

Case No. 44915-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GOLDBERG FAMILY INVESTMENT CORPORATION,
a Washington corporation,

Plaintiff/Appellant,

vs.

WILLIAM D. QUIGG and CAROL QUIGG,
and the marital community comprised thereof; and
PATRICK D. QUIGG and KATHLEEN A. QUIGG,
and the marital community comprised thereof,

Defendants/Respondents.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
BY
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RESPONDENTS' BRIEF

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I. INTRODUCTION

The Trial Court correctly denied Appellant Goldberg Family Investment Corporation's ("Goldberg") Motion to Compel Arbitration of underlying substantive claims against Respondents William D. Quigg, Carol Quigg, Patrick D. Quigg and Kathleen A. Quigg ("the Quiggs") because Goldberg was not the real party in interest and did not have standing to bring the claims alleged. Goldberg was not the real party in interest because the right to prosecute the underlying claims belonged to a receivership created under RCW 7.60. Goldberg did not have standing because it was bound by the Receiver's decisions regarding Goldberg's claims and lacked any injury that is redressable by a favorable decision of the Trial Court.

Moreover, even if Goldberg was the real party in interest and had standing, compelling arbitration would have been improper because the Quiggs were not parties to any arbitration agreement with Goldberg. Instead, William and Patrick Quigg signed the agreements containing the arbitration provisions in their official capacities as Presidents of their respective corporations. Further, Goldberg did not produce any evidence necessary to establish an exception – even if one exists – to bind the Quiggs as non-signatories to any arbitration agreement.

For the same reasons the Trial Court correctly denied Goldberg's Motion to Compel, the Trial Court correctly granted the Quiggs' Motion for Summary Judgment.

Finally, Goldberg admits that it referenced certain allegations in its motion not for their truth, but merely to show that the dispute involved certain claims. As Goldberg admits that it did not offer the allegations for their truth, Goldberg may not rely on them to prove any exception to bind the Quiggs as non-signatories to any arbitration agreement. To the extent Goldberg relies on the truth of these allegations to support its arguments, they are inadmissible and should not be considered.

In sum, the Court should affirm the Trial Courts denial of Goldberg's Motion to Compel Arbitration, and the grant of the Quiggs' Motion for Summary Judgment, and Motion to Strike.

II. ASSIGNMENTS OF ERROR

None.

III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Goldberg's Assignment of Error No. 1

Did the Trial Court err in denying Goldberg's Motion to Compel Arbitration because Goldberg is not the real party in interest?

Did the Trial Court err in denying Goldberg's Motion to Compel Arbitration because Goldberg lacks standing to bring the claims?

B. Goldberg's Assignment of Error No. 2

Did the Trial Court err in granting the Quiggs' Cross-Motions for Summary Judgment because Goldberg is not the real party in interest?

Did the Trial Court err in granting the Quiggs' Cross-Motions for Summary Judgment because Goldberg lacks standing to bring the claims?

C. Goldberg's Assignment of Error No. 3

Did the Trial Court err in granting Defendants' Motion to Strike references to allegations in the Notice of Dispute because they are hearsay?

IV. STATEMENT OF THE CASE

A. The Quiggs Executed Agreements Containing Arbitration Provisions on Behalf of the Entities They Represented.

Grays Harbor Paper L.P. ("LP") was formed in 1993.¹ (CP 2 at ¶ 3.1.) Grays Harbor Industrial, Inc. was the general partner. (CP 57.) Numerous entities were limited partners, including, among others, WDQ Investments, Inc., (CP 57), Quigg Investments, Inc., (CP 62), and Goldberg (CP 66.) William Quigg was the President of WDQ Investments,

¹ On page 1 of Goldberg's Opening Brief, Grays Harbor Paper L.P. is referred to as "Grays Harbor Limited Partnership."

Inc. and Grays Harbor Industrial, Inc. (CP 57.) Patrick Quigg was the President of Quigg Investments, Inc. (CP 62.)

The Grays Harbor Paper L.P. Amended and Restated Limited Partnership Agreement (“LP Agreement”) contained an arbitration clause that provided:

Arbitration. Any dispute, controversy or claim arising out of or in connection with, or relating to this Agreement or any breach or alleged breach hereof, upon the request of any party involved, shall be submitted to, and settled by, arbitration in Grays Harbor County, Washington, or any other venue agreed upon by the parties, pursuant to American Arbitration Association, or under any other form of arbitration mutually acceptable to the parties so involved. ***

(CP 56.) William Quigg executed the LP Agreement on behalf of WDQ Investments, Inc. and Grays Harbor Industrial, Inc. as President for both entities. (CP 57.) Patrick Quigg executed the same LP Agreement on behalf of Quigg Investments, Inc. in his role as President. (CP 62.) The Quiggs did not execute the LP Agreement in their individual capacity. (See CP 57-62.) Moreover, there was nothing to indicate that William or Patrick Quiggs’ marital communities are parties to the LP Agreement. See *id.*

LP merged with Grays Harbor Paper, LLC (“LLC”) on about January 5, 2010. (CP 347, 349.) LLC acquired all properties and assets of LP and LP ceased to exist. (CP 350 at ¶ 6); (see also CP 3 at ¶ 3.2.) Grays

Harbor Industrial, Inc., WDQ Investments, Inc., Quigg Investments, Inc., and Goldberg, among other entities, were members of LLC. (CP 104, 134, 144, 146 and 147.)

