

2011

Mariposa Express, Inc., Et Al v. United Shipping Solutions, LLC, Et Al : Reply Brief of Appellants

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David J. Jordan; Cameron Sabin; Joseph W. Loosle; Stoel Rives; Attorney for defendants/appellees. Karthik Nadesan; Ivan LePundu; Nadesan Beck P.C.; Attorney for plaintiffs/appellants.

Recommended Citation

Reply Brief, *Mariposa Express, Inc., Et Al v. United Shipping Solutions, LLC, Et Al : Reply Brief of Appellants*, No. 20110829 (Utah Court of Appeals, 2011).

https://digitalcommons.law.byu.edu/byu_ca3/2959

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

<p>MARIPOSA EXPRESS, INC., ET AL.,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>UNITED SHIPPING SOLUTIONS, LLC, ET AL.</p> <p>Defendants/Appellees.</p>	<p>Case No. 20110829</p>
---	--------------------------

REPLY BRIEF OF APPELLANTS

Appeal from District Court's Order Granting Motion to Compel Arbitration and Dismiss in the Third Judicial District Court in and for Salt Lake County, The Honorable William Barrett presiding.

Karthik Nadesan
Ivan LePendu
NADESAN BECK P.C.
Attorney for Plaintiffs/Appellants
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

David J. Jordan
Cameron Sabin
Joseph W. Loosle
STOEL RIVES
Attorneys for Defendants/Appellees
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

FILED
UTAH APPELLATE COURTS

JUL 23 2012

IN THE UTAH COURT OF APPEALS

<p>MARIPOSA EXPRESS, INC., ET AL.,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p>v.</p> <p>UNITED SHIPPING SOLUTIONS, LLC, ET AL.</p> <p style="text-align: center;">Defendants/Appellees.</p>	<p style="text-align: center;">Case No. 20110829</p>
---	--

REPLY BRIEF OF APPELLANTS

Appeal from District Court's Order Granting Motion to Compel Arbitration and Dismiss in the Third Judicial District Court in and for Salt Lake County, The Honorable William Barrett presiding.

Karthik Nadesan
NADESAN BECK P.C.
Attorney for Plaintiffs/Appellants
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

David J. Jordan
Cameron Sabin
Joseph W. Loosle
STOEL RIVES
Attorneys for Defendants/Appellees
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	1
I. WHILE THE USS PARTIES HAVE ACKNOWLEDGED THAT THE MARIPOSA FRANCHISEES HAVE RAISED CAUSES OF ACTION IN THEIR COMPLAINT CONCERNING LIABILITY AND THE INTERPRETATION OF THE PARTIES' SETTLEMENT AGREEMENT, THE ARBITRATION PROVISION IN THAT AGREEMENT DOES NOT REQUIRE ARBITRATION OF THOSE ISSUES	1
A. THE PLAIN LANGUAGE OF THE SETTLEMENT AGREEMENT DOES NOT SUPPORT ARBITRATION.	3
B. THE CLAIMS FOR RELIEF AS SET FORTH IN THE COMPLAINT ARE NOT ARBITRABLE BECAUSE THEY DO NOT INVOLVE A DISPUTE OVER THE CAMS DATA AMOUNTS	10
C. THE DISTRICT COURT'S ORDER SHOULD BE REVERSED BECAUSE NONE OF THE CLAIMS IN THE COMPLAINT ARE SUBJECT TO THE ARBITRATION PROVISION	11
II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE DISMISSAL WAS NOT APPROPRIATE UNDER THE UTAH ARBITRATION ACT	12
CONCLUSION	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

STATUTORY PROVISIONS

Utah Code §§ 78B-11-101, <i>et seq.</i>	13
Utah Code § 78B-11-108(3).....	11
Utah Code § 78B-11-108(6)	13
Utah Code § 78B-11-108(7)	10, 13
Utah Code § 78B-11-109	13
Utah Code § 78B-11-112	13
Utah R. Civ. P. 12	12
Utah R. Civ. P. 42	11
9 U.S.C.A. § 3	13

