 2017, the interest holders of HTTP, including Woolley, entered into an "Amended and Restated Operating Agreement of HTTP Holdings, LLC" (2017 Operating Agreement). This 2017 Operating Agreement restructured HTTP to provide for two classes of ownership. The agreement also contained an arbitration

[1] Daniel Kimball is a member of HTTP and the initial manager of the company. He was sued by Woolley in his personal capacity, along with HTTP and El Toro, and, as such, is one of the named appellants. For clarity, we refer to the numerous appellants collectively as HTTP.

provision setting forth the agreement of all interest holders to resolve any dispute as to their rights or liabilities under the agreement by arbitration in accordance with American Arbitration Association (AAA) commercial rules. That section of the agreement states:

> 18.7 Arbitration. Except as otherwise provided in Section 18.3(b), if any dispute shall arise between the Interest Holders as to their rights or liabilities under this Agreement, the dispute shall be exclusively determined, and the dispute shall be settled, by arbitration in accordance with the commercial rules of the American Arbitration Association. The arbitration shall be held in Louisville, Kentucky before a panel of three arbitrators, all of whom shall be chosen from a panel of arbitrators selected by the American Arbitration Association (or such other independent dispute resolution body to which they shall mutually agree). Each of the parties to the dispute shall select one arbitrator and the two arbitrators so selected shall select a third arbitrator. If the two arbitrators are unable to agree on the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association (or such other independent body to which they shall mutually agree). The decision of the arbitrators shall be final and binding upon the Interest Holders and the Company and judgment upon such award may be entered in any court of competent jurisdiction. The costs of the arbitrators and of the arbitration shall be borne one-half by each of the parties. The costs of each party's counsel, accountants, etc., as well as any costs solely for their benefit, shall be borne separately by each party. EACH OF THE INTEREST HOLDERS HEREBY ACKNOWLEDGES THAT THIS PROVISION CONSTITUTES A WAIVER OF THEIR RIGHT TO COMMENCE A LAWSUIT IN ANY JURISDICTION WITH RESPECT TO THE MATTERS WHICH ARE REQUIRED TO BE SETTLED BY ARBITRATION AS PROVIDED IN THIS SECTION 18.7.

In the period between October 16, 2015 and January 14, 2019, HTTP directly and through El Toro, made various payments to Woolley separate from his regular member distributions. Woolley was an employee of HTTP between June 2016 and February 1, 2019, when he was terminated. On the date of termination, HTTP delivered a demand to Woolley seeking a return of the payments he

received separate from his wages as an employee and member distributions. In the termination letter, HTTP characterized the payments as advances.

In March 2019, Woolley filed suit in Snohomish County Superior Court seeking recovery for unpaid wages, a declaratory judgment under a wage rebate theory as to the characterization of the extra payments, and a separate declaratory judgment regarding Woolley's ownership interest in the businesses. HTTP initiated arbitration with Woolley in May 2019. HTTP brought five claims, two of which addressed the merits of Woolley's ownership interest claims and those concerning the characterization of the extra payments.

In June 2019, HTTP filed a motion to dismiss Woolley's wage claims and to stay the claims on the payments and ownership interest pending resolution of the arbitration proceeding. Woolley filed a cross-motion regarding arbitrability. The trial court continued the hearing on the pending motions and the parties engaged in discovery in both the superior court action and the arbitration proceeding.

Following discovery in both proceedings, HTTP amended its claims in the arbitration action so that only those that were substantively the same as Woolley's payment characterization and ownership interest claims remained. Woolley amended his complaint in the trial court to dismiss two of his claims regarding failure to pay wages, leaving only those addressing his asserted ownership interest and the payment characterization. As to the ownership claim, Woolley argues he retained an interest in El Toro that is entirely independent of his ownership interest in HTTP. He disputes HTTP's characterization of the extra payments as advances that he must repay.

The parties provided the trial court with supplemental briefing on their cross-motions and a hearing was set for January 29, 2020. However, the trial court continued the hearing based on a clerical error. The same day that the trial court hearing was set, the AAA panel conducted an evidentiary hearing on whether HTTP's claims regarding the advances and ownership interest fell within the scope of the arbitration provision of the 2017 Operating Agreement. On February 7, 2020, the AAA panel issued an order concluding that Woolley had signed the 2017 Operating Agreement and was bound by the arbitration provision. The panel further determined that both the ownership interest and advances claims were arbitrable.

