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Supreme Court of Texas.
In re Joseph Charles Rubiola a/k/a J.C. Rubiola, Gregory Allan Rubiola,
Catherine Rubiola, JGL Design-Build, LLC a/k/a JGL Design Build and Michael
Cortez, individually and d/b/a The Heights Design and Construction.
No. 09-0309.

September 16, 2010.

Appearances:

Elizabeth Conry Davidson for relators, for petitioner.
Bryan A. Woods for real parties in interest, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in the first cause 09-0309 In Re Joseph Charles Rubiola.

MARSHAL: May it please the Court, Ms. Davidson will present argument for the Relators. Relators have preserved five minutes for rebuttal.

ORAL ARGUMENT OF ELIZABETH CONRY DAVIDSON ON BEHALF OF THE PETITIONER

ATTORNEY ELIZABETH CONRY DAVIDSON: May it please the Court, my name is Conry Davidson and I represent the Relators, J.C., Greg, and Catherine Rubiola, JGL Design-Build, and the Heights Design and Construction. The underlying suit here is for negligence, DTPA violations, and fraud in real estate transaction, and arises out of the purchase of a home at 816 Garrity Road in San Antonio by the Salmon's, a married couple. In this transaction the Salmon's purchased the home using Rubiola Mortgage and Realty. They did not hire their own broker or their own real estate agent, and instead they used J.C. Rubiola for that. They also applied for mortgage financing with Rubiola Mortgage using J.C. Rubiola as their mortgage broker and loan officer. As part of that process, they entered into an arbitration agreement with Rubiola.

JUSTICE EVA M. GUZMAN: Rubiola the Mortgage Company, correct?

ATTORNEY ELIZABETH CONRY DAVIDSON: The actual piece of paper that was signed, yes, states that Rubiola Mortgage Company is one of the signatories. And J.C. signed it as the pres - he is the president of Rubiola Mortgage Company and he signed it on behalf of the company.

JUSTICE EVA M. GUZMAN: What is his capacity with the real estate?

ATTORNEY ELIZABETH CONRY DAVIDSON: Well I don't believe that they have, I don't know if the real estate entity is a separate thing, but he runs it all. He's the president of it all. I don't know whether they do it separately as an entity. So I don't know if there's a separate company for the real estate company, but he is the president. He is in charge of everything.

JUSTICE EVA M. GUZMAN: Of the mortgage company that we know of for sure.

ATTORNEY ELIZABETH CONRY DAVIDSON: Yes. Yes. And he acted as the broker and the agent in this situation and he also helped the Salmon's with, he was in charge of dealing with the construction that was supposed to be done and was done before they actually moved into the home. Now the arbitration agreement that was signed between the parties was a very broad one. It covers any and all controversies between the parties, all arbitrable disputes, any and all controversies or claims between the parties of whatever type or manner including without limitation all past, present, and/or future agreements between the parties. It also defines parties very broadly as including Rubiola Mortgage Company, each and all persons signing the agreement or other agreements among the parties as part of this transaction. It also defined the parties to include all of the individual partners, affiliates, officers, directors, employees, agents, and representatives of any party to these documents, and included the holder and owner of the agreement

JUSTICE DAVID M. MEDINA: Do you think the fact that it's so broad to include just about everybody in the world creates a problem?

ATTORNEY ELIZABETH CONRY DAVIDSON: I don't know that it includes everybody in the world, but I do think that it's very broad in terms of parties and that that means that it certainly includes J.C. Rubiola, who is the president of Rubiola Mortgage and Greg, who is an officer of Rubiola Mortgage, as well as both being employees and representatives and agents of that entity. And so by suing them personally and individually instead of including Rubiola Mortgage, the Salmon's should not be allowed to evade the arbitration agreement that they signed.

JUSTICE EVA M. GUZMAN: Well the claims don't relate to the mortgage transaction, correct?

ATTORNEY ELIZABETH CONRY DAVIDSON: Well I disagree. I believe it's true; they don't complain about the financing itself. They complain about fraud and negligence and misrepresentations.

JUSTICE EVA M. GUZMAN: With respect to the home that's alleged to have mold.