CITED CASES

<u>Central Florida Investments, Inc. v. Parkwest Assocs.</u> , 2002 UT 3, ¶10, 40 P.3d 599	1, 6
<u>G.G.A., Inc. v. Leventis</u> , 773 P.2d 841, 845 (Utah App. 1989)	4
<u>McCoy v. Blue Cross and Blue Shield of Utah</u> , 980 P.2d 694, 697, ¶11 (Utah App. 1999)	3
<u>McEwan v. Mountain Land Support Corp.</u> , 2005 UT App 240, ¶16, 116 P. 3d 955 (Utah App. 2005).....	4
<u>Miller Family Real Estate v. Hajizadeh</u> , 2008 UT App 475, 200 P.3d 213.....	12
<u>Turner v. Staker & Parson Co.</u> , 2012 UT 30, ¶12	13

INTRODUCTION

Under the plain language of the parties' Agreement, their agreement to arbitrate is limited in scope. Specifically, the only reasonable and harmonious interpretation of the Agreement's arbitration provision is that a forensic accountant is required to resolve any disputes regarding the amounts contained in Appellee's (the "USS Parties") CAMS Data – i.e the total amount of outstanding invoices in USS's electronic records system. The Agreement lacks any express provision requiring that the parties' arbitrate other disputes. However, Appellants' (the "Mariposa Franchisees") Complaint does not request that the Court resolve any dispute regarding CAMS Data. Instead, the Complaint requests that the Court interpret the scope of the Agreement's indemnification provision and the Mariposa's liability under that provision. As a result, the district court erred in broadly construing the arbitration provision and compelling the Mariposa Franchisees into arbitration. In addition, because the Utah Uniform Arbitration Act required the district court to stay the action pending arbitration, the district court erred in dismissing the Mariposa Franchisees' Complaint.

ARGUMENT

I. WHILE THE USS PARTIES HAVE ACKNOWLEDGED THAT THE MARIPOSA FRANCHISEES HAVE RAISED CAUSES OF ACTION IN THEIR COMPLAINT CONCERNING LIABILITY AND THE INTERPRETATION OF THE PARTIES' SETTLEMENT AGREEMENT, THE ARBITRATION PROVISION IN THAT AGREEMENT DOES NOT REQUIRE ARBITRATION OF THOSE ISSUES.

Arbitration is "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Central Florida Investments, Inc. v. Parkwest Assocs., 2002 UT 3, ¶10, 40 P.3d 599. In this case, the USS Parties and the Mariposa Franchisees entered into a settlement agreement that addressed several issues, including (i) Mariposa Franchisees' indemnification of the USS Parties, (ii) the parties' proprietary materials and information, (iii) future shipments and billings between the parties, (iv) representations and warranties by the parties, and (v) a

covenant that Mariposa Franchisees would “not to disparage” or defame the USS Parties, among other things. See Agreement (R. 21-54). In addition, the settlement agreement required the Mariposa Franchisees to pay certain amounts to the USS Parties. Id. The payment provisions included a section on “Settlement Payment” where the Mariposa Franchisees agreed to pay a lump sum to the USS Parties, which they did. (Agreement at ¶4; R.26). The agreement contained a “Payment for Freight Services” where the Mariposa Franchisees agreed to reimburse USS for freight shipments, which they did. (Agreement at ¶1; R. 22). And it contained an “Indemnification” provision where the Mariposa Franchisees agreed to indemnify the USS Parties for any amounts paid to DHL Express (USA), Inc. for services provided to the franchisees and their customers. (Agreement at ¶3; R. 25).