The trial court requested a copy of the AAA order and Woolley's counsel provided it to the court. Oral argument on the cross-motions was held on February 25, 2020. The trial court granted in part and denied in part HTTP's motion to compel arbitration. Specifically the court's order stated:

> Defendant's Motion to Compel Arbitration is GRANTED as to: (i) the dispute regarding Plaintiff Benjamin Woolley's ownership interest in HTTP Holdings, LLC, (ii) the dispute regarding how to characterize payments by HTTP Holdings, LLC to Mr. Woolley or on his behalf after November 30, 2017, and (iii) whether Mr. Woolley is obligated to repay payments he received from HTTP Holdings, LLC on or after November 30, 2017.
>
> Except as provided above, Defendant's Motion to Compel Arbitration is DENIED and any arbitration proceeding in conflict with this order is STAYED.

HTTP appealed.

ANALYSIS

I. Determination of Arbitrability

Appellants challenge the trial court's determination that some of the claims were not subject to the arbitration provision of the 2017 Operating Agreement. HTTP argues that this was a question for the arbitrator and not the court. We agree.

This court reviews a trial court's decision on a motion to compel arbitration de novo. Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC, 199 Wn. App. 534, 538, 400 P.3d 347 (2017). "An arbitration clause is a matter of contract and is enforceable as a contract term." Id. at 537. "An arbitration agreement only applies to those issues the parties have agreed to submit to arbitration." Id. at 538. The Uniform Arbitration Act[2] provides that the "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). However, parties to an agreement may contract to delegate the question of arbitrability to the arbitrator. Raven Offshore, 199 Wn. App. at 538.

The issue before us is whether the parties' agreement delegated the question of arbitrability to an arbitrator. The trial court's unchallenged finding of fact #1 states, "Plaintiff signed the Amended and Restated Operating Agreement of HTTP Holdings, LLC dated November 30, 2017 ('HTTP Amended Operating Agreement')." Because this finding of fact is not challenged it is treated as a verity on appeal. Young v. Toyota Motor Sales, U.S.A., 196 Wn.2d 310, 317, 472 P.3d

[2] Ch. 7.04A RCW.

990 (2020). The court further concluded that the 2017 Operating Agreement is effective as to Woolley. The Supreme Court of the United States "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019). "[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." Id.

Here, the arbitration provision in the 2017 Operating Agreement states, "if any dispute shall arise between the Interest Holders as to their rights or liabilities under this Agreement, the dispute shall be exclusively determined, and the dispute shall be settled, by arbitration in accordance with the commercial rules of the American Arbitration Association." This section of the agreement then concludes in bold,

> EACH OF THE INTEREST HOLDERS HEREBY ACKNOWLEDGES THAT THIS PROVISION CONSTITUTES A WAIVER OF THEIR RIGHT TO COMMENCE A LAWSUIT IN ANY JURISDICTION WITH RESPECT TO THE MATTERS WHICH ARE REQUIRED TO BE SETTLED BY ARBITRATION AS PROVIDED IN THIS SECTION 18.7.

Commercial Arbitration Rule 7(a) of the AAA provides, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Similarly, the court in Raven Offshore reviewed an arbitration provision that provided arbitration to be conducted in accordance with the rules of the Maritime Arbitration Association of the United States, the question before the court was whether such a provision constituted

"clear and unmistakable evidence" of the parties' intent to delegate the issues of arbitrability to the arbitrator. 199 Wn. App. at 538-41. This court determined that such a provision is binding and delegates the threshold question of arbitrability to the arbitrator, not the trial court. Id. at 541-42. In Healy v. Seattle Rugby, LLC, this court recently reiterated that if the parties have a valid agreement to arbitrate, there is no risk that the parties will be forced to arbitrate a matter outside of that agreement. __ Wn. App. __, 476 P.3d 583 (2020). This court will not entertain the use of a gateway issue to circumvent arbitration. Id.

