

NO. 71121-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CPI POOL II FUNDING, LLC, a Washington limited liability company,

Appellant,

v.

LONGWELL ARBORS, LLC, a Washington limited liability company;  
LONGWELL COMPANY, a Washington limited liability company; and  
STANLEY XU and NANLING CHEN, husband and wife, individually  
and the marital community comprised thereof,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. SUMMARY OF REPLY AND RESTATEMENT OF THE ISSUE

This Court should grant Appellant CPI Pool's ("CPI's") appeal and reverse the trial court. It is undisputed that an arbitration agreement exists between CPI and Respondents Longwell Arbors, LLC and Longwell Company ("Longwell").<sup>1</sup> That fact alone should end the inquiry. Going further, however, this appeal should be granted because the Court cannot say with "positive assurance" that the CPI/Longwell arbitration agreement is not susceptible of an interpretation that covers the dispute.<sup>2</sup> This case—including Longwell's arguments on the proper scope of the CPI/Longwell agreement<sup>3</sup>—is subject to arbitration and CPI's appeal should be granted.<sup>4</sup>

In its Response Brief, Longwell argues for—what it purports to be—the proper scope of the parties' arbitration agreement.<sup>5</sup> In spite of Longwell's Brief, however, the scope of the arbitration agreement is not the issue before the Court on this appeal.

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<sup>1</sup> When a valid and enforceable arbitration agreement exists (as it does here), if the scope of the agreement is debatable, or reasonably in doubt, the Court *must* construe the agreement in favor of arbitration. *Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 714, 959 P.2d 1140 (1998) (emphasis added).

<sup>2</sup> *Meat Cutters v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 155, 627 P.2d 1330 (1981) ("An order to arbitrate... should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

<sup>3</sup> Longwell devotes the bulk of its brief to this argument regarding "scope." See Respondents' Brief at Page 2 ("the expressly limited scope [of the agreement]... must be respected), Page 10 ("the initial determining factor [in the Court's analysis] is the scope of the agreement"), and Page 11 (arguing that the Court should perform a "contract analysis"). Longwell's discussion of "scope" continues through Page 14 of its brief.

<sup>4</sup> CR 211 at Paragraph 8.

<sup>5</sup> See Fn. 3 and Respondents' Brief at Pages 9-20.

The issue is arbitrability. Under well-established Washington law, arbitrability is to be determined as follows: first, the Court must determine whether an arbitration agreement exists between Longwell and CPI; and second, if it does, the Court must determine whether it can say with “positive assurance” that the agreement expressly excluded the claims asserted here.<sup>6</sup>

If the Court cannot say with “positive assurance” that the arbitration agreement expressly excluded the claims, then Court must transfer these issues to the arbitrator (including Longwell’s arguments on the proper scope of the arbitration agreement). *See id.*

In its briefing to this Court, Longwell asserts that “the initial determining factor [for the Court] is the scope of the agreement to arbitrate.”<sup>7</sup> Longwell’s assertion is incorrect. Longwell cites to no authority in support of its assertion (indeed, because there is none). Longwell cites to no authority because Washington law is clear that interpretation of an arbitration agreement is for the arbitrator, not the courts.

Longwell’s incorrect assertions do not end there: in its briefing, Longwell also argues (repeatedly) that CPI is asking the Court to

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<sup>6</sup> See e.g., *Meat Cutters*, 29 Wn. App. at 154 and *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602,609 (1993).

<sup>7</sup> Respondents’ Brief at Page 10.

determine whether the claims “must be arbitrated.”<sup>8</sup> This is, similarly incorrect.

The Court need not—and, indeed, should not—decide the scope of the parties’ arbitration agreement or whether the merits of the claims “must be” arbitrated. Instead, under Washington law, those determinations are left to the arbitrator.

In denying CPI’s Motion to Compel, the trial court improperly substituted its judgment for that of the arbitrator and interpreted the scope of the parties’ arbitration agreement. Pursuant to Washington law and the parties’ express provision in the arbitration agreement,<sup>9</sup> this Court should grant CPI’s appeal, reverse the lower court, and transfer this case to arbitration.