The agreement also required the parties to arbitrate disputes concerning certain “payments” and “amounts” and it specified that the arbitrator must be “one forensic accountant,” who will review documentation and calculate invoices. (Agreement at ¶1(c); R. 24). The agreement is silent regarding the forum for resolving all other disputes. However, the parties’ intent that all other disputes be resolved through a court action, rather than arbitration, is evidenced in the provision of the Agreement dealing with defaults. (Agreement at ¶¶5-6; R. 28). Under that provision, if the Mariposa Franchisees defaulted under the Agreement, the USS Parties were required to file Confessions of Judgment and a Stipulated Judgment in the district court. Id. The Mariposa Franchisees were entitled to “oppose entry of the judgment on the grounds that no Default occurred.” Id. As a result, given that the Agreement expressly requires that the district court determine whether a default occurred and the conspicuous absence of any provision requiring that other disputes be subject to arbitration, the Agreement must be interpreted as not requiring every dispute to be resolved through arbitration.

In their brief, the USS Parties have acknowledged that “[t]he heart of the dispute between the parties is *whether the Mariposa [Franchisees are] obligated to indemnify the*

USS Parties for the amounts the USS Parties had to pay to DHL for unpaid DHL shipments and, if so, what amount they owe.” (Brief of Appellees at 21) (emphasis added). And, indeed, the Mariposa Franchisees’ Complaint involved the scope and application of the indemnification provision in the settlement agreement, and the liability, if any, of the franchisees under that provision. (R. 1-130). Specifically, the Mariposa Franchisees maintain that they are not obligated to indemnify the USS Parties under the circumstances, and they have requested relief in the form of declaratory judgment and an injunction. *Id.* As a result, the Complaint does not raise claims that may be reconciled by a forensic accountant.

Notwithstanding, the USS Parties first purport to rely on the plain language of the Agreement to claim that the scope and liability issues raised by the Complaint are subject to arbitration. And second, they claim that the issues in the Complaint concerning scope and liability actually qualify as disputes concerning amounts owing under the indemnification provision. Both of the USS Parties’ claims are wrong under the plain language of the Agreement and the Complaint.

A. THE PLAIN LANGUAGE OF THE SETTLEMENT AGREEMENT DOES NOT SUPPORT ARBITRATION.

The USS Parties’ interpretation of the scope of the Agreement’s arbitration provision is overly broad and ignores the basic canons of contract interpretation. In advancing their interpretation, USS Parties rely heavily on Utah’s presumption in favor of arbitration. However, this presumption does not apply to interpreting the existence or scope of the agreement to arbitrate itself. See McCoy v. Blue Cross and Blue Shield of Utah, 980 P.2d 694, 697, ¶11 (Utah App. 1999) (“Parties are required to arbitrate only those disputes they have agreed to submit to arbitration ... [t]hus, a court deciding a motion to compel arbitration must first determine whether the parties agreed to arbitrate, and if so, whether the agreement encompasses the claims asserted”). In this case, the

USS Parties have not claimed there is any ambiguity or any other circumstances under which the presumption would be invoked. As a result, the Court must interpret the contract “by examining the entire contract and all of its parts in relation to each other, giving an objective and reasonable construction to the contract as a whole.” G.G.A., Inc. v. Leventis, 773 P.2d 841, 845 (Utah App. 1989). The contract should be interpreted so as to “harmonize all of its terms and provisions, and all of its terms should be given effect if possible.” Id. Each contract provision must be considered “in relation to all of the others, with a view toward giving effect to all and ignoring none.” McEwan v. Mountain Land Support Corp., 2005 UT App 240, ¶16, 116 P. 3d 955 (Utah App. 2005).

With respect to their first argument, the USS Parties begin with the provision addressing “Payment for Freight Services,” which states that “any dispute regarding the Freight Payments” will be “resolved exclusively by binding arbitration.” (Agreement at ¶1(c); R. 24; Brief of Appellees at 23 n.14). A liberal interpretation of that provision may support the position that any dispute regarding payments for freight services under Section 1 of the Agreement must be submitted to a forensic accountant for arbitration, whether the dispute involves liability for freight services or the amount due for freight services. However, an interpretation of the arbitration provision with respect to freight services under Section 1 of the Agreement does not end the analysis in this dispute because the Mariposa Franchisees’ claims for relief relate to liability under the indemnification provision of Section 3 of the Agreement. The question in this case is whether the parties bargained for arbitration as a method of resolving disagreements concerning interpretation of and liability under the separate indemnification provision of Paragraph 3, as opposed to a dispute under the freight services provision of Paragraph 1.

