

63772-0

63772-0

NO. 637720

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

VERBEEK PROPERTIES, LLC, a Washington limited liability company;
and DEWEY T. VERBEEK and MARILYN J. VERBEEK, husband and
wife, doing business as Verbeek Wrecking,

Plaintiffs,

v.

GREENCO ENVIRONMENTAL, INC., a Washington corporation;
RANDY PERKINS and JANE DOE PERKINS, and the marital
community composed thereof; and DEVELOPERS SURETY AND
INDEMNITY CO. BOND NO. 792634C,

Defendants.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 DEC 30 PM 4:53

RESPONDENTS' BRIEF

Lee Smart, P.S., Inc.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

Jeffrey P. Downer, WSBA No. 12625
Donna Young, WSBA No. 15455
Of Attorneys for Respondents

Peizer Richards Ziontz
1915 Pacific Building
720 Third Avenue
Seattle, WA 98104-1868

Martin L. Ziontz, WSBA No. 10959
Of Attorneys for Respondents

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE.....	1
A. The parties’ relationship is based on a contract containing a mediation and arbitration clause.	1
B. Verbeek’s first response was to try to avoid the contract’s dispute-resolution procedures.	3
C. Verbeek failed to demand arbitration in the action to dismiss GreenCo’s lien.	4
D. GreenCo was required to litigate issues relating to the contractual dispute in the lien litigation matter.....	5
E. Verbeek commenced litigation in this case without demanding arbitration or mediation in the Complaint.	7
F. The superior court properly denied Verbeek’s motion to stay and compel arbitration.	7
IV. SUMMARY OF ARGUMENT	8
V. ARGUMENT	8
A. The standard for review is de novo.	8
B. Verbeek failed to comply with RCW 7.04A.090 and did not properly initiate arbitration.	9
1. Verbeek’s complaint did not properly initiate a demand for arbitration.....	9
2. The letters written by Verbeek’s counsel did not properly initiate arbitration.	10
a. The substantive notice requirements of RCW7.04A.090 are mandatory.....	10
b. Verbeek’s correspondence does not meet the mandatory requirements of RCW 7.04A.090.....	12
c. <i>Westcott</i> does not support Verbeek’s substantial-compliance argument.....	14
3. All relevant factors show that Verbeek waived its right to compel arbitration.....	15
a. The court should consider two factors.	15
b. Verbeek knew of its right to arbitrate.	16

	Page
c. Verbeek acted inconsistently with the right to arbitrate in its motion to dismiss GreenCo’s lien.	16
d. Filing the complaint without a demand for arbitration constitutes waiver.....	18
e. Verbeek unsuccessfully attempts to distinguish its conduct from cases finding waiver of the right to arbitrate.	20
f. Verbeek acted inconsistently with an intent to arbitrate by bringing claims relating to the contract that can only be litigated in court.	21
g. Verbeek’s argument that the court must compel arbitration because the agreement signed by the parties is an adhesion contract is without merit.	24
h. Order finding waiver may be upheld even when the superior court did not find waiver based on the lien litigation.	25
4. An order compelling arbitration would prejudice GreenCo.	26
a. Factors of delay and expense show prejudice.....	26
b. GreenCo has been prejudiced through incurring expenses.	26
c. Litigation of the MTCA and other Declaratory Judgment claims creates prejudice to Greenco because it requires duplication of litigation.	27
d. GreenCo’s lien-foreclosure counterclaim precludes arbitration.....	29
VI. CONCLUSION.....	30

TABLE OF AUTHORITIES
Table of Cases

	Page(s)
Federal Cases	
<i>Grumhaus v. Comerica Securities, Inc.</i> , 223 F.3d 648, 650 (7th Cir. 2000)	19
Cases	
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004)	16, 24
<i>Asarco Inc., v. Dept. of Ecology</i> , 145 Wn.2d 750, 43 P.3d 471 (2002)....	27
<i>Beverly Hills Dev. Corp. v. Wimpey of Florida Inc.</i> , 661 So.2d 969 (Fla. App. 1995)	20
<i>Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2006).....	23
<i>Dash Point Village v. Exxon</i> , 86 Wn. App. 596, 937 P.2d 1148 (1997)...	28
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001). 10	
<i>Harting v. Baron</i> , 101 Wn. App. 954, 6 P.3d 91 (2000).....	20, 21
<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 383, 174 P.2d 123 (2008)	9, 20
<i>Jenson v. Scribner</i> , 57 Wn. App. 478, 480, 789 P.2d 306 (1990)	9, 25
<i>Karmarevcky v. DSHS</i> , 64 Wn. App. 14, 822 P.2d 1222 (1992).....	10
<i>Kelleher v. Ephrata Sch. Dist. No. 165</i> , 56 Wn. 2d 866, 355 P.2d 989 (1960).....	11
<i>Kinsey v. Bradley</i> , 53 Wn. App. 167, 169, 765 P.2d 1329 (1989).....	16, 26
<i>Kruger Clinic Othopeedics LLC, v. Regence Blue Shield</i> , 157 Wn.2d 290, 298, 138 P.3d 396 (2006).....	8, 21, 22
<i>L. Wash. Sch. Dist. No. 414 v. Mobile Modules Northwest Inc.</i> , 28 Wn. App. 59, 61, 621 P.2d 791 (1980).....	9, 10, 16, 19, 26
<i>Marina Cove Condo. Owners Ass'n v. Isabella Estates</i> , 109 Wn. App. 230, 34 P.3d 870 (2001).....	22
<i>McGowan v. State</i> , 148 Wn.2d 278, 288, 60 P.3d 67 (2002)	25
<i>Otis Housing Assoc. v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009).....	9, 13, 17, 18, 21, 25
<i>Pedersen v. Klinkert</i> , 56 Wn.2d 313, 352 P.2d 1025 (1960)....	9, 10, 18, 19
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 217 P.3d 1179 (2009)	11
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	25
<i>Steele v. Lundgren</i> , 85 Wn. App. 845, 849, 935 P.2d 671, <i>rev. denied</i> , 133 Wn.2d 1014 (1997)	16, 26, 27