ATTORNEY ELIZABETH CONRY DAVIDSON: That's true. However, the cases interpreting arbitration agreements that come in a document separate from other documents that are all part of one transaction holds that if they are related to each other sufficiently, then that means that the arbitration agreement is going to apply to the transaction. And when you have an arbitration clause that's as broad as the one here that is especially the case. So although there may be various documents that are executed by the parties, they were all in this situation as they are in these cases holding this way key elements of a transaction. And specifically what I mean here is that the Rubiola, I'm sorry. The Salmon's sought to purchase a house. They did and they went to Rubiola Mortgage to do that. And what they did was they got a listing agent, a broker, they got financing and the whole package resulted in them purchasing a house.

JUSTICE DEBRA H. LEHRMANN: So are you saying that the arbitration agreement had something to do with the deal other than the financing? In other words, I'm having some difficulty figuring out how the claims that have to do with the condition and repair of the home relate to the financing of the home. Can you explain that please?

ATTORNEY ELIZABETH CONRY DAVIDSON: I can and perhaps this kind of goes to the non signatories issue I think in a way. But first of all I think that they don't have to rely specifically on the claims in that financing, in the financing documents for it to be considered an arbitrable claim, okay. Because it was, you can have several different documents in a transaction and as long as they are all sufficiently related to each other and they touch on each other and all of the things are intertwined, then the arbitration clause will apply to the entire transaction. For instance, in--

JUSTICE DAVID M. MEDINA: You're saying separate documents in a closing transaction are all one package and therefore if there's one arbitration clause and one agreement that it applies to every agreement that is signed at a closing?

ATTORNEY ELIZABETH CONRY DAVIDSON: Well no because there are certain, I mean sometimes things can happen where there's, where that's not the case. In this case, yes because they signed the real estate contract, they wanted financing from Rubiola; they did everything with Rubiola Mortgage. And they would not you know as the Auto Nation case I think says, they would not have this issue. They would not have bought that house. They wouldn't have had the house to complain about if they hadn't gone through this whole process. I agree; they could have gotten financing someplace else, but they didn't. They went to Rubiola Mortgage Company. They got everything there and in the process, now I don't know when the Rubiola's hand their clients a disarbitration agreement, which comes by itself. It's one piece of paper by itself. They may, I don't know and there's no evidence in the record of whether they do that when the deal's about to close whether or not they're the ones who are providing the financing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Were there any other contracts between the Salmon's and Rubiola entities at all concerning the house or construction or anything whatsoever?

ATTORNEY ELIZABETH CONRY DAVIDSON: The real estate contract is between Greg Rubiola individually, his wife, and the Salmon's. And then there were agreements that I don't believe were written to do the construction that was done.

CHIEF JUSTICE WALLACE B. JEFFERSON: And were there any other arbitration contracts in those?

ATTORNEY ELIZABETH CONRY DAVIDSON: The only arbitration agreement I'm aware of is the one that's in the record that was just a one page that was filled out or agreed to at the time that they were requesting financing. And so there are several cases that tried to look at and determine what to do in this situation where there are several documents all involved in one transaction, and I know that that's what the Court is concerned about. However, there's, for instance, the Fifth Circuit in Motorola said that it is of no moment that there is more than one agreement, each focusing on a different aspect of the transaction that could be a valid freestanding contract. In the Auto Nation case it was a similar situation where there is a financing agreement. It is a purchase of a vehicle there. The plaintiff was arguing, was making arguments that the arbitration clause in the real estate and I'm sorry, the retail installment contract didn't apply because she wasn't complaining about the financing. And the Court said but for her purchase, which was allowed or was happened because there was a retail installment agreement. But for that purchase there would have been no relationship between the parties and no financing transaction and that is the basis of her claims in that case. Here, but for the purchase, the Salmon's wouldn't have had their claims against the Rubiola's. And instead of--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well that would have been true whether or not they financed through Rubiola, right? If they had gone with a different mortgage company but for their financing they

wouldn't have that relationship with the builder either.

ATTORNEY ELIZABETH CONRY DAVIDSON: That's true, however, they I think it would be a different case then. I think that if it were that situation then I don't know if the Rubiola's would have given an arbitration agreement.

CHIEF JUSTICE WALLACE B. JEFFERSON: So but for is not sufficient. It's necessary, but not sufficient.

ATTORNEY ELIZABETH CONRY DAVIDSON: That's true; I agree.

CHIEF JUSTICE WALLACE B. JEFFERSON: So what else do you need?

ATTORNEY ELIZABETH CONRY DAVIDSON: Pardon?