Sections 16.1 and 16.3 of the Limited Liability Company Agreement of Grays Harbor Paper, LLC (“LLC Agreement”) contained provisions requiring the parties to the LLC Agreement to arbitrate disputes under specific circumstances. (CP 129-130.) Specifically, Section 16.1 provided:

Dispute. Any controversy, claim or dispute of whatever nature arising between any of the parties under this Agreement, the other Transaction Documents or in connection with the transactions contemplated hereunder, including those arising out of or relating to the breach, termination, enforceability, scope or validity hereof, whether such claim existed prior to or arises on or after the date hereof (a “Dispute”), shall be resolved by mediation or, failing mediation, by binding arbitration. The agreement to mediate and arbitrate contained in this Section 16.1 shall continue in full force and effect despite the expiration, rescission or termination of this Agreement.

(CP 129.) Section 16.3 provided in part that the Federal Arbitration Act (“FAA”) governed the arbitration clause. (CP 130.)

William Quigg executed the LLC Agreement on behalf of WDQ Investments, Inc. and Grays Harbor Industrial, Inc. as President for both entities. (CP 134, 147.) Patrick Quigg executed the same LLC

Agreement on behalf of Quigg Investments, Inc. in his role as President. (CP 146.) The Quiggs did not execute the LLC Agreement in their individual capacity. (See CP 134, 146, 147.) There is nothing to indicate that William Quigg or Patrick Quigg agreed to bind their marital communities to the LLC Agreement. (See *id.*)

B. Goldberg's Claims Became Property of a General Receiver, Which Assigned the Claims to U.S. Bank.

On June 6, 2011, for the benefit of its creditors, LLC made an assignment of substantially all of its assets to a Receiver. (CP 353 at ¶ 3.) On the same date, the Receiver petitioned the court in the receivership case in the Superior Court of Washington for Grays Harbor County, Cause No. 11-2-00716-9, for appointment as the general receiver over the assets LLC had assigned. (CP 353-354 at ¶ 3.) The Order appointing a general receiver over the assets of LLC was entered on June 6, 2011. (CP 353 at ¶ 3.)

Goldberg appeared in the receivership case on October 27, 2011 by filing a Notice of Appearance that requested notice of all further filings in the case. (CP 375-376.)

On October 31, 2011, Goldberg served a Dispute Notice Pursuant to ¶ 16.2 of the Grays Harbor Paper LLC Agreement ("Notice of Dispute"). (CP 6-16.) The Notice of Dispute brought one cause of action against the

Quiggs for Breach of Fiduciary and Statutory Duties. (CP 15 at ¶¶ 29-33.) Specifically, Goldberg alleged that the Quiggs breached various duties owed to Goldberg under the LP Agreement, the LLC Agreement and RCW 25.10.441 and constitute actionable conduct under RCW 25.15.155 with respect to LLC. (CP 15 at ¶ 29.) These alleged duties included the duty to return to LP and later LLC all funds improperly received by William Quigg and his affiliates. (Id.) Goldberg alleged further that Patrick Quigg participated in the diversion of funds, that he was under a fiduciary duty to disclose and failed to disclose to Goldberg William Quigg's improper activities, and that as a manager of LLC Patrick Quigg was under a duty to seek disgorgement of the funds improperly diverted by William Quigg. (CP 15 at ¶ 30.) Goldberg continues that as a result of the Quiggs' actions, LLC was left with insufficient operating capital to continue in business and that it ceased operations because of the diversion of funds and failure to obtain disgorgement of funds. (CP 15 at ¶ 31.) Finally, Goldberg alleged that the Quiggs engaged in a civil conspiracy to first improperly divert funds from LP and later to preclude disgorgement of funds improperly diverted from LP. (CP 15 at ¶ 32.) These actions allegedly caused it an unspecified amount of damages. (CP 15 at ¶ 33.)

On December 15, 2011, Goldberg filed a Complaint to Compel Arbitration of the claims alleged in the Notice of Dispute. (CP 1-4.)

On January 30, 2012, the Receiver filed a Notice of Automatic Stay, which informed the parties and the Trial Court that the claims raised in Goldberg's Complaint and Notice of Dispute were assets of the receivership estate. (CP 156 and lines 22-26.) Specifically, the Notice of Automatic Stay stated in relevant part: "While [LLC] is not a party to this litigation, the claims made herein are assets of the Receivership estate and the commencement of this action constitutes a violation of the automatic stay of RCW 7.60.110(1)(c)." (CP 157 at lines 5-7.) Goldberg did not file any pleading in the receivership case that contested the Receiver's Notice of Automatic Stay or its position that Goldberg's claims were assets of the receivership estate.

On August 16, 2012, the Receiver filed a Motion to Terminate Receivership ("Receiver's Motion") in the receivership case for an order assigning all of the remaining receivership estate assets to U.S. Bank National Association ("U.S. Bank"), and terminating the receivership estate. (CP 378-386.) The basis for the Receiver's Motion was that U.S. Bank was the senior secured creditor of LLC and was still owed over \$4,000,000 pursuant to RCW 7.60.230(1)(a). (CP 381, 383.) Included in the Receiver's Motion as assets to be assigned to U.S. Bank were:

Possible claims and causes of action Grays Harbor Paper, LLC may have against William D. Quigg, Carol Quigg, the marital community comprised thereof, and Patrick D. Quigg and Kathleen A. Quigg, and the marital community comprised thereof, and/or others relating to the operations of Grays Harbor Paper, LLC, including, but not limited to those outlined in the *Complaint to Compel Arbitration* filed by the Goldberg Family Investment Corporation in Grays Harbor County Superior Court Case No. 11-2-01730-0 (the “**Director and Officer Claims**”)

(CP 381 at lines 15-19) (emphasis in original).