	Page(s)
<i>Vireo P.L.L.C. v. Cates</i> , 593 S.W.2d 489 (Tex. Ct. Ap. 1997).....	20
<i>W.R.P. Lake Union Limited Partnership v. Exterior Services, Inc.</i> , 85 Wash. App. 744, 752, 934 P.2d 722 (Div. I 1997)	7
<i>Ward v. LaMonico</i> , 47 Wn. App. 373, 380, 735 P.2d 92 (1987).....	23
<i>Westcott Homes LLC, v. Chamness</i> , 146 Wn. App. 728, 192 P.3d 394 (2008).....	11, 12, 13, 14, 15
 Statutes	
RCW 7.04A.....	8, 10
RCW 7.04A.070(4).....	18
RCW 7.04.090	1
RCW 7.04A.090.....	10, 11, 12, 14, 15, 30
RCW 7.24.010	22, 28
RCW 18.27.040	23
RCW 18.27.040(3).....	23
RCW 53.52.020	11
RCW 60.04	4, 5
RCW 60.04.081	4, 6
RCW 60.04.141	29
RCW 60.04.171	29, 30
RCW 70.04A.....	8
RCW 70.04A.090.....	14
RCW 70.105D.080.....	22, 28
 Rules	
RAP 2.4(a)	25
RAP 5.1(d)	25
 Other Authority	
Federal Arbitration Act, 9 USC Sec. 2	16

I. INTRODUCTION

The superior court correctly held that appellant Verbeek Properties LLC and Dewey and Marilyn Verbeek (Verbeek) waived their right to demand arbitration.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Respondents GreenCo Environmental Inc., and Randy and Jane Doe Perkins (GreenCo) make no assignments of error to the superior court's decision.

Issues Pertaining to Assignments of Error

GreenCo disagrees with the assignments of error as stated by Verbeek. Greenco believes that the issues on appeal are more properly stated as follows:

Whether the superior court was correct when concluding that Verbeek waived its right to arbitrate, where:

1. They failed to initiate arbitration in conformity with RCW 7.04.090 and the parties' contract; and
2. They commenced litigation without demanding arbitration.

III. STATEMENT OF THE CASE

A. The parties' relationship is based on a contract containing a mediation and arbitration clause.

GreenCo provides environmental remediation services. Verbeek

contracted with GreenCo to perform environmental remediation services on their property in Snohomish County pursuant to a contract dated July 18, 2008. The scope of work consisted of excavation and remediation of petroleum contaminated soil and water. The contract does not include any warranty or representation that the work provided will result in the Department of Ecology's issuance of a No Further Action letter to Verbeek. CP 177-79. The contract between Verbeek and GreenCo contains the following clause, which provides in its entirety:

The parties agree that any claim or dispute arising out of this Agreement shall be submitted to and be subject to binding arbitration for resolution.

Prior to seeking claim resolution via arbitration the parties shall cooperate and meet and discuss their positions with a neutral mediator in attempt to resolve any difference.

CP 179.

GreenCo commenced remediation work on Verbeek's property using a bio-remediation process. By October 2008, GreenCo advised Verbeek that although cleanup on the site had not yet been completed, bio-remediation work would have to be suspended during winter. CP 88. GreenCo invoiced Verbeek for services rendered. CP 203. Because Verbeek did not pay a long-outstanding invoice, GreenCo filed a statutory lien for \$410,072.00 against Verbeek's property on February 13, 2009. CP 84.

B. Verbeek's first response was to try to avoid the contract's dispute-resolution procedures.

Verbeek's actions before and in the commencement of this litigation are inconsistent with any intent to abide by the contract's dispute resolution procedures. First, Verbeek's counsel Marissa M. Bavand's letter of February 24, 2009 sought to avoid the initial contractual requirement of mediation prior to arbitration:

You are further notified that Verbeek intends to pursue its claim against GreenCo. Under the parties' contract, mediation is a prerequisite to arbitration. **Verbeek is willing to waive that requirement and proceed to arbitration if GreenCo is, as we believe mediation would be futile at this point in time. Please advise us on whether or not you will waive mediation by March 3, 2009.** We look forward to hearing back from you.

CP 49-50 (emphasis added). By letter of March 3, 2009, GreenCo's counsel responded to Ms. Bavand's letter. He made it clear that GreenCo intended to honor the parties' contract and further, would follow the mediation and arbitration requirements of the contract:

GreenCo is fully intending to complete its work under the contract and will fully cooperate with Verbeek and DOE on bringing this contract to successful completion. Any effort by Verbeek to retain another remediation firm would be a breach of contract and would be subject to the mediation and arbitration requirements of the contract.

CP 42-43, 52-56. Ms. Bavand responded on March 11, 2009:

We are in receipt of your March 3, 2009, letter regarding GreenCo's lien on the Verbeek property. We believe GreenCo's position is unsupported by the facts and the law

and hereby demand that GreenCo's lien be released no later than March 16, 2009, or we will bring a motion to show cause regarding GreenCo's frivolous lien.

CP 64-67. Ms. Bavand's letter did not refer to the contractual provisions to mediate or arbitrate, and she proceeded in disregard of both. .