As a result, USS has acknowledged that an interpretation of the indemnification and arbitration provision contained in Paragraph 3 of the Agreement is determinative of the scope of the parties’ agreement to arbitrate. (Appellee Brief at 23). Under the indemnification provision of the Agreement, the Mariposa Franchisees were to indemnify

the USS Parties for any amounts they were required to pay to DHL on behalf of the Mariposa Franchisees in connection with a separate lawsuit between the USS Parties and DHL (the “DHL lawsuit”). Because the Mariposa Franchisees were not involved in the DHL lawsuit, the USS Parties were required to keep the Mariposa Franchisees apprised of developments in the matter and to provide information to the franchisees before reaching any resolution with DHL that may directly affect the franchisees. Specifically, the settlement agreement between the Mariposa Franchisees and the USS Parties stated that if the USS Parties “desire[d] to resolve” the separate DHL lawsuit through settlement, the USS Parties were required to give the Mariposa Franchisees access to CAMS Data, information and invoices relevant to franchisees’ financial obligations under the indemnification provision. (R. 25; Agreement at ¶3.a).¹ The Mariposa Franchisees then would have the opportunity to disagree with the purported amounts in the CAMS Data, but they would not be allowed to interfere in the DHL lawsuit. *Id.* The settlement agreement also stated that “any dispute” between the Mariposa Franchisees and the USS Parties concerning the “amounts” set forth in the CAMS Data and invoices shall be resolved using the procedures set forth in the “Payment for Freight Services” provision. *Id.*

¹ The relevant portion of this provision states that:

The parties agree that, if DHL and the USS parties desire to resolve the DHL Lawsuit through a settlement, the USS Parties shall provide the Mariposa Franchisees with access to the CAMS Data (of the same type and nature set forth in Paragraph 1 above) necessary to show the DHL Services provided to the Mariposa Franchisees and/or their customers. If the Mariposa Franchisees do not agree with the amount identified by the USS Parties, the USS Parties shall nevertheless have the right to proceed with settlement and any dispute between the USS Parties and the Mariposa Franchisees **concerning these amounts** shall be resolved in accordance with the dispute resolution procedure set forth in Paragraph 1.c above.

(R. 25; Agreement at ¶3.a) (emphasis added).

In their brief, the USS Parties repeatedly emphasize the phrase “*any dispute*”, as though that phrase requires the parties to resolve “*all disputes*” in arbitration. See e.g. Brief of Appellees at 23, 24, 26, 31 (emphasis in original). However, the plain language of the agreement does not support that interpretation. Central Florida Investments, Inc. v. Parkwest Assocs., 2002 UT 3, ¶12, 40 P.3d 599. The arbitration provision in the “Payment for Freight Services” section, read together with the indemnification provision, is limited in scope. It unambiguously supports the interpretation that if the Mariposa Franchisees raise a dispute concerning the amounts in the CAMS Data, those disputes must be submitted to a forensic accountant in arbitration. It does not require the parties to arbitrate to any dispute involving issues of liability under the indemnification provision or interpretation of that provision.