Goldberg was served with a copy of the Receiver’s Motion, (CP 387-388, 393), but did not object. On September 17, 2012, the Court granted the Receiver’s Motion and assigned all of the Receiver’s assets to U.S. Bank. (CP 409, 410 at ¶ 5.) Also on September 17, 2012, the Court terminated the receivership. (CP 410 at ¶ 6.)

C. The Parties’ Motions Following Termination of the Receivership.

On November 28, 2012, the Quiggs filed an Answer, Affirmative Defenses and Counter Claims (“Answer”). (CP 160-168.) The Answer alleged as defenses and counterclaims that pursuant to RCW 7.60.160 the litigation should be referred to the receivership case; that Goldberg was not the real party in interest; that Goldberg’s claims were barred by RCW 7.60.210; that Goldberg’s claims were barred by RCW 7.60.190(1);

that Plaintiff's claims were barred by Paragraph 17.8 of the LLC Agreement; and that the Quiggs were not parties to any agreements with Goldberg that compel the arbitration of any disputes between the parties. (CP 162-167.)

On February 13, 2013, Goldberg filed Plaintiff's Motion to Compel Arbitration. (CP 170-176.) Also on February 13, 2013, Goldberg filed Plaintiff's Motion to Dismiss Certain Affirmative Defense and Counterclaim. (CP 189-194.)

On March 4, 2013, the Quiggs filed Defendants' Opposition to Plaintiff's Motion to Compel Arbitration and Cross-Motion for Summary Judgment. (CP 438-449.) The Quiggs asserted that Plaintiff's Motion to Compel Arbitration should be denied and that the Quiggs were entitled to summary judgment against Goldberg's Complaint because Goldberg lacked standing and was not the real party in interest. (CP 449.) The Quiggs asserted further that even if Goldberg had standing, summary judgment was proper because Goldberg could not establish that the Quiggs agreed to arbitrate any claim raised by Goldberg in the Notice of Dispute. (CP 449.)

On April 12, 2013, the Trial Court issued an Order Denying Plaintiff's Motions to Compel Arbitration and Dismiss and Granting Defendants' Cross-Motions for Summary Judgment because Plaintiff lacked standing to bring its claims and was not the real party in interest. (CP 484-485.)

On March 4, 2013, the Quiggs also filed Defendants' Motion to Strike inadmissible statements of "fact" contained in Goldberg's motions, including statements implying LLC was formed because financial improprieties were discovered in LP; that the Quiggs controlled the day-to-day management of LLC; that the Quiggs wholly owned various entities; statements regarding alleged self-dealing, breaches of fiduciary duties, taking millions of dollars, and the need to pierce the corporate veil of various corporate entities. (CP 430-436.) The Trial Court granted the Quiggs' Motion to Strike in its entirety. (CP 482-483.)

On May 7, 2013, Goldberg filed a Notice of Appeal, seeking review of the Order Granting Defendants' Motion to Strike and Order Denying Plaintiff's Motions to Compel Arbitration and Dismiss and Granting Defendants' Cross-Motions for Summary Judgment. (CP 488-489.)

V. ARGUMENT

A. The Court Should Affirm the Trial Court's Denial of Goldberg's Motion to Compel Arbitration.

1. Standard of Review.

An appellate court "review[s] a trial court's decision to deny a motion to compel arbitration de novo." Gandee v. LDL Freedom Enterprises, Inc., 176 Wash. 2d 598, 602, 293 P.3d 1197, 1199 (2013); Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447, 1449

(9th Cir. 1986) (order compelling arbitration subject to de novo review). The party opposing arbitration has the burden of showing the arbitration clause is inapplicable or unenforceable. Gandee, 176 Wash. 2d at 602-03; Otis Housing Ass'n, Inc. v. Ha, 165 Wash.2d 582, 587, 201 P.3d 309 (2009).

2. The Court Should Affirm the Trial Court's Denial of Goldberg's Motion to Compel Arbitration Because Goldberg Is Not the Real Party in Interest.

a. The Real Party in Interest Must Prosecute Every Action.

“Every action shall be prosecuted in the name of the real party in interest.” CR 17(a). “The real party in interest is the person who possesses the right sought to be enforced.” Riverview Community Group, 173 Wash. App. at 576 (quoting Sprague v. Sysco Corp., 97 Wn. App. 169, 176 n. 2, 982 P.2d 1202 (1999)). In Sprague, the plaintiff filed for bankruptcy before bringing a discrimination action against her former employer. Id. at 171. The court held that the plaintiff was not the real party in interest because the right to prosecute the claim belonged to the bankruptcy estate. Id. at 176, n.2. Similarly, as discussed below, Goldberg is not the real party in interest in this case because the right to prosecute any claims belonged first to the Receiver (CP 353 at ¶ 3), and

then to U.S. Bank after the Receiver assigned Goldberg's claims against the Quiggs to U.S. Bank. (CP 381 at lines 15-19.)

b. The Receiver and U.S. Bank Were the Real Parties in Interest to Bring the Claims in the Notice of Dispute.

RCW 7.60 governs the law of receivers in Washington. A "receiver" is "a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manager, or dispose of property of a person." RCW 7.60.005(10). A "receivership" is "the case in which the receiver is appointed." RCW 7.60.005(11). An "estate" includes, in relevant part, "the entirety of the property with respect to which a receiver's appointment applies." RCW 7.60.005(3). "Property" includes:

All right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired. 'Property' includes any proceeds, products, offspring, rents, or profits of or from property in the estate.

RCW 7.60.005(9) (emphasis added).

Washington law provides further that "[t]he person over whose property the receiver is appointed shall . . . [u]pon the receiver's appointment, deliver into the receiver's possession all of the property of

the estate in the person's possession, custody, or control.”