C. Verbeek failed to demand arbitration in the action to dismiss GreenCo's lien.

Verbeek initiated a separate action against GreenCo with the purpose of dismissing the lien filed by GreenCo pursuant to RCW 60.04.081 under Snohomish County cause number 09-2-03924-9. CP 69-82. Verbeek's motion to dismiss the lien was filed March 25, 2009. Verbeek did not include in this motion a request that the court compel arbitration. CP 69-82. Instead, Verbeek asked the superior court to rule that GreenCo's lien was frivolous because GreenCo's work did not improve their property, a requirement of RCW 60.04.081, and then put at issue the quality and adequacy of the work performed by GreenCo, the purported basis for its claims of breach of contract, misrepresentation and fraud in the present pending lawsuit:

Plaintiff, Verbeek Properties, LLC, Renee West, and Dewey and Marilyn Verbeek (collectively "Verbeek"), respectfully request that the Court release the lien filed by GreenCo Environmental, Inc. ("GreenCo") because it is invalid, frivolous, and made without reasonable cause. GreenCo's work is not protected under the mechanic's lien statute RCW 60.04, *et seq.*

...

GreenCo, and in particular, its principal Randy Perkins, told Verbeek that it had performed bioremediation before on other sites and that it could save Verbeek money by treating the soil at the site rather than removing it. GreenCo represented that it was an experienced environmental contractor and that it knew people at DOE, knew the DOE requirements, and could easily obtain the No Further Action letter for Verbeek. *Id.* As Verbeek came to find out, these representations were false. GreenCo did not know what it was doing nor did it have the experience in bioremediation that it claimed it did. *Id.*

...

GreenCo's work has failed to treat or remediate the contaminated soil. It has also failed to meet DOE requirements, which is the purpose of the cleanup at the Site and which GreenCo represented it would do. *See Declaration of Marisa Bavand ("Bavand Dec."), Ex. A.* GreenCo's work has resulted in DOE refusing to issue a No Further Action letter under Washington's Model Toxins [sic] Control Act ("MTCA"). Additionally, GreenCo failed to obtain a grading permit for its work, which has resulted in violations and penalties to Verbeek from Snohomish County. Verbeek relied on GreenCo's alleged expertise in obtaining the permits and performing the work. It is also suspected that GreenCo excavated clean soil, as it never tested the soil to determine the level, extent, and boundaries of contamination at the site.

CP 69-71. The Motion to Dismiss Lien disregarded the contract's obligations first to mediate and then to arbitrate "any claim or dispute arising out this agreement." CP 179.

D. GreenCo was required to litigate issues relating to the contractual dispute in the lien litigation matter.

GreenCo filed an Opposition to Plaintiffs' Motion for Dismissal of

GreenCo's Lien and Counter-Motion for Sanctions. CP 84-102. GreenCo was required to meet Verbeek's claims disputing improvement of the property and asserting facts amounting to breach of contract, misrepresentation and fraud. On April 9, 2009, Snohomish County Superior Court Judge Hon. Michael Downes denied Plaintiffs' Motion to Dismiss Lien, holding that it was

ORDERED, ADJUDGED AND DECREED that the GreenCo lien is not frivolous and was made with reasonable cause, and is not clearly excessive, which shall be based on findings of fact and conclusions of law to be entered herein within 14 days.

CP 104. On May 14, 2009, Judge Downes entered Findings of Fact, Conclusions of Law and Order, which provided in part:

GreenCo has raised debatable issues as to whether the work performed on Verbeek's property improved the property, specifically including whether the remediation of soil would be an improvement of the property and the repair, replacement, and addition of surface water drainage facilities could also be considered an improvement.

...

The Court has reviewed the Declaration of Martin L. Ziontz in Support of GreenCo's claim for attorneys' fees and costs herein and finds that \$12,280.00 constitutes the reasonable attorneys' fees incurred in responding to GreenCo's Motion for Dismissal of Frivolous Lien Pursuant to RCW 60.04.081.

...

GreenCo has raised sufficient factual evidence of improvement of the Plaintiffs' property that its lien is not

frivolous, as defined by the Court in *W.R.P. Lake Union Limited Partnership v. Exterior Services, Inc.*, 85 Wash. App. 744, 752, 934 P.2d 722 (Div. I 1997).

The superior court ordered Verbeek to pay GreenCo's attorneys' fees in the amount of \$12,280.00. CP 108-11.

E. Verbeek commenced litigation in this case without demanding arbitration or mediation in the Complaint.

Verbeek filed this action on April 6, 2009 by alleging: (1) breach of contract, (2) fraud, (3) negligent misrepresentation, (4) violation of the Consumer Protection Act, (5) declaratory relief under the Model Toxics Control Act, (MTCA) and (6) a surety bond claim. CP 216-27. The Complaint does not mention or seek to enforce any right to mediation or arbitration. CP 226. The Complaint asserts two plainly non-arbitrable claims: (1) a claim for declaratory relief under MTCA, and (2) a claim against GreenCo's surety bond. GreenCo filed its Answer and Counterclaim on May 4, 2009, denying the merits of Verbeek's complaint and seeking recovery for amounts owed for services rendered under a contract between the parties. CP 198-200.

F. The superior court properly denied Verbeek's motion to stay and compel arbitration.

Verbeek filed a Motion to Stay Litigation and Enforce Arbitration on May 26, 2009. CP 188-97. GreenCo opposed the motion. CP 140-58. The superior court properly entered an order denying the motion on June

24, 2009 on the grounds that Verbeek did not properly commence arbitration and waived its right to do so. CP 11-13.

IV. SUMMARY OF ARGUMENT

The superior court property denied Verbeek's motion to stay and compel arbitration. This order should be upheld for the following reasons:

1. Verbeek did not comply with RCW 70.04A and did not properly initiate arbitration when it failed to include the demand for arbitration in the complaint.