CHIEF JUSTICE WALLACE B. JEFFERSON: What else do you need?

ATTORNEY ELIZABETH CONRY DAVIDSON: Well, you need a connection between the, you need a good enough connection between the agreements or the documents at issue and the arbitration agreement, and the causes of action and the allegations in the lawsuit. And this gets a little bit into the issues they argue about about parties and third parties and the estoppel issues that we've raised in our reply brief, and that is that the Salmon's have; this goes to non signatories, but the Salmon's have alleged the same claims against everybody in this lawsuit. There's only one diff - based on the same facts, same causes of action against every party in this lawsuit. The only difference is they have a lead paint disclosure claim against Greg and Catherine Rubiola. So because they have, I mean it's true that they don't specifically reference the financing.

JUSTICE DEBRA H. LEHRMANN: So is your point that the fact that this was basically a one-stop shop is a very significant fact?

ATTORNEY ELIZABETH CONRY DAVIDSON: Yes Your Honor, it is.

JUSTICE DEBRA H. LEHRMANN: Okay.

ATTORNEY ELIZABETH CONRY DAVIDSON: It is. They went there for everything. It was one deal. They even, it's not really relevant, but they even sold the Salmon's house for them so that they could close the deal.

JUSTICE EVA M. GUZMAN: Well assuming that the non signatories can compel arbitration; can you talk about the scope of these claims? I think that would be the next step in the inquiry, whether the particular claims at issue fall within the scope of what you contend as a valid arbitration clause.

ATTORNEY ELIZABETH CONRY DAVIDSON: Okay, yes, I can do that. I've already told the Court the wording or the language in the arbitration agreement and it's very broad. And Courts have repeatedly held that very broad arbitration agreements will be construed that way. And the ultimate inquiry is to look at the factual allegations in the complaint, rather than the legal causes of action asserted. And if the facts alleged touch matters have a significant relationship to or are inextricably enmeshed with or are factual intertwined with the contract that is subject to the arbitration agreement, the claim will be arbitrable.

JUSTICE EVA M. GUZMAN: Am I correct that your agreement didn't have the arising under or relating to language in it?

ATTORNEY ELIZABETH CONRY DAVIDSON: Do I believe, I'm sorry; could you say that again?

JUSTICE EVA M. GUZMAN: The arising to or, arising under or relating to language. I don't think that was

part of your agreement and in some of the cases discussing scope that's been pivotal language if you will to determine whether the claims fall within the scope.

ATTORNEY ELIZABETH CONRY DAVIDSON: I would agree, although I understand that that may be more for the cases where it's actually the contract that contains the arbitration clause that's being argued about. I mean of course here we have an arbitration cause or arbitration agreement that is basically a standalone agreement that was given to, that was signed in the context of this entire transaction. And I know that Mr. Woods will probably talk because he has a timeline about the fact that they weren't all done at the same time, maybe contending that this isn't contemporaneous. However, I believe that the cases support the conclusion that these documents don't all have to be executed at the same time; it just has to be viewed as one transaction. I know that Mr. Woods will probably also inline with what the Court has been asking, contend that this is a party issue rather than an issue of breadth. And I believe that this language that I just mentioned here demonstrates that if you do have such a broad arbitration agreement that there's no other defense here. There's no waiver, there's no defense, there are no contentions that they were you know induced into signing this and didn't intend to, or any of those things. They knowingly did it and so they willingly signed a very broad arbitration agreement that has a very broad definition of parties, and then the Salmon's specifically chose to sue everybody but mortgage, realty, or I'm sorry, Rubiola Mortgage or Rubiola Mortgage and Realty Company. And I think that there's a reason for that and that is that they were trying to avoid the application of the arbitration agreement. Everything that J.C. took actions on behalf of both the mort - as a listing agent or broker and also as the financing and loan agent or mortgage broker and loan officer for them at the same time and they sue him. And although in their petition they haven't and that's part of the problem. They have not distinguished between his actions doing these different things and so yet they want us to distinguish. They think that it should be distinguished for purposes of an arbitration agreement, his actions as an individual, his actions as the broker, his actions as the loan officer instead of viewing them all as one piece. And that's essentially what they've alleged in their petition.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. Court is ready to hear argument from the Real Parties in Interest.

MARSHALL: May it please the Court, Mr. Woods will present arguments for the Real Parties in Interest.

