No. 80672-1

SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY NELSON and the marital community composed of Larry and Barbara Nelson,

Plaintiffs/Respondents

v.

WESTPORT SHIPYARD, INC.; J. ORIN EDSON and CHARLENE EDSON; and DARYL WAKEFIELD and KIM WAKEFIELD,

Defendants/Petitioners

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ON PETITION FOR REVIEW FROM COURT OF APPEALS,
DIVISION TWO

PETITIONERS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This case involves what should have been a fairly straightforward legal issue. Plaintiff below, Larry Nelson, alleged various causes of action against his former employer, Westport Shipyard, and also several claims arising out of Nelson's status as a shareholder in Westport. The parties' relationship as shareholders was governed by a shareholder agreement signed in 2004 (the "2004 Shareholders Agreement"). Nelson also named the other shareholders and their spouses as defendants, and these individuals, together with Westport Shipyard, are the Petitioners in this appeal.

The crux of the issue is which, if any, of Nelson's claims against the Petitioners should be heard by an arbitrator in the first instance. Petitioners argued before the trial court and Division II that Nelson's challenges to the enforceability of the 2004 Shareholders Agreement should be heard by the arbitrator in the first instance, pursuant to the United States Supreme Court's decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

Buckeye's holding was clear and simple: challenges to a contract as a whole that contain an arbitration clause must be heard by the arbitrator in the first instance. This bright line rule was wholly consistent with long-standing federal jurisprudence requiring that the laws governing arbitration should be construed liberally in favor of arbitration. And since Nelson himself had conceded that the 2004 Shareholders Agreement was governed by the Federal Arbitration Act, that should have been the end of the matter.

Yet instead of applying these well established principles, Division II swung the proverbial pendulum full force in the opposite direction. Applying a deliberately restrictive reading of Buckeye, and laboring to distinguish facts that should have had no bearing on the plain question presented, Division II concluded that Buckeye (and federal law altogether) did not apply to Nelson's challenge to the 2004 Shareholders Agreement as a whole, citing the supposed critical difference between "narrow" and "broad" arbitration clauses. This conclusion finds no support in the case law either preceding or following Buckeye. Division II's additional reasoning as to why federal arbitration law would not apply is similarly erroneous.

The resulting state of the law in Washington is thus inconsistent with fundamental principles of arbitration law in Washington, in other states, and in the federal courts, including a long line of United States Supreme Court cases mandating the liberal construction of arbitration clauses to effectuate adjudication in an arbitral forum. This Court should return the swinging pendulum to its proper place, which will encourage uniformity and simultaneously discourage forum shopping. The Court of Appeals decision should be reversed, and the case remanded with direction that the arbitrable claims proceed immediately to arbitration.

II. SUPPLEMENTAL STATEMENT OF THE CASE

The factual history of the events leading to this appeal are outlined in the Petitioners' (then "Appellants") Opening and Reply Briefs, submitted to the Court of Appeals and now before this Court, and will not

be reiterated in detail here. Petitioners will reiterate only those points that are undisputed and material to this Court's analysis:

- Nelson does not dispute that the Federal Arbitration Act ("FAA") applies to this contract. Indeed, he conceded this threshold point in early briefing before the trial court on compelling arbitration.

- Nelson admits that he understood that the 2004 Shareholders Agreement required arbitration of certain issues related to the contract.

- Nelson has testified that he is not challenging the validity of the arbitration clause itself.

- Nelson's claim that is the subject of this appeal is a challenge to the validity of the contract as a whole -- an assertion that the 2004 Shareholders Agreement signed by him is not enforceable.

These undisputed facts notwithstanding, the Court of Appeals in Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 163 P.3d 807 (2007), reached the following conclusions:

- Buckeye's holding that a challenge to a contract as a whole, as opposed to a challenge to an arbitration clause therein, must be heard by the arbitrator in the first instance, was an "overly-broad holding." 140 Wn. App. at 115.

- The United States Supreme Court did not intend the broad language in Buckeye to apply to "narrower" arbitration provisions. Id.

- The FAA does not apply because the arbitration provision in the 2004 Shareholders Agreement does not specifically refer to the FAA. Id. at 113-14.