2. Verbeek did not properly initiate arbitration because it did not comply with the mandatory notice requirements of RCW 70.04A.

3. Verbeek waived its right to compel arbitration by initiating suit and failing to demand arbitration.

4. GreenCo will be prejudiced if arbitration is allowed to proceed when key issues relating to the contract dispute can only be resolved in court.

V. ARGUMENT

A. The standard for review is *de novo*.

This court's review of a superior court's decision to grant or deny a motion to compel arbitration is *de novo*. *Kruger Clinic Othopedics LLC, v. Regence Blue Shield*, 157 Wn.2d 290, 298, 138 P.3d 396 (2006). This court may affirm the trial court on any grounds established by the

pleadings and supported by the record. *Otis Housing Assoc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009); *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

B. Verbeek failed to comply with RCW 7.04A.090 and did not properly initiate arbitration.

1. Verbeek's complaint did not properly initiate a demand for arbitration.

Verbeek waived its right to arbitrate by failing to make a demand for arbitration in its complaint. The proper way to initiate the right to compel arbitration is to file suit and include a cause of action to compel arbitration. *Pedersen v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960); *L. Wash. Sch. Dist. No. 414 v. Mobile Modules Northwest Inc.*, 28 Wn. App. 59, 61, 621 P.2d 791 (1980) As stated in *Pedersen*,

It is clear that parties to a contract having an arbitration clause may waive it; and a party does so by failing to invoke it in the trial court when an action is commenced against him on a contract.

Pedersen, 56 Wn.2d at 320.

The demand for arbitration should be in the pleading itself to preserve the right to move to compel arbitration. A demand for arbitration will not be implied if it is not expressly included in the initial pleading. *Ives v. Ramsden*, 142 Wn. App. 369, 383, 174 P.2d 123 (2008) (holding that defendant waived right to demand arbitration in part because the answer did not even mention the word arbitration). Similarly, Verbeek's

complaint contained seven causes of action, and no mention of arbitration. CP 216-27. This fact conclusively establishes that Verbeek did not properly initiate a demand for arbitration. Verbeek's briefing on this issue fails to cite to a single Washington case to support its argument that the right to arbitration is preserved if the complaint does not contain a demand for arbitration. The court should ignore Verbeek's argument based on out-of-state cases, when there is clear authority in Washington to guide this court's decision. *Karmarevcky v. DSHS*, 64 Wn. App. 14, 20-21, 822 P.2d 1222 (1992). Verbeek has not shown why the court should disregard the controlling authority of *Pederson* and *L. Wash. Sch. Dist.*, *supra*.

- 2. The letters written by Verbeek's counsel did not properly initiate arbitration.**
 - a. The substantive notice requirements of RCW 7.04A.090 are mandatory.**

The contract between the parties does not provide a procedure for initiating arbitration. CP 177-79. Therefore, the Washington Arbitration Act, RCW 7.04A, controls here. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 893-94, 16 P.3d 617 (2001). Verbeek concedes that RCW 7.04A governs this case. App. Br. at 17.

RCW 7.04A.090 provides in the pertinent part:

A person initiates an arbitration proceeding by giving notice ... in the agreed manner ... or, in the absence of agreement, by mail certified or registered, return receipt requested and obtained, or by service as authorized for the

initiation of a civil action. The notice must describe the nature of the controversy and the remedy sought.

Verbeek admits that it did not comply with the statute, but argues that it properly initiated arbitration because it “substantially complied” with the statute. App. Br. at 20.

The statute uses the word “must” when establishing the required contents of the notice. The notice must contain (1) a description of the nature of the dispute and (2) the remedy sought. When statutory language is plain and unambiguous, the statute’s meaning must be derived from the wording of the statute itself. The rules of statutory construction provide that words be given their ordinary meaning. *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). The term “must” means mandatory. Interpreting the word “must” in the context of RCW 53.52.020, relating to notice of claims, the Supreme Court stated:

[W]e would hold that the only construction that gives the legislation any meaning is that “must” is mandatory, and that the claim which “must” be presented is a prerequisite to maintaining an action against the school district.

Kelleher v. Ephrata Sch. Dist. No. 165, 56 Wn. 2d 866, 872, 355 P.2d 989 (1960). Therefore, and as noted in *Westcott Homes LLC, v. Chamness*, 146 Wn. App. 728, 192 P.3d 394 (2008), RCW7.04A.090 “does **require** that [the notice] include this specific information.” *Id.* at 736 (emphasis added). The court in *Westcott* concluded that the e-mail on which plaintiff

Wescott relied to claim notice of intent to arbitrate did not comply with RCW 7.04A.090, “even though it was likely that both parties and their attorneys knew both the nature of the dispute and that Westcott sought damages, the e-mail notice must still comply with the notice requirements.” *Id.* Thus, the holding of *Westcott*, is that strict compliance, not mere substantial compliance, is required for the content of the notice to initiate arbitration.

b. Verbeek’s correspondence does not meet the mandatory requirements of RCW 7.04A.090.

None of the correspondence, on which Verbeek relies to show notice, met the procedural or substantive requirements of RCW 7.04A.090. The record contains no evidence that the letters were sent to GreenCo or its counsel by certified or registered mail. Significantly, the only letter sent before Verbeek initiated litigation does not comply with the substantive notice requirement of RCW 7.04A.090. The letter dated February 24, 2009 does not contain a demand for arbitration or any notice of the nature of the controversy or the remedy to be sought in arbitration. CP 49-50. Instead, Verbeek’s letter threatens legal action to attack GreenCo’s lien. Therefore, the letter of February 24, 2009 does not comply with RCW 7.04A.090.