ORAL ARGUMENT OF BRYAN A. WOODS ON BEHALF OF THE RESPONDENT

ATTORNEY BRYAN A. WOODS: Good morning. May it please the Court, my name is Bryan Woods and I represent the Real Parties in Interest, Brian and Christina Salmon. I think the fundamental question for the Court today is are we going to tell the citizens and consumers of this state that their real estate contracts that have an entire agreement clause in them, that say you can pursue claims in the courthouse, and is final for negotiation purposes all options have expired, that those contracts can be changed by a later signed agreement that has nothing to do with this lawsuit, that doesn't have all of the same parties, is signed at a different time and for a different purpose.

JUSTICE EVA M. GUZMAN: Did your real estate agreement contain language though that it could be amended by a later writing? Wasn't that in part of the real estate agreement?

ATTORNEY BRYAN A. WOODS: Yes, Your Honor, it could, and I'm glad you asked that question. It says by written agreement between the parties. Who are the parties to the real estate contract?

JUSTICE EVA M. GUZMAN: Well one of them was acting in a dual capacity, both as the mortgage broker and the listing agent. How does that impact your argument?

ATTORNEY BRYAN A. WOODS: The signatories and the only parties, Your Honor, to the real estate contract are my clients and Greg and Catherine Rubiola, sellers. There are no other parties or signatories to that real es-

tate contract, which is the sole contractual wellspring giving rise to this case. This case relates purely and solely to the physical condition of this home and has absolutely nothing to do with financing.

JUSTICE PAUL W. GREEN: But your client was a party and did sign the agreement. Whether or not the other party did, your client did agree to the arbitration.

ATTORNEY BRYAN A. WOODS: Yes Your Honor. My client signed a later agreement with a separate entity, Rubiola Mortgage Company, that was not a party to the real estate contract.

JUSTICE PAUL W. GREEN: I understand.

ATTORNEY BRYAN A. WOODS: Was not a signatory. So what we have is all of the moving parties in this case are non signatories to the agreement that has the arbitration clause.

JUSTICE PAUL W. GREEN: Except for your client.

ATTORNEY BRYAN A. WOODS: Yes Your Honor. But there's no question, we are a signatory to the financing document that has the arbitration clause provision in it. But because a non signatory is trying to compel arbitration, we have to go to the non signatory analysis.

JUSTICE NATHAN L. HECHT: Do you agree that the defendants are parties as defined in the arbitration agreement?

ATTORNEY BRYAN A. WOODS: No, I don't for two reasons Your Honor. Number one; a proof issue. The only way.

JUSTICE NATHAN L. HECHT: What? I'm sorry.

ATTORNEY BRYAN A. WOODS: A proof issue and pleading issue. Before we tell an esteemed District Judge in this state that he abused his discretion, we should at least have a pleading that alleges third party beneficiary. The only.

JUSTICE NATHAN L. HECHT: Well, I'm just wondering if these people, the four, is it four defendants? There are four defendants, right?

ATTORNEY BRYAN A. WOODS: Yes Your Honor.

JUSTICE NATHAN L. HECHT: I'm just wondering if you think they fall within the definition of parties. That's a defined term in the arbitration agreement.

ATTORNEY BRYAN A. WOODS: I believe they potentially do if they meet.

JUSTICE NATHAN L. HECHT: What does potentially mean?

ATTORNEY BRYAN A. WOODS: If they meet their burden of proof to prove that they're third party beneficiaries.

JUSTICE NATHAN L. HECHT: Well, I'm just wondering, it says parties are defined as and then there's a list of things. And apart from third party beneficiary I'm just wondering if Joseph Charles Rubiola, Greg and Catherine Rubiola, JGL and Michael Cortez are in that group.

ATTORNEY BRYAN A. WOODS: There was no proof that Greg and Catherine Rubiola were in that group. There is a very curious document in Appendix C, an affidavit that was never attached to either motion. Both the motion to compel heard in December of '08 and the motion for reconsideration in February of '09 was never introduced into evidence and the District Clerk record that I have in the appendix, it was never filed.

JUSTICE NATHAN L. HECHT: Well I don't mean-- this is harder than I thought it was going to be. Parties includes the Salmon's, right?

ATTORNEY BRYAN A. WOODS: Yes Your Honor.