- Federal law would not apply to the 2004 Shareholders Agreement in any event because (1) Westport is a closely-held corporation; and (2) there is a general Washington choice-of-law provision in the contract. Id. at 114.

The Court of Appeals then determined that the only claim "arising out of" the 2004 Shareholders Agreement was the proper value of the buyback

value of Nelson's shares in Westport, id. at 118-19, and that no other claims or defenses would be heard by the arbitrator.[1]

III. SUPPLEMENTAL ARGUMENT

A. Whether an Arbitration Clause at Issue Is "Broad" or "Narrow" Is of No Moment. BUCKEYE Plainly Mandates that a Challenge to the Contract as a Whole, as Is the Case Here, MUST Be Heard by the Arbitrator in the First Instance.

The holding in Buckeye is simple, and the United States Supreme Court laid out the applicable principles concisely and clearly: (1) arbitration provisions are severable from the remainder of the contract; (2) the issue of a contract's validity is to be heard by the arbitrator in the first instance "unless the challenge is to the arbitration clause itself;" and (3) this arbitration law applies equally in federal and state courts. Buckeye, 546 U.S. at 445-46. The Court in Buckeye gleaned these basic principles from its prior holdings in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967), and Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). These decades-old cases are the bedrock upon which Buckeye rests. Yet, the Court of Appeals in Nelson characterized Buckeye as being an "overly-broad holding" and opined that the United States Supreme

[1] The Court of Appeals also declined to review Nelson's argument that Westport's appeal was untimely, which had previously been rejected by the court's commissioner in denying a motion to dismiss Petitioners' appeal. Nelson, 140 Wn. App. at 110 n.5. Petitioners have previously addressed this matter at the Court of Appeals and in Petitioners' Reply to Nelson's Answer to the Petition for Review, and Petitioners stand on this briefing. See Appellants' Reply Brief, pp. 16-24; see generally Reply to Answer for Petition for Review.

Court did not intend for its holding in Buckeye to apply to arbitration clauses that are "narrower in scope" than the arbitration clause in Buckeye. Nelson, 140 Wn. App. at 115. This conclusion is dangerously flawed for a number of reasons, all of which mandate that this Court reverse the Court of Appeals, reaffirm that the basic principles set forth in Buckeye apply in our state courts, and remand so that the arbitrable claims can proceed forthwith to arbitration.

1. There Is Not So Much as a Hint in BUCKEYE that the Particular Language of the Arbitration Clause Determines Whether the Principles in BUCKEYE Ultimately Apply to the Contract. Perhaps the most troubling error that the Court of Appeals made in construing Buckeye was concluding that the purported scope of the arbitration clause -- "broad" versus "narrow" -- in any way determines whether Buckeye's plain rule applies. Nelson, 140 Wn. App. at 115. This distinction is not supported by Buckeye or any other case law, is contrary to the decisions upon which Buckeye's rests, and misstates the guiding principles of arbitration law. Indeed, Buckeye did not examine or even discuss the difference between "broad" and "narrow" arbitration clauses, and did not revisit the language in the arbitration clause at issue after initially reciting the clause. It is an untenable stretch to maintain that Buckeye should be applied differently based upon some "narrow" versus "broad" construction of the arbitration clause at hand, which is plainly contrary to the presumption in favor of arbitration.

a. Courts Must Apply the Presumption of Arbitrability Regardless of Whether the Arbitration Clause Is "Narrow" or "Broad," and

Any Contrary Approach Turns This Well Established Presumption on Its Head. As detailed at length in the merits briefing below and in the Petition for Review, both state and federal law have a strong presumption in favor of construing arbitration provisions liberally and finding in favor of arbitrability. See Appellants' Opening Brief, pp. 25-29; Appellants' Reply Brief, p. 8, Petition for Review, pp. 10-11; see also n.7, infra. Even before Buckeye, courts consistently applied the presumption in favor of arbitration, even where the arbitration clause was ostensibly "narrow."