RCW 7.60.080(3). “When the person over whose property the receiver is appointed is an entity, each of the officers, directors, managers, members, partners, or other individuals exercising or having the power to exercise control over the affairs of the entity are subject to the requirements” to turn over property of the entity to the receiver. RCW 7.60.080.

In this case, an Order appointing a general receiver over the assets of the LLC was entered on June 6, 2011. (CP 353 at ¶ 3.) On January 30, 2012, the Receiver filed a Notice of Automatic Stay, which informed the parties and the Trial Court that the claims raised in Goldberg's Complaint and Notice of Dispute were assets of the Receivership estate. (CP 156 and lines 22-26.) In the Notice of Dispute, Goldberg alleged that William and Patrick Quigg breached various duties owed to Goldberg that caused an unspecified amount of damages to Goldberg. (CP 15 at ¶¶ 29-33.) Goldberg's ability to recover damages is solely based on its status as a member of LLC. As a result, Goldberg would have only received funds/money from LLC if it was sufficiently solvent to pass its profits or proceeds on to its members under the terms of the LLC Agreement. Because Goldberg seeks to recover proceeds and/or profits it would have obtained from LLC, these claims were “property” of the Receiver as defined by RCW 7.60.005.

In sum, Goldberg was not the real party in interest. Instead, the right to prosecute the claims belonged to the Receiver, which assigned the claims to U.S. Bank, the LLC's Senior Secured Creditor. For these reasons, the Court should affirm the Trial Court's denial of Goldberg's Motion to Compel Arbitration.

3. The Court Should Affirm the Trial Court's Denial of Goldberg's Motion to Compel Arbitration Because Goldberg Does Not Have Standing to Bring the Claims in the Notice of Dispute Against the Quiggs.

a. Standing is a Threshold Issue on any Motion to Compel Arbitration.

Standing is always a threshold issue in determining a motion to compel arbitration. Britton v. Co-op Banking Group, 916 F.2d 1405, 1413 n. 9 (9th Cir. 1990) (applying FAA to motion to compel arbitration). Standing refers to the demonstrated existence of 'an injury to a legally protected right.'" Riverview Community Group v. Spencer & Livingston, 173 Wash. App. 568, 576, 295 P.3d 258 (2013) (quoting Sprague v. Sysco Corp., 97 Wn. App. 169, 176 n. 2, 982 P.2d 1202 (1999)). "To have standing, one must have some protectable interest that has been invaded or is about to be invaded." Orion Corp. v. State, 103 Wash. 2d 441, 455, 693 P.2d 1369, 1377 (1985); Vovos v. Grant, 87 Wash.2d 697, 699, 555 P.2d 1343 (1976) ("person has standing to challenge a court

order or other court action if his protectable interest is adversely affected thereby”).

Washington courts often interchange the concepts of real party in interest and standing. Riverview Community Group v. Spencer & Livingston, 173 Wash. App. 568, 576, 295 P.3d 258 (2013). In Sprague, the court explained the distinction, holding that the plaintiff had standing to sue because she was the alleged injured party, but was not the real party in interest because the right to prosecute the claim belonged to the bankruptcy estate. Id. at 176, n.2. Further, as noted by the Washington Supreme Court, it is improper for a plaintiff lacking standing to assert the rights of other parties or nonparties; its claims fail on account of its lack of standing. Haberman v. Wash. Pub. Power Sup. Sys., 109 Wash.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987).

b. Goldberg Does Not Have Standing Because It is Bound by the Receiver’s Decision Regarding the Claims in the Notice of Dispute Against the Quiggs.

Goldberg’s claims were property of the Receiver and, thus, Goldberg is bound by the Receiver’s decision regarding the disposition of any claim against the Quiggs. Parties that appear and participate in the receivership “are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as

parties.” RCW 7.60.190(1). Parties opposing a disposition of the receivership estate property must object to the disposition “at least three days before the date of the proposed action.” RCW 7.60.190(6). Further, “[a]ll persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is [*sic*] bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.” RCW 7.60.190(7).

In this case, Goldberg formally appeared in the receivership case as an interested party, received notice of the Receiver’s motion to assign Goldberg’s claims to U.S. Bank, and failed to object to any action of the Receiver. (CP 375-377, 378-383, 393.) As a result, when the Trial Court approved the assignment of Goldberg’s claims to U.S. Bank, Goldberg became bound by that ruling by law. See RCW 7.60.190(1); RCW 7.60.190(7). Consequently, Goldberg lacks any injury that is redressable by a favorable decision of the court and, therefore, lacks standing to bring this action. As a result, the Trial Court properly denied Goldberg’s Motion to Compel Arbitration because Goldberg does not have standing to bring any claim or the Motion to Compel Arbitration.

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4. Even if Goldberg is the Real Party in Interest and Has Standing, the Court Should Affirm the Trial Court’s Denial of Goldberg’s Motion to Compel Arbitration Because There Is Not a Valid Agreement to Arbitrate Between Goldberg and the Quiggs and Because the Arbitration Agreement Does Not Encompass the Dispute at Issue.

a. The FAA Does Not Compel Arbitration Where There Is Not a Valid Agreement to Arbitrate Between the Parties and Where the Arbitration Agreement Does Not Encompass the Dispute at Issue.