## II. ARGUMENT

### A. The Arbitration Agreement Covers Longwell’s Claims—This Case Should Be Transferred to Arbitration.

In Washington, there exists a strong presumption in favor of arbitration. To that end, the Court “must indulge every presumption in favor of arbitration, [including] the construction of the contract language itself.” *Verbeek Properties, LLC. v. GreenCo Env’tl., Inc.*, 159 Wn. App. 82,87, 246 P.3d 205 (2010) (emphasis added). The Court is to resolve any

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<sup>8</sup> Respondents’ Brief at Page 1 (“The argument by Appellant that the current claims must be arbitrated...”).

<sup>9</sup> CP 211 at Paragraph 8.

doubt concerning the scope of an arbitration agreement in favor of coverage. *Kamaya*, 91 Wn. App. at 714.

Given this strong presumption in favor of arbitration, when presented with an issue of arbitrability, the Court's inquiry is as follows: first, it must determine if a valid and enforceable arbitration agreement exists. *Id.* Second, when a valid and enforceable arbitration agreement exists (as it does here), if the scope of the agreement is debatable, or reasonably in doubt, the Court must construe the agreement in favor of arbitration. *Id.* Unless the Court can say "with positive assurance" that an arbitration clause is not susceptible of an interpretation that covers the asserted dispute, it must be transferred to arbitration. *Id.*

This test has been well-established in Washington law; as explained in the *Meat Cutters* case:

In an action to compel arbitration, the threshold question of arbitrability is for the court... If the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator.

29 Wn. App. at 154 (emphasis added). Absent an express provision excluding a particular type of dispute, "only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail." *ML Park Place*, 71 Wn. App. at 739.

On the evidence before the Court here, the Court cannot say with “positive assurance” that that the arbitration agreement is not susceptible of an interpretation that covers the asserted dispute. *Kamaya*, 91 Wn. App. at 714. Therefore, the proper interpretation of the agreement is for the arbitrator (here, the agreed-upon Arbitrator (Hon. Terry Lukens (Ret.))).

In 2011, Longwell and CPI signed an agreement to arbitrate all financial accounting claims arising between them (*e.g.*, disputes arising out of or relating to financial accounting and alleged improprieties).<sup>10</sup> Two years later, Longwell filed claims against CPI in King County Superior Court. Longwell claimed that CPI was involved in “self-dealing,” “improper spending and accounting,” “improperly inflating [expenses],” and failing “to provide timely [financial] reports.”<sup>11</sup> Given the similarity in these financial accounting claims to the examples used in the arbitration agreement, the Court cannot say with “positive assurance” that these financial accounting claims are not covered by the arbitration agreement.

Furthermore, and importantly, the parties’ themselves provided that issues of interpretation of the arbitration agreement would be decided by the arbitrator, not the Court—CPI and Longwell expressly agreed that,

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<sup>10</sup> CP 209 at Paragraph 4.

<sup>11</sup> CP 5 at Paragraph 3.16, CP 6 at Paragraph 3.17.

“[a]ny and all disputes concerning the interpretation or construction of this [agreement]... shall be resolved by binding arbitration before the Hon. Terry Lukens (Ret.).”<sup>12</sup>

Given this strong evidence in favor of arbitration (*i.e.*, the parties’ own words), the Court should grant CPI’s appeal, reverse the trial court, and transfer this dispute to arbitration. *See ML Park Place*, 71 Wn. App. at 739 (“Absent an express provision excluding a particular type of dispute, only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail”).

If, after this case is transferred to arbitration, Longwell continues to contest the proper scope of the arbitration agreement, Longwell may request that the Arbitrator—who is the proper decision-maker to interpret and decide the scope of the agreement—to engage in a contract analysis and decide the issue.

If the Arbitrator agrees with Longwell and finds that the claims are indeed not covered by the agreement, this case will be transferred back to the trial court. Only then will the trial court properly have jurisdiction over this dispute. This result is mandated by both Washington law and the parties’ express agreement.<sup>13</sup>

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<sup>12</sup> CP 211 at Paragraph 8.