- Int'l Bhd. of Elec. Workers, Local 2188 v. Western Elec. Co., 661 F.2d 514, 516 n.3 (5th Cir. 1981) ("[T]he [Supreme] Court has never indicated, in its statement of the rule, that the presumption [in favor of arbitration] is limited to such broad clauses. . . . Such a limitation would render the presumption of little value as a rule of construction: we would first have to determine that the arbitration clause is 'broad' enough to cover all contractual disputes, and only then apply the presumption (when it is no longer needed). Moreover, this court has consistently applied the presumption to arbitration clauses of varying breadth. . . . [I]n determining whether a dispute is within the confines of the arbitration clause, the presumption of arbitrability applies, regardless of whether one party characterizes the clause as 'narrow.'") (citations omitted).

- Washington Mailers Union No. 29 v. Washington Post Co., 233 F.3d 587, 592 n.4 (D.C. Cir. 2000) ("The Post argues that the presumption cases are inapplicable because they involve the construction of a 'broad' arbitration clause. We disagree. While the fact that the arbitration clause in this case is not broad -- limiting grievances to allegations of 'violation of a specific provision of this Agreement' -- is relevant to our inquiry, it does not negate the presumption of arbitrability.") (citing Western Electric, 661 F.2d at 516 n.3).

- Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1320 n.23 (11th Cir. 2002) (rejecting argument that presumption in favor of arbitration applies only to broad arbitration clauses and does not apply to "narrow" arbitration clauses, stating that "the Court in Moses [H.] Cone made no such distinction, but rather, grounded its preference for arbitration in the 'congressional declaration [in the

FAA] of a liberal federal policy favoring arbitration agreements.'" (emphasis added)).

- In re Dillard Dept. Stores, Inc., 186 S.W.3d 514, 516 (Tex. 2006) (construing "narrow" arbitration clause to cover plaintiff's claims, stating that "[a] court should not deny arbitration 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'"); (Therefore, where the arbitration agreement is susceptible to an interpretation that would include plaintiff's claims, the trial court is required to compel arbitration.).[2]

Thus, and as discussed further below, regardless of the scope of the arbitration clause, the presumption favoring arbitrability applies with full force, and should be confirmed as the rule in Washington.

b. State Courts Applying BUCKEYE Either Have Rejected the Distinction Between "Broad" and "Narrow" Arbitration Clauses, or Have Not Even Bothered to Address the Issue at All. Post-Buckeye decisions in our sister state courts have expressly rejected -- or ignored altogether -- any purported distinction between "broad" versus "narrow" arbitration clauses.

In Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC, 157 P.3d 470 (Alaska 2007), the Alaska Supreme Court, in construing a "narrow" arbitration clause, ruled that whether the arbitration clause is "narrow" or "broad" is immaterial to an analysis under Buckeye. The

[2] These and similar decisions have dealt primarily with arbitration clauses that were deemed "narrow" because they referred to the arbitrability of specific disputes. See, e.g., Int'l Bhd. of Elec. Workers, Local 2188 v. Western Elec. Co., 661 F.2d 514, 515 (5th Cir. 1981) (arbitration clause specifically limited to issues over classification of employees in the union). But all of these decisions relied on the long line of Supreme Court precedent establishing the presumption in favor of arbitration, and therefore are just as instructive for any case like the present case addressing any distinction between the phrases "arising out of" and "relating to."

Alaska Supreme Court specifically rejected the parties' attempt to distinguish Buckeye on the basis that the arbitration provision at issue was admittedly "narrow."[3] The Court went on to confirm that "regardless of whether the arbitration agreement at issue is identical to the agreement before the court in Buckeye, the Court's holding [in Buckeye] applies." Id. at 475.