Specifically, USS’s interpretation ignores the first sentence of Paragraph 3(a), which states that USS must provide the Mariposa Franchisees with access to “the CAMS Data (of the same type and nature set forth in Paragraph 1 above).” (Agreement at ¶3.a; R. 25). Paragraph 1(a) of the Agreement defines CAMS Data as “copies of the corporate payment screen and open franchise invoices for their respective franchises, showing the amounts USS believes each Mariposa Franchisee owes.” (Agreement at ¶1.a; R. 22)(emphasis added). Indeed, in its brief, USS has acknowledged that the CAMS Data refers to an amount, stating that “[a]fter disclosure of the CAMS Data, the Mariposa Franchisees were given time to review that data and indicate whether they disputed the amounts shown in the CAMS Data.” (Appellee Brief at 9). Given the immediate proximity of the sentence requiring that the Mariposa Franchisees be provided with the CAMS Data amount to the sentence referring to the Mariposa Franchisees disagreeing with the “amount identified by the USS Parties” and requiring arbitration of any disputes “concerning these amounts,” the only harmonious and reasonable interpretation of the Agreement is that the parties only agreed to submit any dispute regarding the CAMS Data amount to arbitration.

In addition, USS's interpretation renders Paragraph 3.a. redundant and/or meaningless. Paragraph 3.a contains two separate and distinct invocations of arbitration. First, "[i]f the Mariposa Franchisees do not agree with the amount identified by the USS Parties, the USS Parties shall nevertheless have the right to proceed with settlement and any dispute between the USS Parties and the Mariposa Franchisees concerning these amounts shall be resolved in accordance with the dispute resolution procedure set forth in Paragraph 1.c above." (Agreement at ¶3.a; R. 25). Second, "if the USS Parties are determined to owe DHL, through a judgment, any amount for services provided to the Mariposa Franchisees and/or their customers, any dispute between the USS Parties and the Mariposa Franchisees concerning such amounts shall be resolve [sic] in accordance with the dispute resolution procedure set forth in Paragraph 1.c above." *Id.* Under USS's interpretation, which requires that all disputes be arbitrated, this repeated reference to the arbitration procedure would be redundant and meaningless. Indeed, Paragraph 3.a would be rendered meaningless in almost its entirety. Under USS's interpretation, Paragraph 3.a. would stand for the simple proposition that all disputes regarding the indemnification amounts would be subject to arbitration. All of the verbiage defining the circumstances under which the parties would follow the arbitration procedures would be meaningless. As a result, the only reasonable and harmonious interpretation of Paragraph 3.a., which gives meaning to all of its terms, is that the parties' intended that the arbitration procedures only apply to specific well-defined disputes involving the CAMS Data amounts.

Furthermore, USS's interpretation renders part of Paragraph 1(c)(i), which defines the role of arbitrator, meaningless. Under Paragraph 1(c)(i), "the parties shall submit the matter to binding arbitration before one forensic accountant, who shall review the parties' documentation and establish the amount owed to USS, if any, on any disputed invoices." (Agreement at ¶1.c; R. 24) (emphasis added). If the parties intended that the arbitrator decide legal issues, such as whether the indemnification provision had been triggered and

the proportionate amount of each Mariposa Franchisees' liability, the more limited definition of the arbitrator's role contained in Paragraph 1.c.i would be meaningless. Instead, the harmonious and reasonable interpretation of Paragraphs 3(a) and 1(c) is that the forensic accountant would review the CAMS Data, which included all "open franchise invoices," and determine the amount due "on any disputed invoices." (Agreement at ¶¶1.a, 1.c; R. 22, 24) (emphasis added).² Such an interpretation also makes more sense from a practical standpoint – a forensic accountant is more qualified and would be more efficient at resolving disputed invoices than a judge or jury. On the other hand, a judge would be more qualified to make legal determinations regarding whether the indemnification provision had been triggered or the pro rata amount of each Mariposa franchisees' indemnification obligation.