JUSTICE NATHAN L. HECHT: And the definition is each and all persons and entities signing this agreement and any other agreements between or among any of the parties. And Greg and Catherine Rubiola signed the home sales contract, so I'm wondering why that doesn't include them.

ATTORNEY BRYAN A. WOODS: Well because the add-on phrase, what I'll call the affiliates, all that. If we discuss that. That applies to both the Salmon's and Rubiola Mortgage Company, okay. Now I believe that that kind of argument runs headlong into the restrictive view of third party beneficiary status. And if I could explain that, Your Honor, with a hypothetical for just a minute.

JUSTICE NATHAN L. HECHT: And you can as soon as you answer for me why you don't think that Greg and Catherine Rubiola for example are within the definition in that paragraph. Third party beneficiary aside.

ATTORNEY BRYAN A. WOODS: Two reasons. They never proved third party beneficiary. Secondly, they never proved that Greg and Catherine Rubiola are officers, directors, agents, whatever of Rubiola Mortgage Company. Now we can assume--

JUSTICE NATHAN L. HECHT: But they did sign the home contract.

ATTORNEY BRYAN A. WOODS: The Rubiola's, Greg and Catherine signed the home contract individually.

JUSTICE NATHAN L. HECHT: And this says anybody who signs any agreement with any of the parties.

ATTORNEY BRYAN A. WOODS: Yes Your Honor.

JUSTICE NATHAN L. HECHT: And the Salmon's are parties.

ATTORNEY BRYAN A. WOODS: Yes.

JUSTICE NATHAN L. HECHT: And there was an agreement and they signed it, so I'm wondering why they're not parties.

ATTORNEY BRYAN A. WOODS: May I explain my hypothetical, Your Honor, for just a minute? And the danger in this case in accepting that and including the world as having rights under this agreement. We are both, opposing Counsel and I are both representatives in this case. If we have a car wreck outside today, does that mean and did the parties intend that we are going to arbitrate that dispute? Later and I know she won't have me, but we decide to get married and divorced. Does that mean that we have agreed to arbitrate that dispute? The danger in accepting all these people as third party beneficiaries, Your Honor, is it runs headlong into the restrictive view of this Court and MCI in granting third party beneficiary status by a mere generic reference to add-ons.

JUSTICE NATHAN L. HECHT: And I understand that and you can certainly make that argument. I'm just wondering if first of all, they fall within the definition. Your position is well you can't read this too broadly and bad things will happen if you do. But it is broad enough to cover them.

ATTORNEY BRYAN A. WOODS: I believe the correct interpretation, Your Honor, is the add-on language applies to those individuals acting in their capacity of Rubiola Mortgage Company. And we are not making any allegations and we have disavowed in our briefing any claims regarding Rubiola Mortgage Company or anybody acting in their capacity or anything related to financing. Now opposing Counsel has--

CHIEF JUSTICE WALLACE B. JEFFERSON: Because it would be odd if the arbitration covered I don't know, an eBay transaction you know for the purchase of a TV or something completely unrelated just because the Rubiola's and the Salmon's signed that as well.

ATTORNEY BRYAN A. WOODS: Absolutely. I mean where do we stop with this?

JUSTICE DALE WAINWRIGHT: Good question, Counsel. Let me ask you some questions about that. If there were a claim for defamation between the Salmon's and the Rubiola's regarding the financing, would that be covered in your opinion under the scope of the arbitration agreement? It's about finance.

ATTORNEY BRYAN A. WOODS: I think it probably would.

JUSTICE DALE WAINWRIGHT: Okay. If there were claim for defamation arising from the workmanship in the house, would that be compelled to arbitration in your opinion?

ATTORNEY BRYAN A. WOODS: No, because the financing document is totally unrelated to the real estate contract which is the wellspring of this case. Perhaps I didn't understand your earlier hypothetical. I thought you asked me about defamation in relation to the mortgage transaction.

JUSTICE DALE WAINWRIGHT: I did.

ATTORNEY BRYAN A. WOODS: Okay.

JUSTICE DALE WAINWRIGHT: The financing portion.

ATTORNEY BRYAN A. WOODS: But opposing Counsel said there aren't any other documents signed February 13, 2007. Well there are. They've put in their appendix. There's a loan application, there's a disclosure about Texas Mortgage Brokers. This document is clearly in a separate lending transaction.