After concluding that the 2017 Operating Agreement was effective as to Woolley, the trial court concluded that there was a temporal limit on the issues to which it applied. However, once it was determined that the agreement was signed by and effective as to Woolley, the threshold question of arbitrability was no longer before the court based on the plain language of that agreement. As such, the scope of the arbitration, including any temporal or issue-based limits, are to be determined by an arbitrator.

Woolley advances no authority as to why the parties would not be bound to the AAA's commercial rules surrounding the threshold question of arbitrability expressly incorporated into the arbitration provision of the 2017 Operating Agreement. Further, Raven Offshore makes clear that such an agreement is binding in our state. As such, the trial court erred when it determined that, while the arbitration provision was signed and binding as to Woolley, the arbitrability of

certain claims should not be determined by the arbitrator. Accordingly, we reverse.[3]

Reversed.

WE CONCUR:

[3] Woolley renews his argument from the trial court in his response brief that the arbitration agreement is unconscionable. He has not cross-appealed the trial court's rejection of his unconscionability argument, so we decline to consider it on appeal. See RAP 10.3(b)

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAMIN WOOLLEY, an individual residing in the State of Washington, Respondent, v. EL TORO.COM, LLC, a Delaware limited liability company; HTTP HOLDINGS, LLC, a Wyoming corporation; and DANIEL KIMBALL, an individual residing in the state of Kentucky, Appellant.	)	No. 81218-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Benjamin Woolley, filed a motion for reconsideration of the opinion filed on January 25, 2021. The appellants filed a response to the motion. The court has determined that said motion should be denied; now therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

Appendix C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAMIN WOOLLEY, an individual residing in the State of Washington, Respondent, v. EL TORO.COM, LLC, a Delaware limited liability company; HTTP HOLDINGS, LLC, a Wyoming corporation; and DANIEL KIMBALL, an individual residing in the state of Kentucky, Appellant.	)	No. 81218-1-I DIVISION ONE ORDER WITHDRAWING OPINION AND SUBSTITUTING OPINION

The opinion for this case was filed on January 25, 2021. A majority of the panel request that the opinion filed on January 25, 2021 be withdrawn and a substitute unpublished opinion be filed. Now therefore, it is hereby

ORDERED that the opinion filed on January 25, 2021 is withdrawn and a substitute unpublished opinion shall be filed.

FOR THE COURT:

Judge

FILED
5/3/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAMIN WOOLLEY, an individual residing in the State of Washington, Respondent, v. EL TORO.COM, LLC, a Delaware limited liability company; HTTP HOLDINGS, LLC, a Wyoming corporation; and DANIEL KIMBALL, an individual residing in the state of Kentucky, Appellant.	)	No. 81218-1-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Appellants challenge the trial court's determination that only some claims at issue in this case are subject to arbitration. The written agreement between the parties expressly incorporates the American Arbitration Association's commercial rules and provides that an arbitrator is to determine whether claims are subject to arbitration. Therefore, the trial court erred in determining the arbitrability of the parties' claims and we reverse.

FACTS

Due to the procedural posture of this case, many of the facts remain disputed by the parties. Those set out in this opinion are derived from the briefing

and record on appeal, but with the understanding that this is not a fact finding court and proper findings of fact will be determined in future proceedings after remand.

El Toro.com, LLC (El Toro) and HTTP Holdings, LLC (HTTP),[1] both based in Kentucky, are in the business of developing, marketing, and licensing an online platform that implements a proprietary data sharing model that allows for a marketplace to utilize the value of personally identifiable information, without the need for the information to leave the source.

Around June 2012, Daniel Kimball reached out to Benjamin Woolley about joining him at El Toro, a new business venture he had undertaken. The two contemplated that Woolley would receive an ownership interest in exchange for his work with the business. Woolley also began working as an independent contractor for El Toro. Effective January 1, 2015, the executives of El Toro, including Woolley, formed HTTP for the purpose of owning their collective interest in and managing El Toro. All the executives voluntarily ceded their shares in El Toro to HTTP and, in return, were provided HTTP membership interests and became interest holders in HTTP.