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.*, “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” Volt. Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989). Arbitration is a “matter of contract,” and no party may be required to submit to arbitration “any dispute which he has not agreed so to submit.” Howsam v. Dean Witter Reynolders, Inc., 537 U.S. 79, 79 (2002) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)); *see also* Volt. Info. Sciences, Inc., 489 U.S. at 478 (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). A party cannot be ordered to arbitration unless there is “an express, unequivocal agreement to that effect.” Samson v. NAMA Holdings, LLC, 637 F.3d 915, 923 (9th Cir. 2010) (quoting Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.,

636 F.2d 51, 54 (3rd Cir. 1980)). When deciding whether the parties agreed to arbitrate a certain matter, courts should apply ordinary state-law principles that govern the formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Powell v. Sphere Drake Insurance P.L.C., 97 Wn. App. 890, 894, 988 P.2d 12 (1999).

Section 4 of the FAA “confers only the right to obtain an order directing that ‘arbitration proceed in the manner provided for in [the parties’s] agreement.’” Volt. Info. Sciences, Inc., 489 U.S. at 475 (quoting 9 U.S.C. § 4). A court’s discretion for compelling arbitration is thus limited to a two-step process of “determining (1) whether a valid agreement to arbitrate exists, and if it does; (2) whether the agreement encompasses the dispute at issue.” Chiron Corp. v. Ortho Diagnostics Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

In this case, even if Goldberg was the real party in interest and had standing to bring the claims, the Trial Court’s denial of the Motion to Compel Arbitration should be affirmed because the Quiggs are not parties to any arbitration agreements with Goldberg and because the arbitration agreements at issue do not encompass any dispute between the Quiggs and Goldberg.

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b. The Quiggs Are Not Parties to Any Arbitration Agreement with Goldberg Because They Signed the LP and LLC Agreements Containing the Arbitration Provisions in Their Official Capacities.

It is well-settled in Washington that when a representative of a corporation signs a contract on behalf of the corporation, and identifies his agency with the corporation following his signature, only the corporation is a party to and liable under the contract. Union Machinery & Supply Co. v. Taylor-Morrison Logging Co., 143 Wash. 154, 159-161, 254 P. 1094 (1927). In Union Machinery & Supply Co., the Washington Supreme Court adopted the rationale of a Wisconsin case that explained that when a president of a corporation signs in his official capacity he is not personally liable. The Wisconsin court stated in relevant part:

The principle of these authorities seems to be 'that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound.' Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word 'president' to his own name he shows conclusively that as president of the corporation he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix, cashier, secretary,

president or agent, to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word 'by' or 'per' or 'pro' would not add to the certainty of what is thus expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation.

Id. at 158 (quoting Liebscher v. Kraus, 74 Wis. 387, 43 N.W. 166 (1889))

(*emphasis added*). This understanding is also incorporated in

Washington's version of the Uniform Commercial Code, which provides

that "[i]f a representative signs the name of the representative to an

instrument and the signature is an authorized signature of the represented

person, * * * [i]f the form of the signature shows unambiguously that the

signature is made on behalf of the represented person who is identified in

the instrument, the representative is not liable on the instrument."

RCW 62A.3-402(b)(1) and comment 2.

In this case, the William and Patrick Quigg executed the LP Agreement and the LLC Agreement as the Presidents of various identified corporations. Their signatures showed unambiguously that they represented only that those entities agreed to be bound by the terms of the LP and LLC Agreements. There is no indication in Goldberg's Complaint or the attached exhibits that the Quiggs agreed to arbitrate claims against

them individually or their marital communities. As a result, under Washington contract law the Quiggs are not a party to any agreement to arbitrate and cannot be held liable for any agreement to arbitrate with Goldberg. Similarly, as no arbitration agreement exists between Goldberg and the Quiggs, the arbitration provisions cannot encompass the disputes at issue.

In sum, Goldberg cannot satisfy its burden of establishing that a valid contract to arbitrate exists between the parties under Washington law as required by the FAA. Thus, the Court should affirm Trial Court's denial of Goldberg's Motion to Compel Arbitration.

c. Goldberg Did Not Establish that the Quiggs, as Non-Signatories, Could be Bound by the Arbitration Agreement.

While Goldberg acknowledges that the Quiggs did not personally sign the LP and LLC Agreements containing the arbitration provisions, Goldberg contends that they still may be required to arbitrate because federal courts applying the FAA have recognized that non-signatures to a contract containing an arbitration provision may be bound to arbitrate. (Opening Brief at 10; citing Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (S.D.N.Y. 1995).) Goldberg is mistaken and relies on foreign cases that state that non-signatories to a contract may be

compelled to arbitrate claims under the principles of estoppel, piercing the corporate veil/ego and agency. (Opening Brief at 10-13.)

While Washington Courts have repeated these general statements, no Washington state appellate case has upheld a motion to compel arbitration against an individual in their personal capacity where the individual signed the contract in his or her corporate capacity. For instance, in Woodall v. Avalon Care Center-Federal Way, LLC, 115 Wn. App. 919, 923-24, 231 P.3d 1252 (2010), the court noted that “federal courts have held” and that the Washington Court of Appeals has “recognized[] that ‘[n]on-signatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.’” The court held, however, that where a deceased nursing home patient had signed an arbitration agreement, but the patient's heirs had not, the heirs were not required to arbitrate their wrongful death claims against the operator of the nursing home. Id. at 929-30. In Powell v. Sphere Drake Insurance P.L.C., 97 Wash. App. 890, 898, 988 P.2d 12 (1999), the court held that the plaintiff, a seaman, was not required to arbitrate his claims where he was not a party to the contract requiring the arbitration clause. Absent a single Washington State case ruling that a person in the Quiggs’ specific circumstances is bound by a contract compelling arbitration, the Court is bound by the above cited Washington law stating that individuals

who sign contracts in their corporate capacity are not personally bound to or liable for those contracts.