In this case, as admitted by both the parties, the Mariposa Franchisees' Complaint does not request that the district court resolve a dispute over the CAMS Data amounts. Rather it seeks declaratory judgment as to whether the Mariposa Franchisees are obligated under the circumstances to indemnify the USS Parties at all. The Complaint states that the Mariposa Franchisees made efforts to obtain information relating to the

² Furthermore, USS's interpretation creates a contradictory timeline within the Settlement Agreement. Pursuant to Paragraph 3.a, if Mariposa Franchisees disagreed with the amounts "identified by the USS Parties, the USS Parties shall nevertheless have the right to proceed with settlement and any dispute ... concerning these amounts shall be resolved" through arbitration. (Paragraph ¶3.a). Therefore, according to this provision, the disputed amount is identified by USS prior to entering into a settlement with DHL. However, the indemnification amount in Paragraph 3 is the amount that "USS [is] determined to owe DHL through judgment or settlement for DHL services." (Paragraph ¶3). In other words, the indemnification amount is not determined until after the settlement with DHL is finalized. As a result, USS's interpretation is inherently contradictory because USS would be required to provide the Mariposa Franchisees with the amount they were determined to owe DHL through settlement before such a settlement had even taken place. Instead, the harmonious reading is that the amount referred to is the CAMS Data, which already existed prior to any settlement between USS and DHL.

resolution of the DHL lawsuit and the USS Parties' liability to DHL upon resolution of that lawsuit. (Complaint at ¶¶62-63, 71, 79-80; R. 1-130). The Mariposa Franchisees therefore filed the lawsuit to resolve those liability issues and they have asserted causes of action for interpretation and proper enforcement of the Agreement. (Complaint at ¶¶76-122; R.1-130).

The Mariposa Franchisees' course of action was proper. The settlement agreement contemplates arbitration with a forensic accountant only when invoices and CAM Data are in dispute; it is otherwise silent as to any challenge concerning liability or interpretation of the indemnification provision. An accountant may be uniquely situated to resolve disputes concerning amounts and invoices quickly and efficiently, but lacks the training and qualification to resolve questions of liability and interpretation. In that instance, the district court should resolve the liability issues and then, once they are resolved, order the parties to arbitrate any dispute concerning amounts.³

While the USS Parties claim that such a procedure "is unreasonable and would result in nonsensical outcomes" (Brief of Appellees at 28), the procedure is supported by the Utah Uniform Arbitration Act. The Act allows a district court to sever claims in a civil action and to retain and resolve those claims that are not covered by an enforceable arbitration agreement. The court is required to refer the remaining claims to arbitration. See Utah Code § 78B-11-108(7). Indeed, by only having the arbitration procedure applicable to the specific circumstances when a judgment had been entered against USS or prior to USS entering into a settlement with DHL, the parties were limiting the arbitration to circumstances where legal proceedings were unnecessary. Specifically, if a judgment had been entered against USS, liability under the indemnification provision would not be an issue – only the amount of each Mariposa Franchisees' liability. Similarly, if the USS Parties kept the Mariposa Franchisees informed of settlement

³ The Complaint in this case did not ask the district court to decide amounts. Moreover, it is not unusual for issues of liability and damages to be bifurcated.

negotiations with DHL and resolved any dispute regarding CAMS Amounts prior to entering into a settlement; the probability of later litigation regarding liability under the indemnification provision would be slim.⁴

B. THE CLAIMS FOR RELIEF AS SET FORTH IN THE COMPLAINT ARE NOT ARBITRABLE BECAUSE THEY DO NOT INVOLVE A DISPUTE OVER THE CAMS DATA AMOUNTS.

In apparent recognition of the limited scope of the arbitration provision, the USS Parties next claim that the scope and liability issues set forth in the Complaint qualify as disputes concerning the CAMS Data amounts. They claim that the Complaint ultimately comes down to whether the Mariposa Franchisees owe anything at all. Thus, the claims should be arbitrated under the provision concerning disputes of CAM Data amounts. (Appellees' Brief at 31-32). The USS Parties' characterization is an oversimplification of the matter. As stated above, the Complaint raises claims dealing with liability and the scope of the indemnification provision. It does not dispute the amount of the payment as reflected in the CAMS Data under the indemnification provision.