JUSTICE EVA M. GUZMAN: Could I ask you a question about that, about the arbitration agreement? When we were looking at the definition of the parties, it also says agreements between or among any of the parties as part of this transaction awards this transaction in the context of this arbitration agreement. Can they relate only to the transaction involving mortgage financing?

ATTORNEY BRYAN A. WOODS: Your Honor, they never defined for the trial judge, who's a very good judge in San Antonio, what this transaction is.

JUSTICE EVA M. GUZMAN: But regardless, this document, at least this document, the arbitration agreement, was signed when they were applying for a mortgage loan, correct?

ATTORNEY BRYAN A. WOODS: Absolutely.

JUSTICE EVA M. GUZMAN: And that was that transaction?

ATTORNEY BRYAN A. WOODS: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: So when we're looking at the definition and it says this transaction.

ATTORNEY BRYAN A. WOODS: I believe that's a correct analysis Your Honor.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, opposing Counsel said that the fact that this was a one-stop shop was significant. Can you comment on that?

ATTORNEY BRYAN A. WOODS: I appreciate that Justice Lehrmann. There are a legion of outside the record references in the briefing. One-stop shopping was never mentioned to Judge Gabriel. Rubiola Mortgage and Realty. I today, I don't know what Rubiola Mortgage and Realty is. There is no proof in the record what is that entity? Is that a different entity than Rubiola Mortgage Company? If so, what is its relation to all these other folks? And as I said in my brief I believe, and that's 27 times in their brief in bold Rubiola Mortgage and Realty. To confuse this Court to fit within and further their purpose of saying oh this is all one big ball of wax, we're going to arbitration. If I could briefly explain the timeline in the--

JUSTICE DEBRA H. LEHRMANN: Can I just ask you though if it were, let's just assume that they're correct in that.

ATTORNEY BRYAN A. WOODS: One-stop shop?

JUSTICE DEBRA H. LEHRMANN: Yeah. Then what affect do you think that would have?

ATTORNEY BRYAN A. WOODS: I don't think it would have any effect because this Court's holding in Merrill is clear. In Merrill there were cash management agreements signed with Merrill Lynch Corporate as part of an overall financial plan. Later the plaintiff in that case signed separate agreements with M.L. Life and M.L. Trust as part of the overall financial plan. This Court said because there are no arbitration agreements in those separate agreements with M.L. Trust and Life, even though clearly we're talking about a related deal, and there were multiple cash management agreements with arbitration clauses, that's not enough to compel arbitration. It also sided the Mercury Construction case, U.S. Supreme Court case that holds two claims that are related to one transaction is an insufficient basis to compel arbitration. I submit to this Court we have one claim and one claim only. It's even further removed than Mercury Construction. We have one claim against the sellers of this home and the real estate agent involved in the transaction and the contractors that worked on the house; period, end of story that relates only to the physical condition of this house. When I filed the petition I didn't even know about, and I know this is outside the record; I didn't even know about this agreement. Opposing Counsel called me and said we're going to arbitration and I said what are you talking about? We've got the standard one to four contract that says you can go to the courthouse; there is no arbitration clause. Oh, well they signed a financing document. How can I artfully plead around something that I didn't even know exist? And I think the lack of artful pleading in this case is very important for the Court to consider because it's kind of the nub of a lot of the non signatory theories; direct benefits estoppel. In other words, if you're going to sue on a contract and try to take a benefit of it that has an arbitration clause, you got to take the arbitration clause with it. We're not suing on any financing document. That has, the financing documents have nothing to do with this case.

JUSTICE NATHAN L. HECHT: But do you think that two people, A and B can just sit down and say well we agree that whatever disputes may arise among us of whatever nature, we're going to arbitrate?

ATTORNEY BRYAN A. WOODS: I believe they can Your Honor, but if we look at the real estate contract the effective date in the timeline, January 20, 2007, the financing condition addendum expires January 25, 2007. When that expired my clients were contractually bound to purchase this home irrespective of financing, save and except for an underwriting decision. They could have been sued and subject to specific performance regard-

less of whether they got their financing. January 30th, the other termination option expires. January 30, 2007, the parties were bound to the transaction; all options had expired. Are we now going to alter that final real estate contract by a document in a separate transaction that doesn't have the same parties in the face of an entire agreement clause in that real estate contract? I submit that that analysis would cause a host of issues with respect to general construction, contract construction principles.