Even if the Court considers these exceptions as a potential basis to compel the Quiggs to arbitration, Goldberg has not produced evidence to support them. To rely on these exceptions, a “willing signatory seeking . . . to arbitrate with a non-signatory that is unwilling . . . must establish at least one of the five theories describe in Thomson-CSF.” Merrill Lynch Investment Managers v. Optibase, LTC, 337 F.3d 125, 131 (2003); see Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Custom Air Systems, Inc., 357 F.3d 266, 268 (2004) (ruling that determination of alter ego must be made by district court in order to compel arbitration on basis of alter ego); AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986) (stating that the question whether the parties have agreed to submit a particular dispute to arbitration is “undeniably an issue for judicial determination”).

Requiring a party to establish an exception outlined in Thomson-CSF is necessary in light of the general rule that arbitration is a “matter of contract” and that no party may be required to submit to arbitration “any dispute which he has not agreed so to submit.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 79 (2002) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960));

see also Volt Info. Sciences, Inc., 489 U.S. at 478 (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). As discussed above, to compel arbitration, the Court must determine (1) whether a valid agreement to arbitrate exists, and if it does; (2) whether the agreement encompasses the dispute at issue.” Chiron Corp., 207 F.3d at 1130. A court cannot make these determinations as to non-signatories unless the party seeking to compel arbitration actually proves the theories outlined in Thomson-CSF.

In this case, Goldberg has not produced any evidence to support any of the exceptions upon which it relies.² First, Goldberg has not established estoppel. Instead, Goldberg merely asserts that “[t]he conclusion that [the Quiggs] derived benefit from their involvement over a period in excess of a decade with LP/LLC is inescapable.” (Opening Brief at 12.) Plaintiff, however, produced no evidence to support any such allegation.

Second, Goldberg did not produce any evidence to establish the necessary elements of piercing the corporate veil/alter ego. Corporate disregard requires proof of two elements: “First, the corporate form must be intentionally used to violate or evade a duty; second, disregard must be

² See discussion below regarding the Quiggs’ Motion to Strike several “facts” contained in the Notice of Dispute and relied upon by Goldberg in support of its motions to compel arbitration and dismiss the Quiggs affirmative defenses and counterclaim.

‘necessary and required to prevent unjustified loss to the injured party.’”
Rogerson Hiller Corporation v. Port of Los Angeles, 96 Wn. App. 918,
924, 982 P.2d 131 (1999) (citing Meisel v. M & N Modern Hydraulic
Press Co., 97 Wash.2d 403, 410, 645 P.2d 689 (1982) (quoting Morgan v.
Burks, 93 Wash.2d 580, 587, 611 P.2d 751 (1980)). The first element
requires a finding of an abuse of the corporate form. Id. (citing Meisel,
97 Wash.2d at 410). The second element requires that the abuse caused
harm to the party seeking relief so that disregarding the corporate form is
necessary. Id. Additionally, informality in the operation of a closely held
corporation will not lead to a disregard of the corporate entity if the
informality neither prejudices nor misleads the plaintiff. See Block v.
Olympic Health Spa, Inc., 24 Wash. App. 938, 604 P.2d 1317 (1979).

In this case, Goldberg did not produce any evidence that the
Quiggs abused the corporate form of their entities Grays Harbor Industrial,
Inc., WDQ Investments, Inc., or Quigg Investments, Inc. Goldberg did not
offer any evidence that the Quiggs’ corporate forms were used to violate or
evade a single duty contained in any of the Agreements. Further, Goldberg
did not produce evidence that Grays Harbor Industrial, Inc., WDQ
Investments, Inc., or Quigg Investments, Inc. were operated informally or
that any informality prejudiced or misled Goldberg. Even if Goldberg had
produced evidence that the Quiggs had abused the corporate form of their

entities, Goldberg did not produce any evidence that any such abuse harmed Goldberg. As a result, Goldberg cannot establish the elements necessary to pierce the corporate veil of Grays Harbor Industrial, Inc., WDQ Investments, Inc., or Quigg Investments.

Finally, as discussed above, Goldberg did not produce any evidence that William and Patrick Quigg are personally bound by the arbitration provisions. Thus, the Court should affirm the Trial Court's denial of Goldberg's Motion to Compel Arbitration.

d. Goldberg Asserts Incorrectly that the Quiggs Have Never Challenged the Enforceability of the Arbitration Provision.

Goldberg asserts incorrectly that the Quiggs have never challenged the enforceability of the arbitration provision. (Opening Brief at 13.) To the contrary, the Quiggs argued in their briefing to the Trial Court that the agreement provision was not enforceable against the Quiggs for the reasons articulated above.

Moreover, Goldberg claims incorrectly that the arbitrator, not the court, must decide the enforceability of the arbitration provision. The cases relied upon by Goldberg are inapposite. In Prima Paint Corp v. Flood & Conklin Mfg., Inc., 388 U.S. 395, 397 (1967), both the plaintiff and defendant were parties to the consulting agreement containing the arbitration provision at issue. In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006), the parties entered into agreements

containing arbitration provisions. In Pinkis v. Network Cinema Corp., 9 Wn. App. 337, 337-38, 512 P.2d 751 (1973), the plaintiffs and defendant were parties to exhibitor franchise agreements containing arbitration provisions. In Allison v. Medicab Int'l, Inc., 92 Wn.2d 199, 200, 597 P.2d 380 (1979), the parties were subject to a franchise agreement for transportation of the physically handicapped containing an arbitration provision. In these cases, unlike this one, the parties were signatories to the arbitration provisions at issue and, thus, the courts held that it was for the arbitrator to decide whether the particular disputes were subject to arbitration. In contrast, it was proper for the Trial Court to decide whether the claims in the Notice of Dispute were subject to arbitration because Goldberg and the Quiggs were not parties to any arbitration agreement.