While liability issues and damages issues often go together, they are not one in the same. Liability issues can and may be resolved separately from damages/amounts issues. Indeed, the Utah Uniform Arbitration Act allows for proceedings in a civil case to be

⁴ USS's claim that only an arbitrator can decide if contingent circumstances for arbitration have been met is not applicable here. As admitted by USS, the "facts are not in dispute" in this case. (Appellee Brief at 17). It is undisputed that there is no dispute concerning liability or the amount payable for freight under Paragraph 1.a. It is undisputed that no judgment was entered against USS in the DHL Lawsuit, and that USS and DHL settled the case. *Id.* at 13. And USS has admitted that "[a]fter entering into the DHL Agreement, the USS Parties informed the Mariposa Franchisees of that agreement by letter." *Id.* (emphasis added). "In that letter, the USS parties ... provided the Mariposa Franchisees with the CAMS Data for each of their respective franchises." *Id.* at 13-14. Therefore it is undisputed that USS did not provide the Mariposa Franchisees with the CAMS Data until well after it has settled with DHL. As a result, there are no factual disputes for the arbitrator to decide regarding the occurrence of contingent circumstances requiring arbitration.

severed to accommodate arbitration for portions of the case. Utah Code § 78B-11-108(7). Moreover, the Utah Rules of Civil Procedure permit claims in a civil case to be severed and bifurcated. See e.g. Utah R. Civ. P. 42(b). In this case, the final amount owed to the USS Parties may well turn on “the accuracy of the CAMS Data” (Brief of Appellees at 31), but the initial questions concerning liability and the scope of the indemnification provision may or may not lead to the issue of whether the CAMS Data amounts are accurate. Once the initial issues are resolved, the court then may refer any dispute concerning the amounts to arbitration.

C. THE DISTRICT COURT’S ORDER SHOULD BE REVERSED BECAUSE NONE OF THE CLAIMS IN THE COMPLAINT ARE SUBJECT TO THE ARBITRATION PROVISION.

The district court erred when it broadly construed the arbitration provision in the settlement agreement to apply to the claims in the Mariposa Franchisees’ Complaint. Its interpretation of the limited arbitration provision invites the absurd result of an accountant being required to address issues of liability and contract interpretation. Moreover, the district court’s misapplication of the arbitration provision does not further the policy in favor of arbitration. Utah courts favor arbitration but they do so only when the parties have agreed to arbitrate the dispute. If no enforceable agreement to arbitrate exists, the court “may not” compel arbitration. Utah Code § 78B-11-108(3). As explained above, the Complaint was limited to liability issues under the indemnification provision. These issues were outside the scope of the arbitration provision in the settlement agreement and no other enforceable agreement to arbitrate exists to support the district court’s order. The Mariposa Franchisees therefore respectfully ask this Court to reverse the district court’s order compelling arbitration and dismissing the Complaint.

II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE DISMISSAL WAS NOT APPROPRIATE UNDER THE UTAH ARBITRATION ACT.

The USS Parties claim that the Mariposa Franchisees have not challenged the district court's order on appeal dismissing the Mariposa Franchisees' Complaint. (Brief of Appellees at 1 n.2, 3-4 n.3). However, not only have the Mariposa Franchisees raised that issue on appeal, but the issue itself is inextricably intertwined with the Mariposa Franchisees' other arguments on appeal. Specifically, the Mariposa Franchisees have argued that the claims for relief set forth in the Complaint are not subject to the arbitration provision of the parties' Agreement. Thus, the Mariposa Franchisees brought this appeal because "the district court erred in dismissing the Complaint and compelling arbitration." (Brief of Appellant, 8, 10, 11-12, 15).