In 2017, the interest holders of HTTP, including Woolley, entered into an "Amended and Restated Operating Agreement of HTTP Holdings, LLC" (2017 Operating Agreement). This 2017 Operating Agreement restructured HTTP to provide for two classes of ownership. The agreement also contained an arbitration provision setting forth the agreement of all interest holders to resolve any dispute

[1] Daniel Kimball is a member of HTTP and the initial manager of the company. He was sued by Woolley in his personal capacity, along with HTTP and El Toro, and, as such, is one of the named appellants. For clarity, we refer to the numerous appellants collectively as HTTP.

as to their rights or liabilities under the agreement by arbitration in accordance with American Arbitration Association (AAA) commercial rules. That section of the agreement states:

> 18.7 Arbitration. Except as otherwise provided in Section 18.3(b), if any dispute shall arise between the Interest Holders as to their rights or liabilities under this Agreement, the dispute shall be exclusively determined, and the dispute shall be settled, by arbitration in accordance with the commercial rules of the American Arbitration Association. The arbitration shall be held in Louisville, Kentucky before a panel of three arbitrators, all of whom shall be chosen from a panel of arbitrators selected by the American Arbitration Association (or such other independent dispute resolution body to which they shall mutually agree). Each of the parties to the dispute shall select one arbitrator and the two arbitrators so selected shall select a third arbitrator. If the two arbitrators are unable to agree on the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association (or such other independent body to which they shall mutually agree). The decision of the arbitrators shall be final and binding upon the Interest Holders and the Company and judgment upon such award may be entered in any court of competent jurisdiction. The costs of the arbitrators and of the arbitration shall be borne one-half by each of the parties. The costs of each party's counsel, accountants, etc., as well as any costs solely for their benefit, shall be borne separately by each party. EACH OF THE INTEREST HOLDERS HEREBY ACKNOWLEDGES THAT THIS PROVISION CONSTITUTES A WAIVER OF THEIR RIGHT TO COMMENCE A LAWSUIT IN ANY JURISDICTION WITH RESPECT TO THE MATTERS WHICH ARE REQUIRED TO BE SETTLED BY ARBITRATION AS PROVIDED IN THIS SECTION 18.7.

In the period between October 16, 2015 and January 14, 2019, HTTP directly and through El Toro, made various payments to Woolley separate from his regular member distributions. Woolley was an employee of HTTP between June 2016 and February 1, 2019, when he was terminated. On the date of termination, HTTP delivered a demand to Woolley seeking a return of the payments he received separate from his wages as an employee and member distributions. In the termination letter, HTTP characterized the payments as advances.

In March 2019, Woolley filed suit in Snohomish County Superior Court seeking recovery for unpaid wages, a declaratory judgment under a wage rebate theory as to the characterization of the extra payments, and a separate declaratory judgment regarding Woolley's ownership interest in the businesses. HTTP initiated arbitration with Woolley in May 2019. HTTP brought five claims, two of which addressed the merits of Woolley's ownership interest claims and those concerning the characterization of the extra payments.

In June 2019, HTTP filed a motion to dismiss Woolley's wage claims and to stay the claims on the payments and ownership interest pending resolution of the arbitration proceeding. Woolley filed a cross-motion regarding arbitrability. The trial court continued the hearing on the pending motions and the parties engaged in discovery in both the superior court action and the arbitration proceeding.

Following discovery in both proceedings, HTTP amended its claims in the arbitration action so that only those that were substantively the same as Woolley's payment characterization and ownership interest claims remained. Woolley amended his complaint in the trial court to dismiss two of his claims regarding failure to pay wages, leaving only those addressing his asserted ownership interest and the payment characterization. As to the ownership claim, Woolley argues he retained an interest in El Toro that is entirely independent of his ownership interest in HTTP. He disputes HTTP's characterization of the extra payments as advances that he must repay.

The parties provided the trial court with supplemental briefing on their cross-motions and a hearing was set for January 29, 2020. However, the trial court

continued the hearing based on a clerical error. The same day that the trial court hearing was set, the AAA panel conducted an evidentiary hearing on whether HTTP's claims regarding the advances and ownership interest fell within the scope of the arbitration provision of the 2017 Operating Agreement. On February 7, 2020, the AAA panel issued an order concluding that Woolley had signed the 2017 Operating Agreement and was bound by the arbitration provision. The panel further determined that both the ownership interest and advances claims were arbitrable.