<sup>13</sup> *See, e.g., Meat Cutters*, 29 Wn. App. at 154; *ML Park Place*, 71 Wn. App. at 739; and CP 211 at Paragraph 8 (“[a]ny and all disputes concerning the interpretation or

## **B. Issues of Interpretation Are For the Arbitrator, Not the Court.**

In response to this appeal, Longwell improperly argues that the Court should interpret the scope of the arbitration agreement to deny CPI's appeal and exclude the current claims from arbitration. Longwell argues that the Court should engage in a "contract analysis."<sup>14</sup>

Its entire Response brief is devoted to this theme. Longwell's arguments are off point, contrary to Washington law, and the Court should reject them.

Among Longwell's misstatements are Longwell's claims that:

- "The expressly limited scope [of the agreement]... must be respected,"<sup>15</sup>
- "The August 3, 2011 CR 2A Stipulation was limited to the specific issues that were in dispute at the time...,"<sup>16</sup>
- "[T]he initial determining factor [in the Court's analysis] is the scope of the agreement to arbitrate,"<sup>17</sup>
- "applicable case law [] requires the court to first perform a contract analysis."<sup>18</sup>

Each of Longwell's statements is incorrect; either because it is not an issue on appeal (*e.g.*, Longwell's arguments regarding the proper scope

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construction of this [agreement]... shall be resolved by binding arbitration before the Hon. Terry Lukens (Ret.)").

<sup>14</sup> Respondents' Brief at Page 11.

<sup>15</sup> *Id.* at Page 2.

<sup>16</sup> *Id.* at Page 8.

<sup>17</sup> *Id.* at Page 10.

<sup>18</sup> *Id.* at Page 11; see more argument on interpretation through Page 14.

of the arbitration agreement) or because it is a misstatement of Washington law (*e.g.*, “the initial determining factor [in the Court’s analysis] is the scope of the agreement to arbitrate;”<sup>19</sup> and Longwell’s argument that the Court should engage in a “contract analysis”<sup>20</sup>). As is articulated above, under well-established Washington law and the parties’ express agreement, the arbitrator, not the Court, is to decide the proper scope of the arbitration agreement.

None of the cases cited by Longwell support its position. Instead, each of Longwell’s cases support CPI. For example, Longwell cites to *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010)<sup>21</sup> where the Court found the parties were not required to arbitrate their wrongful death claims. The facts of *Woodall* were strikingly different than those at issue here, however.

In *Woodall*, the Court found against arbitration because the party opposing arbitration had not signed the arbitration agreement. *Id.* The Court in *Woodall* did not interpret the scope of the agreement, as Longwell asks the Court to do here—instead, the *Woodall* Court found that no agreement existed because the parties had not signed it and

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<sup>19</sup> Respondents’ Brief at Page 8.

<sup>20</sup> *Id.* at Page 11.

<sup>21</sup> *See id.* at Page 10. Longwell’s Response did not contain the correct citation for the Washington Appellate Reports; we have corrected the error in this Reply brief. The correct Washington Appellate Reports citation is stated above.

therefore (correctly) declined to transfer the case to arbitration. There is no legal precedent to support Longwell's position. Accordingly, this Court should grant CPI's appeal and transfer this case to arbitration.

**C. In the Interests of Judicial Economy, This Case Should be Arbitrated.**

Arbitration is a highly favored means of resolving business disputes, in part because it “eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation.” *Munsey v. Walla Walla College*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995). The principals of CPI and Longwell are sophisticated business professionals; in 2011, they entered into an agreement under which they provided that all “financial accounting claims” should be decided in arbitration by The Hon. Terry Lukens (Ret.).<sup>22</sup> Lukens already served as an arbitrator between these two parties in 2011—he has heard testimony and argument by the parties relating to the very same types of claims, the same subject matter (the Arbors apartment complex), and the same business relationship at issue here.

Consistent with the parties' agreement, in the interests of judicial economy and under Washington's clear policy of favoring arbitration, the

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<sup>22</sup> CP 209 at Paragraph 4.

Arbitrator should also decide the claims alleged by Longwell in this case.

*Verbeek*, 159 Wn. App. at 87.

### III. CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's denial of CPI's motion to compel arbitration.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following:

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

Signed April 28, 2014 at Seattle, Washington.

  
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