Other state courts applying Buckeye have not even bothered to undertake any "narrow" versus "broad" analysis. For example, in C. R. Klewin Northeast, LLC v. City of Bridgeport, 282 Conn. 54, 919 A.2d 1002 (Conn. 2007), the city of Bridgeport claimed that the entire contract, which contained an arbitration clause, was void *ab initio*. Id. at 63-64. Without reciting or discussing the scope of the arbitration provision, the Connecticut Supreme Court held that Buckeye applied to the challenge to the enforceability of the contract as a whole, and that the matter was "firmly committed to the arbitration panel in the first instance." Id.; accord Martz v. Beneficial Montana, Inc., 332 Mont. 93, 98-99, 135 P.3d 790 (Mont. 2006)

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[3] The Alaska Supreme Court's specific language bears repeating, as it speaks directly to the issue here:

> Goldbelt Eagle attempts to distinguish Buckeye by arguing that the arbitration clause in Buckeye was more exhaustive than the clause at issue in this case. Although Goldbelt Eagle is correct that this arbitration agreement is drafted differently from the clause at issue in Buckeye, the Supreme Court's holding in Buckeye was broad. It was not predicated on a close reading of the agreement at issue in that case; the Court did not parse the language of the agreement, nor did it refer back to the language of the clause after initially quoting it.

Lexington Marketing Group, 157 P.3d at 475 (emphasis added).

(Montana Supreme Court did not cite to the arbitration provision or discuss any issue of "narrow" versus "broad," yet determined that Buckeye applied to the challenge to the agreement as a whole); Salley v. Option One Mortgage Corp., 542 Pa. 323, 338, 925 A.2d 115 (Pa. 2007) (same; noting that Buckeye established a bright-line rule that challenges to the validity of the contract as a whole go to the arbitrator). Thus, limiting Buckeye's application only to those so-called "broad" arbitration clauses is both expressly and implicitly inconsistent with the decision of every appellate court of every other state that has addressed the scope of Buckeye.[4]

2. MEDITERRANEAN ENTERPRISES Is Instructive: In the Context of an Admittedly "Narrow" Arbitration Clause, the Ninth Circuit Nonetheless Stayed the Litigation and Let the Arbitrable Claims Go to Arbitration. The Court of Appeals was dismissive of the Ninth Circuit's reasoning in Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983). See Nelson, 140 Wn. App. at 117 n.9 ("Mediterranean is immaterial to resolving the question of whether a trial court should generally submit disputes of contract validity to the arbitrator"). The Court of Appeals' conclusion ignores that Mediterranean dealt with the exact issue now before this Court: Do claims and defenses regarding the enforceability

[4] In Tortoriello v. Gerald Nissan of N. Aurora, 379 Ill. App. 3d 214, 882 N.E.2d 157 (Ill. Ct. App. 2008), the Illinois Court of Appeals applied Illinois' state arbitration law to the arbitration provision at issue, citing the fact that none of the parties had ever asserted that the claims were subject to the FAA. Id. at 225. The court noted that it was precluded from determining, on appeal, the factual question of whether the FAA applied, and therefore declined to do so. Id.

of the contract as a whole go to the arbitrator in the first instance, even where the arbitration clause is deemed to be "narrow"? Mediterranean answered that question emphatically in the affirmative, and the Ninth Circuit affirmed the trial court's stay of the litigation pending the arbitration. Thus, the one case dealing with "narrow" arbitration clauses indeed concluded that certain of the claims -- dealing with breach and enforceability of the contract -- nonetheless had to be arbitrated. Tellingly, the Court of Appeals in Nelson did not cite a single case wherein arbitration was denied because the contract contained a "narrow" arbitration clause.[5]

3. Strong Public Policy Supports Liberal Construction of the Law Governing Arbitration in General and Applying BUCKEYE, Specifically: Uniformity Discourages Forum Shopping. In Southland Corp. v. Keating, 465 U.S. 1, 15, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), the United States Supreme Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the requirement of arbitration in similar cases. The Court concluded that the Federal Arbitration Act preempts state law; and it held that state courts

[5] Nelson cited a number of unpublished opinions in his brief before the Court of Appeals. See Respondent's Brief, pp. 31-34. Petitioners addressed these cases in Appellants' Reply Brief at pages 10-13. Petitioners only revisit this issue now to point out that Nelson did discuss Mediterranean in his brief, highlighting the narrow versus broad issue, but makes no mention of the fact that the Ninth Circuit parsed out the arbitrable and nonarbitrable claims -- even with a "narrow" arbitration clause, and sent three of the plaintiff's claims to arbitration, affirming the trial court's stay of the litigation until completion of the arbitration. Cf. Respondent's Brief, pp. 32-33, with Mediterranean, 708 F.2d at 1464-65. Nelson has yet to reconcile his position with that taken in Mediterranean.

cannot apply state law to bar arbitration in circumstances where federal courts require it. Id. at 15-16. The Court in Southland reasoned:

> Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable. The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted.