The only other letter in the record that Verbeek claims complied

with the notice requirement is Ms. Bavand's letter dated April 13, 2009. CP 162-63. This letter came after Verbeek had filed its action to dismiss GreenCo's lien, CP 84-102, after the Court Order of April 9, 2009 denying Verbeek's motion to dismiss the lien, CP 104-06, and after Verbeek filed the Complaint that failed to demand arbitration. CP 216-27. This letter cannot be considered substantial compliance with the demand for arbitration, because it came after litigation had commenced. A letter sent after litigation was commenced does not serve to enforce the right of arbitration. *Otis*, 165 Wn.2d at 588.

Furthermore, Verbeek's April 13 letter does not specify which issues Verbeek was demanding be resolved in arbitration, and what remedy was being sought. Just like the e-mail in *Westcott*, the letter of April 13, 2009, on its face does not contain a description of the nature of the controversy or the remedy sought. Just like in *Westcott*, the first paragraph mentions arbitration and proceeds directly to discussing the choice of arbitrator and other matters. Just like in *Westcott*, the letter of April 13, 2009 does not meet the mandatory requirements for the content of the notice to initiate arbitration.

The fact that the April 13 letter references the attached copy of the Complaint does not satisfy the mandatory statutory requirement for a description of the controversy and the **relief being sought in arbitration**

because the complaint only describes the nature of the controversy and **relief being sought in court, including non-arbitrable claims for declaratory relief and against GreenCo's surety bond.** Accordingly, the trial court was correct in finding that Verbeek failed to comply with the terms of RCW 7.04A.090, and properly denied the motion to compel arbitration.

c. *Westcott* does not support Verbeek's substantial-compliance argument.

Verbeek argues that its letters substantially complied with the notice requirement of RCW 7.04A.090, citing *Westcott, supra*. The case does not stand for the proposition that a party need only “substantially comply” with the notice provisions to initiate arbitration. In *Westcott*, the court considered whether an e-mail communication met the requirements of RCW 7.04A.090. The e-mail stated that the client “is going to want to proceed to arbitrate the dispute between it and the Chamnesses. To that end, we offer the following suggestions for an arbitrator[.]” *Westcott*, 146 Wn. App. at 732. The trial court dismissed the case holding that *Westcott* failed to timely and properly initiate arbitration. On appeal, the court did not address whether e-mail notice is **substantial compliance with the required service methods** under RCW 7.04A.090, but focused, instead, on whether the e-mail met the content requirements of RCW 7.04A.090. The court held only that the e-mail did not meet the statutory requirement

that the demand for arbitration contain a description of the nature of the controversy and the remedy sought. *Westcott*, 146 Wn. App. at 735-36. Therefore, Verbeek is in error in arguing that *Westcott* stands for the proposition that only substantial compliance with notices provisions is required to preserve the right to demand arbitration.

Verbeek also argues that strict compliance with the substantive notice requirement is not necessary because both parties had actual knowledge of the arbitration clause. But this argument was rejected in *Westcott*. As noted above, the court recognized that both parties were aware of the nature of the dispute and damages, but this does not satisfy the requirement that a party must comply with the mandatory requirements of RCW 7.04A.090 in order to initiate arbitration.

Finally, Verbeek claims that it has always been prepared to provide notice in compliance with law, App. Br. at 21 n. 3. This is simply irrelevant to whether they did provide proper notice. Instead, Verbeek should have included such notice in one of its many pleadings and motions for which service of process was required.

3. All relevant factors show that Verbeek waived its right to compel arbitration.

a. The court should consider two factors.

Two factors determine if a party has waived its right to compel arbitration: (1) knowledge of an existing right to compel arbitration; and

(2) acts inconsistent with that right. *Kinsey v. Bradley*, 53 Wn. App. 167, 169, 765 P.2d 1329 (1989). A showing of prejudice is not required under Washington law, *L. Wash. Sch. Dist.*, 28. Wn. App. at 62, and is only required when the court interprets contracts under the Federal Arbitration Act, 9 USC Sec. 2, *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 362, 103 P.3d 773 (2004); *Steele v. Lundgren*, 85 Wn. App. 845, 849, 935 P.2d 671, *review denied*, 133 Wn.2d 1014 (1997) (both cases interpreting the agreements in the context of employment disputes subject to the Federal Arbitration Act). Only Washington law applies in this case and only two factors need to be considered to determine whether Verbeek has waived its right to compel arbitration.

b. Verbeek knew of its right to arbitrate.

Verbeek admittedly was always aware of its right to demand arbitration. CP 49-50, App. Br. at 21 n. 3.

c. Verbeek acted inconsistently with the right to arbitrate in its motion to dismiss GreenCo's lien.

Verbeek's Motion to Dismiss Lien sought relief in superior court for matters that were subject to arbitration. Verbeek alleged in the Motion to Dismiss Lien that (1) GreenCo's soil remediation treatments did not improve Verbeek's property; (2) GreenCo's drainage lines did not improve Verbeek's property; (3) GreenCo misrepresented its

qualifications to perform remediation; (4) GreenCo failed to remediate the soil; (5) GreenCo failed to meet DOE MTCA cleanup requirements; (6) GreenCo's work resulted in DOE refusing to issue a No Further Action letter; (7) GreenCo failed to get a grading permit and (8) GreenCo never tested for the limits of contamination. CP 69-72. Presenting these factual allegations in connection with the lien litigation forced GreenCo to dispute them, CP 84- 102, and the court to consider them when deciding the issue of whether the lien should be dismissed. CP 108-11. The Findings of Fact and Conclusions of Law show that the superior court considered the merits of the dispute between Verbeek and GreenCo in the lien action:

GreenCo has raised debatable issue as to whether the work performed on Verbeek's property improved the property, specifically including whether the remediation of soil would be an improvement of the property and the repair, replacement and addition of surface water drainage facilities could also be considered an improvement.