B. The Court Should Affirm the Trial Court's Grant of the Quiggs' Motion for Summary Judgment.

1. Standard of Review.

An appellate court reviews an order granting summary judgment de novo. Ruvalcaba v. Kwang Ho Back, 175 Wash. 2d 1, 6, 282 P.3d 1083, 1085-86 (2012). A court shall grant a motion for summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment." Folsom v. Burger King, 135 Wash. 2d 658, 663, 958 P.2d 301, 305 (1998). The court should grant

a summary judgment motion “if, from all the evidence, a reasonable person could reach only one conclusion.” Id.

The absence of an essential element in a plaintiff’s case makes all other facts immaterial. Young v. Key Pharmaceuticals, Inc., 112 Wash. 2d 216, 225, 770 P.2d 182, 187 (1989). A non-moving party attempting to resist a summary judgment motion may not rely upon speculation or argumentative assertions that unresolved factual matters remain. Halvorsen v. Ferguson, 46 Wn. App. 708, 721, 735 P.2d 675 (1986), rev. denied, 108 Wn.2d 1008 (1987). A defendant may move for summary judgment by merely pointing out the absence of competent evidence to support the plaintiff’s case. Guile v. Ballard Community Hospital, 70 Wn. App. 18, 27, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 873 P.2d 72 (1993).

2. The Court Should Affirm the Trial Court’s Grant of Summary Judgment for the Quiggs for the Same Reasons the Court Should Affirm the Denial of Goldberg’s Motion to Compel Arbitration.

The Court should affirm the grant of the Quiggs’ Motion for Summary Judgment for the same reasons the Court should affirm the Trial Court’s denial of Goldberg’s Motion to Compel Arbitration. Goldberg is not the real party in interest and lacks standing to bring the claims against the Quiggs. Even if Goldberg was the real party in interest and had standing, arbitration should not be compelled because the Quiggs were not

parties to any arbitration agreements with Goldberg and the arbitration agreements at issue do not encompass any disputes between the parties.

3. Allowing Goldberg to Prosecute the Claims in the Notice of Dispute Would Defeat the Stated Purpose of Washington’s Receivership Statutes.

Allowing Goldberg to prosecute the claims in the Notice of Dispute would defeat the stated purpose of Washington’s receivership statutes. The “notes” section of RCW 7.60.005 provides that “[t]he purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein.” To fulfill this purpose, RCW 7.60.230 sets up priorities a Receiver must follow when disposing of estate property, and specifically provides that all creditors of the entity in receivership must be paid in full before any assets are returned to the entity. RCW 7.60.230(2).

Here, Goldberg’s allegations demonstrate that if it were to prevail on its substantive claims, it would obtain a judgment for funds it admits should be returned to LLC and by law must be distributed pursuant to the priorities outlined in RCW 7.60.230. As noted above, Goldberg’s claim is based on the allegation that the Quiggs took money from LLC, leaving it without sufficient funds to operate. (CP 15 at ¶¶ 29-33.) Goldberg further alleges that the Quiggs had the duty to return all funds improperly received to LLC.

(CP at ¶ 29.) As a result, the Court should not allow Goldberg to bypass the purpose of RCW 7.60 or the priorities of RCW 7.60.230, and should affirm the Trial Court's grant of the Quiggs' Motion for Summary Judgment.

Goldberg, in asserting that it is the real party in interest to bring the claims against the Quiggs, relies incorrectly on two Washington cases. The first, Finley v. Takisaki, 2006 WL 1169794 (W.D. Wash. Apr. 28, 2006), supports the Quiggs' position that Goldberg is not the real party in interest. When examining whether the plaintiff had standing to bring its action, the Finley court ruled as follows:

To establish standing, Plaintiffs would have to allege a direct injury that is independent of [the LLC's] injury. Shell Petroleum, N.V. v. Graves, 709 F.2d 593, 595 (9th Cir.1983); In re Real Marketing Servs., LLC, 309 B.R. 783, 789 (S.D.Cal. 2004). Plaintiffs have no doubt shown, at least on the pleadings, that they suffered personal economic loss as a result of Defendants' wrongdoing. This is insufficient, however, because their personal loss derives from their membership in the LLC. Shell Petroleum, 709 F.2d at 595; Real Marketing, 309 B.R. at 789; see also Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir.1998); Sabey v. Howard Johnson & Co., 5 P.3d 730, 735 (Wash.Ct.App.200). Instead of a derivative loss, Plaintiffs must allege that they suffered an injury distinct from those of any other LLC member, or that there was a special relationship between themselves and the Defendants. Sparling, 864 F.2d at 640. There are no such allegations in the instant complaint.

Finley, 2006 WL 1169794 at *3 (emphasis added). Here, Goldberg's claims similarly fails because its alleged personal loss derives from its membership

in LLC and it has failed to allege that it suffered an injury distinct from those of any other LLC member, or that there was a special relationship between itself and the Quiggs.

Goldberg also cites to Bishop of Victoria Corp. Sole v. Corporate Business Park LLC, 138 Wn. App. 443, 158 P.3d 1183 (2007), for the proposition that Goldberg and the Quiggs' entities had a fiduciary relationship sufficient to satisfy the "special relationship" prong of Finley. Bishop of Victoria, however, deals with a member-managed LLC and Grays Harbor Paper, LLC was a manager-managed LLC. Furthermore, even if the duties expressed for member-managed LLCs extend to manager-managed LLCs, the members of Grays Harbor Paper, LLC specifically waived these duties. Section 1.6 of the LLC Agreement provides:

"The only duties of: (i) the Members, (ii) the Directors to the Members, (iii) the Directors, and (iv) the Company shall be those established in this Agreement, and there shall be no other express or implied duties of those Members, the Directors to the Members, the Directors, or the Company."