Indeed, the district court's order of dismissal was improper under the Utah Uniform Arbitration Act. Although the court did not refer to Utah Rule of Civil Procedure 12 for the dismissal, that rule is the primary mechanism in this jurisdiction for dismissing claims in civil actions. Specifically, Rule 12 states that after a party files a complaint, the responding party shall file an answer or a motion to dismiss. Utah R. Civ. P. 12(a), (b). The USS Parties filed a motion to compel arbitration and to dismiss the case, relying on Miller Family Real Estate v. Hajizadeh, 2008 UT App 475, 200 P.3d 213. (R. 167). But in Miller, this Court did not consider whether a district court may dismiss a complaint to compel arbitration under the Utah Uniform Arbitration Act. Instead, it considered whether the district court was justified in dismissing a complaint without prejudice where the agreement between the parties required them first to mediate their disputes. 2008 UT App 475, ¶¶5, 15-16.⁵

⁵ USS cited to several federal cases in the district court to support its claim that the Complaint should be dismissed. (R.167-68). However, the Federal Arbitration Act is different from the Utah Uniform Arbitration Act. According to the federal act, in any

Under the Utah Uniform Arbitration Act, a district court is not at liberty to “dismiss” a properly served complaint even if all claims in the complaint are subject to arbitration. Utah Code §§ 78B-11-101, *et seq.* (the Utah Uniform Arbitration Act). Specifically, the plain language of section 78B-11-108 states that “[i]f a party makes a motion to the court to order arbitration, the court on just terms **shall stay** any judicial proceeding that involves a claim alleged to be subject to the arbitration” until final judgment is entered. Utah Code § 78B-11-108(6) (emphasis added). In addition, claims in a complaint that are not subject to arbitration may be severed from the arbitrable claims, and the court may limit the order staying the proceedings to the latter claims. *Id.* at § 78B-11-108(7).

If the legislature had intended dismissal to be a proper remedy in cases where all the claims in the complaint were arbitrable, it would not have included a separate and distinct severability provision or a provisions requiring that the district court stay the proceedings. *Id.*; *Turner v. Staker & Parson Co.*, 2012 UT 30, ¶12, -- P.3d -- (court presumes the legislature used each word in a statute advisedly; it gives effect to every word and it avoids interpretations that render words superfluous). As a result, the plain language of the Act requires the district court to stay judicial proceedings if the claims are arbitrable (Utah Code § 78B-11-108(6)); to sever non-arbitrable claims from arbitrable claims when issuing the stay, (*Id.* at § 78B-11-108(7); and to proceed with non-arbitrable claims in the case. *Id.* In addition, the Act contemplates the involvement of the district court throughout the arbitration proceedings. *See e.g.*, Utah Code § 78B-11-109, -112.

Therefore, given the plain and direct language of the Utah Uniform Arbitration Act, the district court’s order of dismissal was in error.

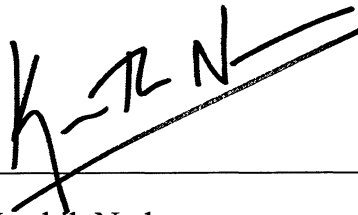
“suit or proceeding” for a claim that is subject to arbitration, the district court shall stay the trial of the action. 9 U.S.C.A. § 3. Federal law also allows a party to petition for

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the district court's September 06, 2011, Order granting USS's Motion to Dismiss and Compel Arbitration be reversed and the case be remanded.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

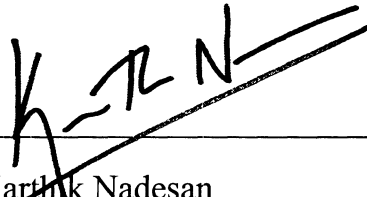
NADESAN BECK P.C.

A handwritten signature in black ink, appearing to read 'K-N', is written over a horizontal line.

Karthik Nadesan
Ivan LePendu
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count of this brief as determined using Microsoft Word for Mac word processing program is no more than 4,480 in compliance with the Utah Rules of Appellate Procedure Rule 24(f).



Karthik Nadesan
Ivan LePendu
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was sent by U.S Post to the following:

David J. Jordan
Cameron Sabin
Joseph Loosle
Stoel Rives
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111