CP 109.

Verbeek's decision to litigate the lien issue in court, raising substantive factual contentions that the agreement to arbitrate covered, is completely inconsistent with an intent to arbitrate. It does not matter that the motion to dismiss the lien was a limited procedure. *Otis*, 165 Wn.2d at 588. Rather, the only inquiry the court needs to make is whether by bringing a contract dispute before the court under a contract that contained an arbitration clause, the parties waived arbitration. *Id.* The *Otis* Court

stated:

Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.

Otis, 165 Wn.2d at 588.

RCW 7.04A.070(4) provides:

If a proceeding **involving a claim referable to arbitration** under an alleged agreement to arbitrate is pending in court, a motion under this section **must be filed in that court.** ...

Verbeek clearly acted inconsistent with an intent to arbitrate when it presented the court, in the context of a Motion to Dismiss Lien, with factual and legal issues that were subject to the broadly worded arbitration clause – “any claim or dispute arising out of this agreement shall be submitted and subject to binding arbitration for resolution.” CP 179.

d. Filing the complaint without a demand for arbitration constitutes waiver.

Verbeek continued with conduct inconsistent with intent to arbitrate when it filed the complaint, containing seven causes of action and completely failing to assert a demand to mediate or to arbitrate. CP 216-227. Verbeek did not bother to preserve the right to compel arbitration by asserting the right as a cause of action in its complaint. Failure to include a demand for arbitration in the complaint waives the right to arbitration. *Pedersen*, 56 Wn.2d at 320.

Verbeek argues that it did not waive its right to arbitrate by trying to distinguish the facts of this case from *L. Wash. Sch. Dist*, 28 Wn. App. at 60-61. In that case the court, relying on *Pedersen*, stated:

Parties to an arbitration contract may waive that provision, however, and a party does so by failing to invoke the clause when an action is commenced and arbitration has been ignored.

Id. at 61.

It was reiterated in *L. Wash. Sch. Dist* that the key to whether the right to demand arbitration was preserved is whether the complaint contains a demand for arbitration. *Id.* at 63. Because Verbeek did not preserve the right to demand arbitration by adding the claim to its complaint, as was done by the defendant Mobile Modules, Verbeek's reliance on the "strong presumption" in favor of arbitration mentioned in the case is entirely misplaced. The rule in Washington is clear that the demand for arbitration must be contained in the first pleading in order to initiate arbitration, and avoid waiver. *Pedersen*, 56 Wn.2d at 320.

Federal courts deciding the same issue are in accord. "In fact, we have held that a court must presume that a party implicitly waived its right to arbitrate when it chooses a judicial forum for the resolution of a dispute." *Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648, 650 (7th

Cir. 2000).¹

e. Verbeek unsuccessfully attempts to distinguish its conduct from cases finding waiver of the right to arbitrate.

Verbeek makes a weak attempt to distinguish this case from a series of cases finding waiver of the right to demand arbitration when the party failed to plead a demand for arbitration. Verbeek relied on *Ives*, 142 Wn. App. at 369, arguing that waiver was found in that case only because of egregious circumstances. Yet *Ives* is directly on point. In that case the defendant argued that the matter should have been handled in arbitration, but did not demand arbitration in its answer. The court stated that the reference to “waiver” in the answer was insufficient to establish the affirmative defense of a right to compel arbitration and therefore the defendant waived the right to compel arbitration. *Id.* at 383.

Verbeek similarly relies on *Harting v. Baron*, 101 Wn. App. 954, 6 P.3d 91 (2000). In *Harting*, the defendant answered but did not include an affirmative defense demanding arbitration of the contract claim raised in the plaintiff’s complaint. The court held that a demand for arbitration is an affirmative defense. The court relied on the specific failure to plead the

¹ While it is not necessary to rely on cases from other jurisdictions to resolve the issues presented, GreenCo’s argument that filing suit alone waives arbitration is supported by *Vireo P.L.L.C. v. Cates*, 593 S.W.2d 489 (Tex. Ct. Ap. 1997) (plaintiff who initiates suit without demanding arbitration waives arbitration as a matter of law) and *Beverly Hills Dev. Corp. v. Wimpey of Florida Inc.*, 661 So.2d 969 (Fla. App. 1995) (initiating a lawsuit constitutes affirmative election to forgo arbitration).

right to arbitration as the basis for waiver of the right. *Harting*, 101 Wn. App. at 962.

Finally, Verbeek tries to distinguish *Otis*, 165 Wn.2d at 582, which held that the defendant waived its right to compel arbitration by asserting a contract defense to an unlawful detainer action without asserting the demand for arbitration in that matter. Verbeek argues that they did not have to assert the demand for arbitration in the motion to dismiss a frivolous lien action because it differs from an unlawful detainer action. Even if this is true, *Otis* still holds that a party must, in order to preserve the right to arbitrate, include the demand in their pleading. Here, Verbeek's current complaint failed to do this. *Otis*'s holding is on point: "[A] party waives a right to arbitrate if it elects to litigate instead of arbitrate." *Id.* at 588.

f. Verbeek acted inconsistently with an intent to arbitrate by bringing claims relating to the contract that can only be litigated in court.

Where a cause of action must, by statute, be brought in superior court, an arbitration clause does not permit the arbitrator to exercise powers that are reserved to the courts. As the Supreme Court held in *Kruger*:

Regarding the second rejected conclusion, the limited judicial review afforded in the WAA [Washington Arbitration Act] does not satisfy the WAC regulation's

requirement that “judicial remedies” be available subsequent to the chosen ADR process. In an analogous case, the Court of Appeals declined to compel binding arbitration pursuant to a contract provision, where an applicable statute preserved a party’s right to seek redress in a “judicial proceeding.”