(CP 105.) As a result, Goldberg cannot establish a special relationship between it and the Quiggs necessary to proceed with its claims as required by Finley. Thus, the Trial Court properly granted the Quiggs' Motion for Summary Judgment.

4. Collateral Estoppel Bars Goldberg's Substantive Claims.

Even if Goldberg has standing to bring this claim and its claims are not barred by RCW 7.60, all of its claims are still barred by the doctrine of

collateral estoppel because the court in the receivership matter assigned all of LLC's assets, including the claims raised in Goldberg's Complaint and Notice of Dispute, to U.S. Bank on or about November 14, 2011.

"Collateral estoppel works to prevent relitigation of issues that were resolved in a prior proceeding." City of Aberdeen v. Regan, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010). The doctrine bars a claim when: (1) an issue decided in an earlier proceeding is identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Id. (quoting City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 792, 193 P.3d 1077 (2008)); Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Additionally, an order that accepts a receiver's final report and orders his discharge is a judgment. American Linen Supply Company v. Nursing Home Building Corporation, 15 Wash.App. 757, 766, 551 P.2d 1038 (1976) (citing Garrett v. Nespelem Consol. Mines, Inc., 23 Wash.2d 824, 826, 162 P.2d 591 (1945)).

In American Linen Supply Company, the receivership's court order terminating the receivership transferred all corporate property to

Nursing Home Building Corporation (hereinafter “Building Corporation”) “subject to the debts or claims of creditors set forth in the final report.” Id. American Linen Supply Company (hereinafter “American”) was one of the creditors, and its claim was one of the claims referred to in the court’s order. Id. After the termination of the receivership, American sued Building Corporation for the unpaid debt and the trial court granted American’s summary judgment motion. Building Corporation appealed arguing that it was not liable to American. The Washington Supreme Court ruled that the receivership’s court order approving the Receiver’s final report and declaring that Building Corporation took the corporate property subject to the debts or claims of American triggered the doctrine of collateral estoppel and estopped Building Corporation from later denying that its assets were answerable for American’s claim. Id. at 766-767.

In this case, as discussed above, the Receiver took the position that Goldberg’s claims were property of the receivership estate. Goldberg appeared in the receivership matter and did not contest any of the Receiver’s actions, including the Receiver’s request to assign the claims alleged by Goldberg to U.S. Bank. As a result, Goldberg is now estopped from bringing the claim alleged in its Complaint and the Notice of Dispute because it is prohibited from relitigating whether the claims belong to it or

U.S. Bank. Consequently, the Trial Court properly granted the Quiggs' Motion for Summary Judgment.

C. The Court Should Affirm the Trial Court's Grant of the Quiggs' Motion to Strike.

1. Standard of Review.

An appellate court applies de novo review to a trial court's evidentiary ruling made in conjunction with a summary judgment order. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

2. Goldberg Admits the Facts are Not Offered for Their Truth.

Goldberg admits that its discussion of the allegations in the Notice of Dispute was not for the purpose of proving the truth of those allegations, but to show that the dispute involved a claim for breach of fiduciary or other duties to Goldberg. (Opening Brief at 9, 21-22.) As Goldberg admits that it did not offer the allegations for their truth, Goldberg may not rely on them to prove its claims of estoppel, piercing the corporate veil/alter ego, or agency.

3. To the Extent Goldberg Relies on the Truth of Certain Allegations in the Notice of Dispute to Support Its Arguments, They Are Inadmissible and Should Not be Considered by the Court.

CR 56(e) provides that a moving party's motion must be supported by "facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein."

Additionally, conclusory statements of “fact” are not sufficient to support motions for summary judgment. Hash v. Children’s Orthopedic Hospital & Medical Center, 110 Wn.2d 912, 757 P.2d 507 (1988); see Parkin v. Colocousis, 53 Wn. App. 649 (1989) (holding that physician’s affidavit is insufficient when it does little more than state that a physician was not negligent, and fails to set forth specific facts negating any of the required elements).

In Goldberg’s briefing to the Trial Court, it referred to and reasserted as “facts” allegations contained in the Notice of Dispute that were not supported by any affidavit testimony or other admissible evidence. Specifically, the unsupported or inadmissible statements of “fact” included statements implying that LLC was formed because financial improprieties were discovered in LP; that the Quiggs controlled the day-to-day management of LLC; that the Quiggs wholly-owned various entities; and that self-dealing, breaches of fiduciary duties, and the taking of millions of dollars occurred. These facts were inadmissible because Goldberg did not provide any testimony that anyone had personal knowledge of the facts as required by ER 602. Moreover, the allegations contained in the Notice of Dispute were inadmissible hearsay pursuant to ER 801 and 802. Similarly, the documents referred to in the Notice of Dispute contained

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inadmissible hearsay pursuant to ER 801 and 802 and were not properly authenticated pursuant to ER 901. Thus, the Court should affirm the Trial Court's grant of the Quiggs' Motion to Strike.

Dated this 18th day of September, 2013 at Portland, Oregon.

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CERTIFICATE OF SERVICE

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by the following indicated method or methods:

- X by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.
- X by **email transmission** a full, true and correct copy thereof to the attorney email address as shown above, which is the last-known email address for the attorney, on the date set forth below. *(With prior permission granted by: _____ on _____)*

Dated this 18th day of September, 2013 at Portland, Oregon.

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