Id. at 15 (internal citations and footnotes omitted; emphasis added).

The Court of Appeals simply "got it wrong," and this Court now has the opportunity to confirm that Washington law, especially in light of Washington's strong policy favoring arbitrability, is consistent with other federal and state courts' law on both basic principles of arbitration law, as well as the specific application of the United States Supreme Court's decision in Buckeye.

B. The Court of Appeals' Conclusory Determination that BUCKEYE Does Not Apply Because Federal Law Did Not Apply Is Contrary to Law and Inconsistent with Nelson's Own Admission that the FAA Applies.

After (erroneously) dismissing the "overly-broad holding" in Buckeye, the Court of Appeals went on to reach the conclusion that federal law would not apply in this case because: (1) the corporation involved is a local, closely-held corporation; and (2) there is a Washington choice-of-law provision in the 2004 Shareholders Agreement. Nelson, 140 Wn. App. at 115. These conclusions are also contrary to controlling law and the record.

1. Nelson Himself Admits that the 2004 Shareholders Agreement is Subject to the FAA. Nelson admits that the FAA applies here. See Plaintiff's Opposition to Motion to Stay Litigation and Compel Arbitration, p. 3 n.1 (CP 86). Specifically, Nelson declared:

> Defendants have not asserted that the FAA does not apply here, and based on Washington case law, the FAA does apply even though this matter is in state court. "Chapter 1 of the FAA applies in both state and federal courts . . . ." Kamaya Co. v. American Property, [sic] 91 Wn. App. 703, 710, 959 P.2d 1140 (1998).

Id. (emphasis added). Indeed, Nelson has never since disputed that the FAA applies, or that Westport, which (along with its shareholders) is a party to the 2004 Shareholders Agreement, is in the business of interstate commerce.

2. The Court of Appeals Cited No Authority that a Closely-Held Corporation Is Not Governed By the Same Federal Law that All Corporations Engaged in Interstate Commerce Are Governed by, and Such a Conclusion Is Contrary to Well-Established Principles of Federal Arbitration Law. The Court of Appeals cited no authority for the proposition that a "closely-held" corporation engaged in interstate commerce should be treated any differently than a publicly held corporation. (Indeed, in the on-point case of Bosworth v. Ehrenreich, 823 F. Supp. 1175, 1179 (D.N.J. 1993), the court applied the FAA to an arbitration provision in a shareholders agreement between the three equal co-owners of a closely-held corporation that engaged in interstate commerce. See Petition for Review, p. 17.)

The FAA was specifically enacted to prevent state courts from adopting legal rules that could undermine arbitration. Permitting a state court

to graft restrictive requirements onto the FAA about the nature of the contracting entity is directly contrary to the purpose of Congress' enactment of the FAA, which is to overcome state court refusals to enforce arbitration agreements. E.g., Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 270, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). Congress intended that the FAA would require state courts to enforce arbitration agreements and place them on the same footing as other contracts. Id., 513 U.S. at 271 (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) and Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), in turn citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)). State courts simply are not empowered to create obstacles to the application of federal arbitration law. See, e.g., Threlkeld v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir. 1991) (state law requirements that add more rigid requirements for enforceability of arbitration agreements are preempted as "they effectively reincarnate the former judicial hostility towards arbitration"). That Westport may be a closely-held corporation is wholly immaterial to the analysis -- the 2004 Shareholders Agreement satisfies the requirements for FAA coverage.

3. A Generic Choice-of-Law Provision Will Not Remove an Arbitration Provision from the Ambit of the FAA. The Court of Appeals also inferred from the generic Washington choice-of-law provision in the 2004 Shareholders Agreement that the Agreement would not be subject to federal law. Nelson, 140 Wn. App. at 115. This conclusion is contrary to

the decisions of federal and state courts, including Division I of the Washington Court of Appeals.