Kruger, 157 Wn.2d at 304-05 (emphasis added), citing with the approval *Marina Cove Condo. Owners Ass’n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001). In *Marina Cove*, Isabella Estates contended that parties should arbitrate construction defect disputes as required by the condominium documents and to defeat this agreement violated Washington’s strong public policy favoring arbitration. The Court of Appeals rejected this argument because the Washington Condominium Act provided remedies in a “judicial proceeding”:

Isabella Estates contends that such a holding is contrary to Washington’s strong public policy favoring arbitration. ... We agree that Washington courts voice a preference for arbitration in other contexts, **but we will not defy express provisions of a statute to further that policy.**

Marina, 109 Wn. App. at 236 (emphasis added). Similarly here, the Declaratory Judgments Act vests authority to proceed exclusively in the superior court. RCW 7.24.010. Verbeek’s choice to seek declaratory and equitable relief under MTCA is also flatly inconsistent with arbitration. There is no statutory authority for a MTCA claim to proceed in arbitration. RCW 70.105D.080.

Similarly, Verbeek acted inconsistently with an intent to arbitrate by joining a claim against Developers Surety and Indemnity Company Bond No. 792634C, (Developers Surety). Verbeek's complaint includes a claim against Developers Surety for GreenCo's acts, omissions and breach of contract. At paragraph 8 of Verbeek's prayer for relief they seek a judgment against Developers Surety. CP 226. RCW 18.27.040 provides in pertinent part as follows:

(3) Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section **may bring suit against the contractor and the bond or deposit in the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had.** The surety issuing the bond shall be named as a party to any suit upon the bond . . .

(emphasis added.) As the Supreme Court observed in *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006):

RCW 18.27.040(3) allows parties having a claim to bring suit against the bond. The statute recites filing requirements, statutes of limitations, and service requirements specifically for suits against the bond.

Id. at 297. "The act unambiguously states the limited circumstances under which an obligee is to have recourse to the bond. *See* RCW 18.27.040, 18.27.090." *Ward v. LaMonico*, 47 Wn. App. 373, 380, 735 P.2d 92 (1987): Furthermore, Developers Surety is not a party to the contract

between Verbeek and GreenCo. Verbeek has no basis to claim that Developers Surety agreed to arbitrate with Verbeek. Plainly, Verbeek is not entitled to proceed against the Developers Surety in an arbitration proceeding and having elected to bring such a claim in this matter against GreenCo, Verbeek has waived their right to arbitration.

g. Verbeek's argument that the court must compel arbitration because the agreement signed by the parties is an adhesion contract is without merit.

Verbeek argues that the court should compel arbitration because the document signed by the parties is an adhesion contract that must be construed against Greenco. App. Br. at 15-16, n. 3. First there was no evidence presented or argued below to show that the contract signed by the parties is not a contract of adhesion. Nevertheless, an adhesion contract exists if: (1) the contract is a printed form; (2) it is prepared by one of the parties and offered to the other party on a "take it or leave it" basis; and (3) there is no true equality of bargaining power between the parties. *Adler*, 153 Wn.2d at 347. The court can see by looking at the contract, CP 179, that it was not a printed form. Therefore the contract does not meet the first requirement of an adhesion contract. Verbeek does not present any evidence or argument of unequal bargaining power, or that the offer was a "take it or leave it" offer. The entire argument lacks merit.

h. Order finding waiver may be upheld even when the superior court did not find waiver based on the lien litigation.

The superior court order provides that Verbeek did not waive the right to demand arbitration when it filed suit to release GreenCo's lien. CP 9. Even though GreenCo did not file a cross review of this issue, the court may base its finding that Verbeek waived its right to demand arbitration on the fact that it litigated contract issues in the lien litigation. A decision of the superior court may be affirmed on any grounds established by the pleadings and supported by the record. *Otis*, 165 Wn.2d at 587; *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990) (sustaining trial court order on summary judgment based on an issue that did not form the basis of the summary judgment but had been briefed by the parties). A prevailing party that seeks no further affirmative relief on appeal "is entitled to argue any grounds in support of the [ruling] that are supported by the record." *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002) (citing RAP 2.4(a); RAP 5.1(d); *State v. Bobic*, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000)). Here, Greenco prevailed, and seeks no further affirmative relief than its request that the superior court's ruling be upheld. Furthermore, the parties fully litigated whether the lien litigation constituted waiver of the right to arbitration. CP 24-26, 35-37. Verbeek undisputedly failed to include a demand for arbitration in its

motion to dismiss the lien. CP 69-82. GreenCo was compelled to litigate substantive issues regarding the scope and completeness of its work in the lien litigation. CP 43-44, 76, 78, 85-97. These facts are another basis for this court to affirm the superior court's order ruling that Verbeek waived its right to arbitrate.

4. An order compelling arbitration would prejudice GreenCo.

a. Factors of delay and expense show prejudice

Under Washington law, a showing of prejudice is not required for the court to find waiver of the right to arbitrate. *Kinsey*, 53 Wn. App. at 169; *L. Wash. Sch. Dist*, 28 Wn. App. at 62. Even if prejudice is not required, it has been shown here. Proof of prejudice depends on the facts of each case and can be shown by factors of delay or expense, or as a result of decisions on the merits. *Steele*, 85 Wn. App. at 859 (applying federal law to license application for handling securities transactions).

b. GreenCo has been prejudiced through incurring expenses.

Here, multiple factors show prejudice to GreenCo. First, Verbeek delayed asserting a demand for arbitration. GreenCo's lien was filed on February 13, 2009. Rather than demand arbitration, Verbeek utilized the court to litigate for relief. More than three months elapsed between the lien filing and the Motion to Compel Arbitration. Delay amounts to

prejudice when there is no good excuse for it. *Steele*, 85 Wn. App. at 858.