JUSTICE EVA M. GUZMAN: Did anyone introduce evidence about how these entities, various entities were registered with the Secretary of State's office and that kind of thing?

ATTORNEY BRYAN A. WOODS: No, Your Honor.

JUSTICE EVA M. GUZMAN: Because I mean the reason I'm making this argument that we're one-stop and we don't know who the officers are of each company.

ATTORNEY BRYAN A. WOODS: Right, absolutely not.

JUSTICE EVA M. GUZMAN: So no one introduced evidence that they were in fact a separate entity and that.

ATTORNEY BRYAN A. WOODS: Absolutely not. And I do want to mention this affidavit once again. The affidavit is signed in November of 2008. Our first hearing is in December in front of Judge Gabriel. It's not attached to the motion. Now in fairness to the other side, opposing Counsel starts reading from some affidavit, it's in the record. He says I have an affidavit that says thus and such. This affidavit in Exhibit C is not even attached to the motion for reconsideration that comes in February of 2009. The first time I actually saw Exhibit C in the Appendix was when the writ of mandamus was filed with the Fourth Court of Appeals. Now is it sufficient to say a judge abused his discretion by somebody standing there and saying I have a piece of evidence and this is what it says? I don't think that's sufficient. If I was at trial and say I said judge, this is what the contract says and never introduced it into evidence or summary judgment hearing, I have an affidavit. Is that going to be sufficient when we go up on appeal? I don't think so. That is the only possible piece of evidence that touches on your question Justice Guzman is the affidavit which I have strenuously objected to in my briefing. I know I've been talking real fast here; I apologize. But I believe that the correct framework for analysis for this Court is we clearly have non signatories seeking to compel arbitration. Why do I say non signatories?

JUSTICE NATHAN L. HECHT: If they can, do you agree that this dispute is within the scope of the arbitration agreement?

ATTORNEY BRYAN A. WOODS: I believe so Your Honor. This is not a scope case.

JUSTICE NATHAN L. HECHT: So this is a parties case. [Inaudible] this is a parties case in your view?

ATTORNEY BRYAN A. WOODS: Yes. This Court in Kellogg held that just because you have a broad scope doesn't automatically mean that parties have agreed to arbitrate. And it's important to remember that the presumption in favor of arbitration does not begin until there's a valid enforceable agreement proven to the trial judge. That presumption doesn't begin until then and it's their burden to prove that and they did not do that. We go to the analysis of non signatories. There's only two non signatory theories that they identify in their brief. Incorporation by reference and estoppel. Now the incorporation by reference we've got non simultaneous agreements that don't have the same parties. One says you can go to the courthouse. They were signed at different times. The real estate contract, and I believe this is the critical thing, says this is it; this is the entire agreement. And I don't believe incorporation by reference is applicable here, especially in light of this Court's pronouncement in Merrill was actually an implication. The Court in Merrill never tries to lead the cash management agreements and the documents with M.L. Life and M.L. Trust that were signed as one document. So let's go to the estoppel theory, the only other theory that they're relying upon. The insight to this Court was substantially interdependent and concerted misconduct prong of Grigson as something that is accepted by this Court which

this Court expressly rejected in Justice Brister's opinion in Merrill. Now I know Justice Hecht had a concurring opinion that perhaps we should consider that. And even if it is ultimately accepted by this Court, which it was expressly rejected in Merrill, there is no substantially interdependent or concerted misconduct. Again, we go back to what is the nature of these claims? These claims relate solely to the physical condition; have nothing to do with financing. The other estoppel prong, direct benefits estoppel. The question is are my clients seeking to take advantage of the financing document that has the arbitration clause? Absolutely not. In fact, their own briefing they just gloss over it. There is no proof presented to the trial judge and they don't even argue in the briefing to this court that we are seeking to benefit from the document with the arbitration clause. And this Court in Kellogg said if claims stand alone from the contract with the arbitration agreement, the matter is not arbitrable. And I'm going to quote from an admission on page 48 of the transcript of motion to reconsider, opposing Counsel said they said that and suggested that they aren't suing about credit facilities and I agree; that doesn't seem to be the case. Direct benefits estoppel does not apply in this case either. So in summary, we've got a major pleading and proof issue, we've got allegations outside the record to try to bolster that now which it clearly should not be considered in my opinion by this Court. I think it would be unfair to the Trial Judge now to consider the one-stop shopping in Rubiola Mortgage and Realty. They also tell you improperly that J.C. Rubiola was acting as agent for Rubiola Mortgage and Realty in the real estate transactions. You will see a license number of the broker in the real estate contract. That license number is Greg Rubiola individually. Rubiola Mortgage and Realty is not the responsible broker in this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. Any questions? Thank you. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF ELIZABETH CONRY DAVIDSON ON BEHALF OF PETITIONER