Division I has previously provided a comprehensive analysis of how the FAA applies in state courts, and the interplay of the FAA with choice-of-law provisions. In Kamaya Co., Ltd. v. American Property Consultants, Ltd., 91 Wn. App. 703, 709-13, 959 P.2d 1140 (1998). Division I rejected the argument that a generic Japanese choice-of-law provision trumped application of the FAA, even though the choice-of-law provision applied to "essentially the whole agreement," concluding:

> [I]t is axiomatic that courts must have some law to apply when initially determining whether the parties agreed to arbitrate a particular dispute. The FAA provides courts with this necessary analytical framework. . . . Therefore, we hold that although the FAA does not preempt the partnership agreement's Japanese choice-of-law provision, "whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law."

Id. at 713 (internal citation omitted). Yet, in Nelson, Division II did not address, or even cite to Kamaya when it concluded that the FAA did not apply because of the Washington choice-of-law provision.

This leaves the Nelson decision at odds not only with Division I's holding in Kamaya, but also with other federal and state courts that have specifically addressed the issue. See, e.g., Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 289 (3d Cir. 2001), abrogated on other grounds by Hall Street Assoc., L.L.C. v. Mattel, Inc., --- U.S. ---, 128 S. Ct. 1396, 1403 n.5, 170 L. Ed. 2d 254 (2008) (generic choice-of-law clause does not demonstrate that parties intended to opt out of the FAA's default standards);

Jeereddi A. Prassad M.D., Inc. Retirement Plan Trust Profit Sharing Plan v. Investors Assocs. Inc., 82 F. Supp. 2d 365, 369 (D.N.J. 2000) (holding that choice-of-law provision, that at best creates ambiguity in the contract and at worst undermines the finality of arbitration awards, will not affect application of FAA and federal law principles to arbitration agreement); J. Alexander Sec., Inc. v. Mendez, 17 Cal. App. 4th 1083, 1091, 21 Cal. Rptr. 2d 826 (Cal. Ct. App. 1993) (choice-of-law provision merely designates the substantive law that the arbitrators must apply); Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344, 352 n.5 (Minn. 2003) (Minnesota choice-of-law provision in contract did not establish that arbitration should be governed by Minnesota law rather than FAA and its progeny; "Courts do not interpret contract language to preclude application of the FAA unless the parties' intent is 'abundantly clear.'" (citation omitted)); Dewey v. Wegner, 138 S.W. 2d 591, 596 (Tex. Ct. App. 2004) ("[A] choice-of-law clause that does not specifically exclude application of federal law will not preclude application of the FAA."); see also, Volt Info. Sciences, 489 U.S. at 476 (choice-of-law provision could designate procedural rules for arbitration and were not preempted by FAA; "rules which are manifestly designed to encourage resort to the arbitral process" do not offend the FAA).

Permitting a choice-of-law clause to trump the FAA offends one of the most basic principles of arbitration: Any ambiguity should be resolved in favor of arbitration. In Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995), the United States Supreme Court reasoned that "[a]t most, a choice of law clause introduces

an ambiguity into an arbitration agreement," and affirmed the principle that "'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" Id. at 62 (emphasis added) (quoting Volt, 489 U.S. at 469).[6] The only conclusion consistent with these fundamental tenets of arbitration law is to confirm the holding in Kamaya that a general choice-of-law provision does not affect the application of the FAA.[7]

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[6] In Preston v. Ferrer, --- U.S. ---, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008), issued after the Court of Appeals filed the Nelson opinion, the Supreme Court further refused to infer that the generic California choice-of-law provision would govern the arbitration provision, rather than federal law. The Supreme Court in Preston found that the presence of a reference to the American Arbitration Association Commercial Arbitration Rules in that agreement weighed against inferring that the choice-of-law provision governed. Id. at 989. As noted in the Nelson decision, the 2004 Shareholders Agreement also referred to the AAA rules. 140 Wn. App. at 114. Yet the Court of Appeals read that to mean that federal law did not apply, but that state law did. Id.