The trial court requested a copy of the AAA order and Woolley's counsel provided it to the court. Oral argument on the cross-motions was held on February 25, 2020. The trial court granted in part and denied in part HTTP's motion to compel arbitration. Specifically the court's order stated:

> Defendant's Motion to Compel Arbitration is GRANTED as to: (i) the dispute regarding Plaintiff Benjamin Woolley's ownership interest in HTTP Holdings, LLC, (ii) the dispute regarding how to characterize payments by HTTP Holdings, LLC to Mr. Woolley or on his behalf after November 30, 2017, and (iii) whether Mr. Woolley is obligated to repay payments he received from HTTP Holdings, LLC on or after November 30, 2017.
>
> Except as provided above, Defendant's Motion to Compel Arbitration is DENIED and any arbitration proceeding in conflict with this order is STAYED.

HTTP appealed.

ANALYSIS

I. Determination of Arbitrability

Appellants challenge the trial court's determination that some of the claims were not subject to the arbitration provision of the 2017 Operating Agreement.

HTTP argues that this was a question for the arbitrator and not the court. We agree.

This court reviews a trial court's decision on a motion to compel arbitration de novo. Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC, 199 Wn. App. 534, 538, 400 P.3d 347 (2017). "An arbitration clause is a matter of contract and is enforceable as a contract term." Id. at 537. "An arbitration agreement only applies to those issues the parties have agreed to submit to arbitration." Id. at 538. The Uniform Arbitration Act[2] provides that the "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). However, parties to an agreement may contract to delegate the question of arbitrability to the arbitrator. Raven Offshore, 199 Wn. App. at 538.

The issue before us is whether the parties' agreement delegated the question of arbitrability to an arbitrator. The trial court's unchallenged finding of fact #1 states, "Plaintiff signed the Amended and Restated Operating Agreement of HTTP Holdings, LLC dated November 30, 2017 ('HTTP Amended Operating Agreement')." Because this finding of fact is not challenged it is treated as a verity on appeal. Young v. Toyota Motor Sales, U.S.A., 196 Wn.2d 310, 317, 472 P.3d 990 (2020). The court further concluded that the 2017 Operating Agreement is effective as to Woolley. The Supreme Court of the United States "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."

[2] Ch. 7.04A RCW.

Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019). "[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." Id.

Here, the arbitration provision in the 2017 Operating Agreement states, "if any dispute shall arise between the Interest Holders as to their rights or liabilities under this Agreement, the dispute shall be exclusively determined, and the dispute shall be settled, by arbitration in accordance with the commercial rules of the American Arbitration Association." This section of the agreement then concludes in bold,

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this court recently reiterated that if the parties have a valid agreement to arbitrate, there is no risk that the parties will be forced to arbitrate a matter outside of that agreement. 15 Wn. App. 2d 539, 476 P.3d 583 (2020). This court will not entertain the use of a gateway issue to circumvent arbitration. Id.

After concluding that the 2017 Operating Agreement was effective as to Woolley, the trial court concluded that there was a temporal limit on the issues to which it applied. However, once it was determined that the agreement was signed by and effective as to Woolley, the threshold question of arbitrability was no longer before the court based on the plain language of that agreement. As such, the scope of the arbitration, including any temporal or issue-based limits, are to be determined by an arbitrator.

Woolley advances no authority as to why the parties would not be bound to the AAA's commercial rules surrounding the threshold question of arbitrability expressly incorporated into the arbitration provision of the 2017 Operating Agreement. Further, Raven Offshore makes clear that such an agreement is binding in our state. As such, the trial court erred when it determined that, while the arbitration provision was signed and binding as to Woolley, the arbitrability of certain claims should not be determined by the arbitrator. Accordingly, we reverse.[3]

[3] Woolley renews his argument from the trial court in his response brief that the arbitration agreement is unconscionable. He has not cross-appealed the trial court's rejection of his unconscionability argument, so we decline to consider it on appeal. See RAP 10.3(b)

Reversed.

WE CONCUR:

Appendix D

RCW 7.04A.060

Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[**2005 c 433 § 6**.]

HELSELL FETTERMAN LLP

June 01, 2021 - 3:23 PM

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