JUSTICE PAUL W. GREEN: Ms. Davidson, there are a lot of Rubiola's in San Antonio and it seems like all of them are in the real estate business. What if one of the other branches of the Rubiola family entered into a transaction, would they then somehow be considered an affiliate or a party to the mortgage agreement arbitration clause?

ATTORNEY ELIZABETH CONRY DAVIDSON: No, because I still think that it's going to be modified by transactions that are related to part of and so on. It would have to be specifically related to this purchase of the home at garrity and that entire transaction.

JUSTICE PAUL W. GREEN: So the link is the house itself, the property itself, not the affiliation?

ATTORNEY ELIZABETH CONRY DAVIDSON: I think the affiliation is important, but I think that when we're talking about what the transaction is and what's covered by it I suppose, I think one way to look at it is that when you were talking to opposing Counsel you were talking about whether you know basically you're talking about whether it could stand alone. And he's contending that they're just complaining about the real estate contract; they're not complaining about the finance transaction, and that's what the arbitration clause relates to. However, if you subtract the real estate contract from this equation and all you, then the financing makes no sense. What is the subject of the financing agreement if there's no real estate contract?

JUSTICE DEBRA H. LEHRMANN: Can I just ask you one question? The real estate agreement specifically provides that it does not preclude a party from seeking equitable relief from a Court of competent jurisdiction, and it further states that it contains the entire agreement of the parties and cannot be exchanged except by the written agreement. How do you deal with that? I know that there's a part in it about amending it further, but how do you deal with that right there?

ATTORNEY ELIZABETH CONRY DAVIDSON: Well I think that you would avoid the problem that the Salmon's have now by having entered into real estate contract with each other with the Rubiola's and then not

entering into an arbitration agreement later as part of the same transaction when they're trying to obtain financing for that transaction.

JUSTICE DEBRA H. LEHRMANN: If that's the, so you're saying it's really the same document?

ATTORNEY ELIZABETH CONRY DAVIDSON: No, I'm not. I guess one could say that it's a modification of that agreement, but I don't want to say that because I can't, I haven't thought about it that way. But they had a transaction and the cases talk about how if you have a transaction all these things are interrelated and there's an arbitration agreement in just one of these documents, if they're all connected to each other and the parties are right then the arbitration clause covers the whole transaction.

JUSTICE EVA M. GUZMAN: If the financing had been obtained from a different mortgage company, not someone that was affiliated with the real estate company and there was a lawsuit that stemmed from that and that arbitration agreement also had the words "this transaction." In that context, would that also allow the non signatories then to compel arbitration, the realtors? I mean how do you reconcile that I guess if you're using another company?

ATTORNEY ELIZABETH CONRY DAVIDSON: Okay and I presume that we're saying that the other company had them sign an arbitration agreement.

JUSTICE EVA M. GUZMAN: Broad language. The other company had them sign an arbitration agreement with broad language. And we're not talking about scope, just whether there's a valid clause. In other words, this transaction do you argue that that also then would relate back to the agreement with the real estate company?

ATTORNEY ELIZABETH CONRY DAVIDSON: I think that arguably it could. However, there would be a party, I think there would be a real party issue in that one because the parties, assuming it's the same arbitration agreement, would be different parties presumably. It'd be ABC Mortgage Company. But as the Court knows, there are cases where parties have tried to impose arbitration agreements on non signatories in situations like that.

JUSTICE EVA M. GUZMAN: Indeed, but they have certain exceptions that are clearly defined that they fall within; you don't. I think you're asking us to crack a rule that is very unique to your case. Everyone knew that it was one big transaction and so I'm concerned more about what this rule would look like and what impact it would have in other context where those six exceptions that are commonly part of the analysis are not present.

ATTORNEY ELIZABETH CONRY DAVIDSON: Right and I do think that this case is very much like the other cases where there's a financing agreement involved and then there's a sales type agreement or the actual document that accomplishes the transaction or the exchange. And so I would ask this Court to follow those cases.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

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