Second, forcing a defendant to litigate and incur expense is substantive prejudice. *Id.* at 859. GreenCo was forced to litigate the merits of its lien in court. It incurred substantial costs in doing so. The court awarded over \$12,000 in attorney fees to GreenCo. CP 108-10. This is proof of prejudice. *Id.* at 857 (court determination of \$10,000 of attorney fees was proof of prejudice).

c. Litigation of the MTCA and other Declaratory Judgment claims creates prejudice to GreenCo because it requires duplication of litigation.

Verbeek's Complaint seeks declaratory relief:

8.4 Plaintiffs seek a decision by the Court for declaratory relief confirming Defendants' liability as a responsible party under the Model Toxics Contract [sic] Act.

CP 225. Similarly, Verbeek's prayer for relief states as follows:

7. Declaratory relief against GreenCo and Randy Perkins that they are liable as a responsible party under the Model Toxics Control Act.

CP 226.

The claim under the Model Toxics Control Act (MTCA) is a claim for contribution, completely independent of any breach of contract claim that would be within the scope of the agreement to arbitrate. *Asarco Inc., v. Dept. of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 (2002). The court

has jurisdiction in equity to decide liability under the statute. RCW 70.105D.080; *Dash Point Village v. Exxon*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997).

RCW 7.24.010 provides in pertinent part:

Courts of record within their respective jurisdiction shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.

Verbeek makes the MTCA claim the heart of its case. Verbeek state that its goal was to have its property cleaned up according to MTCA standards. App. Br. at 4. Verbeek states that it submitted Greenco's report to the Department of Ecology to obtain a "No Further Action" letter, but was denied. App. Br. at 6. Verbeek lists a number of allegations against GreenCo, including claims that go beyond breach of contract. App. Br. at 6-7.

In response to the current complaint, GreenCo prepared and filed an answer and counterclaim, asserting requests for relief that are not subject to arbitration, as discussed below. If Verbeek's motion was granted, the declaratory-judgment claims and the lien foreclosure would remain in superior court, and the contract dispute would be in arbitration. This would increase the cost of litigation and create duplication of effort, all to the great prejudice of GreenCo.

The contract provides that GreenCo will provide services to remove hydrocarbon contaminants from the soil and water using its bio-remediation method in an eight step process, for the listed prices. The arbitration would be limited to the question of whether the designated services were provided. This necessarily involves testimony about all the work the GreenCo performed and whether they achieved removal of contaminant based hydrocarbons. The MTCA claim will involve all the same facts as the breach of contract claim, with the added factual issues of whether GreenCo's work met MTCA standards, and legal issues such as whether GreenCo can be liable to Verbeek under MTCA. The tort claims for fraud, negligent misrepresentation and the CPA claim all arise out of the same contractual relationship. Having to litigate the same facts in two different forums is prejudicial.

d. GreenCo's lien-foreclosure counterclaim precludes arbitration.

GreenCo's answer includes a counterclaim to foreclose their now validated lien pursuant to RCW 60.04.141 and 171. CP 203-04. RCW 60.04.141 provides in pertinent part:

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

is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action;

(Emphasis added.). Under RCW 60.04.171:

The lien provided by this chapter, for which claims of lien have been recorded may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property.

(Italics supplied.) Plainly, GreenCo's counterclaim to foreclose their lien, along with the MTCA claims and counterclaims, must be pursued in superior court, not by arbitration.

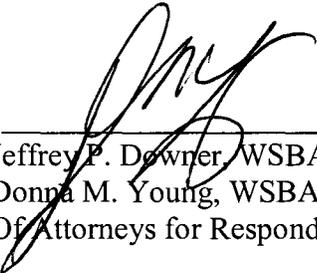
VI. CONCLUSION

Verbeek failed to comply with RCW 7.04A.090 and clearly waived its right to demand arbitration. Verbeek did not make a demand for arbitration before initiating litigation in accordance with the mandatory requirements of RCW 7.04A.090, and its complaint did not contain a demand for arbitration. GreenCo will be prejudiced if the contract dispute is sent to arbitration. At the heart of Verbeek's claim is the MTCA claim that is subject to the court's exclusive jurisdiction. GreenCo has incurred significant expense, and sought affirmative relief only the court can provide. GreenCo requests that the superior court order denying

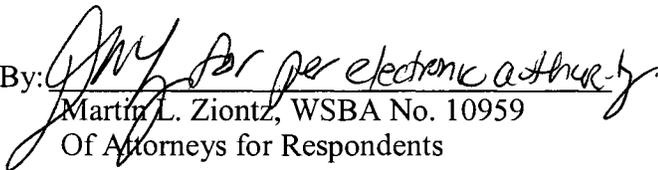
Verbeek's Motion to Stay Litigation and Enforce Arbitration be affirmed.

Respectfully submitted this 30 day of December, 2009.

LEE SMART, P.S., INC.

By: 
Jeffrey P. Downer, WSBA No. 12625
Donna M. Young, WSBA No. 15455
Of Attorneys for Respondents

PEIZER RICHARDS ZIONTZ

By: 
Martin L. Ziontz, WSBA No. 10959
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on December 30, 2009, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Martin L. Ziontz
Peizer Richards Ziontz
1915 Pacific Building
720 Third Avenue
Seattle, WA 98104-1868

VIA LEGAL MESSENGER

Marissa M. Bavand
Kristi D. Favard
Groff Murphy, PLLC
300 East Pine
Seattle, WA 98122

DATED this 30th day of December at Seattle, Washington.


Wendy Larson, Legal Assistant