[7] This is a further reason why the Court of Appeals' conclusion, that the FAA did not apply because the contract did not specifically mention it, is bewildering. Nelson, 140 Wn. App. at 114. Requiring that the agreement specifically call out the FAA again tips the presumption regarding arbitrability in the wrong direction. Both Washington courts and the U.S. Supreme Court have repeatedly declared that "[c]ourts must indulge every presumption 'in favor of arbitration.'" Zuver v. Airtouch Communc'ns Inc., 153 Wn.2d 293, 301, 103 P.3d 753 (2004); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. (Emphasis added.)). Requiring that the FAA be affirmatively cited in the arbitration agreement is 180 degrees contrary to these basic and well established principles. See also n.4, supra.

C. Nelson's Complaints About the Potentially Preclusive Effect of an Arbitration that Precedes Litigation Are Unfounded; Washington Courts Routinely Recognize This Preclusive Effect.

Nelson attempts to make much legal hay out of the potentially preclusive effect of proceeding to arbitration and having the arbitrator make certain factual findings before the litigation, as though such a principle is offensive to Washington jurisprudence. To the contrary, Washington courts have embraced the collateral estoppel effects of an arbitration preceding litigation, even where the party opposing estoppel cries foul vis-à-vis his right to a jury trial:

> Contrary to Hamed's claim, it is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial. Hamed's assertion that doing so deprives him of his right to trial by jury is totally without merit. The United States Supreme Court has specifically rejected this claim in Parklane Hosiery Co. v. Shore[, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d (1979)], holding that a party's right to jury trial is not infringed by the application of collateral estoppel based on a factual finding in a previous non-jury case.

Robinson v. Hamed, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991) (emphasis added). Indeed, the Robinson court continued, "'preclusion may not be defeated simply by showing that there was no right to trial by jury in the first action and that there is a constitutional right to trial by jury in the second action, no matter what anguish that may cause to those who believe in juries.'" Id. at 97 (emphasis added) (citing Benjamin v. Traffic Executive Ass'n, 869 F.2d 107, 114 (2d Cir. 1989), in turn quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4465, at 600 (1981)); accord Neff v. Allstate Ins. Co., 70 Wn. App. 796, 800, 855

P.2d 1223 (1993) ("[A]n arbitration proceeding may be the basis for collateral estoppel or issue preclusion." (Citation omitted.)).

Again, the fact that the initial proceeding -- the arbitration -- was without a jury does not offend constitutional principles regarding a party's right to a jury trial. Robinson, 62 Wn. App. at 97. "It does not matter whether the prior adjudication occurred in arbitration or in litigation, so long as it resulted in a final judgment." Larsen v. Farmers Ins. Co., 80 Wn. App. 259, 262, 909 P.2d 935 (1996) (citing Neff, supra, Western Indus. & Envtl. Servs., Inc., v. Kaldveer Assoc., Inc., 126 Idaho 541, 887 P.2d 1048, 1050 (1994); E.W. Audet & Sons, Inc. v. Fireman's Fund Ins. Co., 635 A.2d 1181 (R.I. 1994); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 651 (Minn. 1990) (citing cases); Channel v. Channel, 61 Wn. App. 295, 298, 810 P.2d 67 (1991)). Thus, a party is directly estopped from readjudicating the same issue in a subsequent action, even if on a different claim.

In short, there is nothing new, novel or controversial about the idea that findings made in an arbitration proceeding may have a preclusive effect on subsequent litigation. As the Robinson court concluded, this basic principle is true, regardless of what anguish it may cause to those demanding that a jury decide certain facts. This Court will be on solid jurisprudential ground in reaffirming this additional fundamental principle.[8]

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[8] For the same reason, this Court, in reversing the Court of Appeals, should direct that arbitration should proceed immediately and the balance of the case (that is, the few non-arbitrable claims) stayed so that unnecessary duplication of proceedings can be avoided.

IV. CONCLUSION

The Court of Appeals should be reversed and the matter remanded so that the arbitrable issues may proceed immediately to arbitration.

RESPECTFULLY SUBMITTED this 21st day of July, 2008.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on July 21, 2008, I served true and complete copies of Petitioners' Supplemental Brief by U.S. mail on the individuals and law firms listed below:

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