

2011

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

Utah Court of Appeals

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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.

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IN THE UTAH COURT OF APPEALS

MARIPOSA EXPRESS, INC., ET AL.,

Plaintiffs/Appellants,

v.

UNITED SHIPPING SOLUTIONS, LLC,
ET AL.,

Defendants/Appellees

No. 20110829 - CA

Appeal from the Utah Third District Court
Trial Court No. 110915908

– BRIEF OF APPELLEES –

**UNITED SHIPPING SOLUTIONS, LLC; USS LOGISTICS, LLC;
ROBERT ROSS; CHARLES DERR; AND JESSE MOORE**

Karthik Nadesan
Ivan LePendu
NADESAN BECK P.C.
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 363-1140
Facsimile: (801) 534-1948
Attorneys for Plaintiffs/Appellants

David J. Jordan
Cameron L. Sabin
Joseph W. Loosle
STOEL RIVES LLP
201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 328-3131
Facsimile: (801) 578-6999
Attorneys for Defendants/Appellees

ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS**

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Telephone: (801) 363-1140
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201 S. Main Street, Suite 1100
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LIST OF PARTIES

The following is a complete list of all parties to the proceeding in the court whose order is sought to be reviewed:

Mariposa Express, Inc.; Cold Spring Investments, LLC; Cold Spring Investments No. 1, Limited Partnership; Cold Spring Investments No. 2, Limited Partnership; Newburyport Capital, LLC; Hannah Enterprises, Inc.; USS Holdings, LLC; USS Columbia, LLC; Metro Mar Ventures LLC; Michael Jones, LLC; Stirling LLC; Michaelson Ventures Inc.; USS O'Brien, Inc.; USS Highland Park, Inc.; Sharon McWilliams; George Ammirato; William Demet; Robert Harris; Michael Jones; Ted Michaelson; Jim O'Brien; and Stefan Triandafilou (collectively, the "Mariposa Group" or "Appellants").¹

United Shipping Solutions, LLC ("USS"); USS Logistics, LLC ("USSL"); Robert Ross, Charles Derr; and Jesse Moore (collectively, the "USS Parties" or "Appellees").

¹ Following the issuance of the arbitrator's decision in an arbitration between the parties that concluded in February 2012 and the filing of Appellants' brief, Appellants Sharon McWilliams, Mariposa Express, Inc., Ted Michaelson, Stirling LLC, and Michaelson Ventures, Inc. indicated, through counsel, that they were no longer participating in any post-arbitration motions or other issues related to the dispute between the parties. Ms. McWilliams and Mariposa Express, Inc. paid to the USS Parties the amounts determined by the arbitrator and have committed to pay their portions of the attorneys' fees and costs determined by the arbitrator. Similarly, Mr. Michaelson, Stirling LLC and Michaelson Ventures, Inc. have accepted the amounts determined by the arbitrator and have made payments and payment arrangements (including executing promissory notes) with the USS Parties to pay those amounts. Accordingly, it is the USS Parties' understanding that Ms. McWilliams, Mariposa Express, Inc., Mr. Michaelson, Stirling LLC, and Michaelson Ventures, Inc. are no longer participating in this appeal.

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EXHIBIT A: Utah Code Ann. §§ 78B-11-107 & 108 (2008)

**EXHIBIT B: Transcript of Oral Argument regarding Defendants' Motion to Compel
Mandatory Arbitration**

EXHIBIT C: Order Granting Defendants' Motion to Compel Mandatory Arbitration

EXHIBIT D: Memorandum Decision, Case No. 080926254 (Partial Summary Judgment)

I. JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j) (Supp. 2011).

II. ISSUE PRESENTED FOR REVIEW & STANDARD OF REVIEW

Issue: Whether the district court correctly granted the USS Parties' Motion to Compel Mandatory Arbitration (the "Motion") by holding that the parties' dispute was subject to the mandatory arbitration provision of the parties' settlement agreement.

Standard of Review: "[W]hether a trial court correctly decided a motion to compel arbitration is a question of law which [the Court] review[s] for correctness, according no deference to the trial judge." *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 10, 40 P.3d 599.²

Preservation for Appeal: The USS Parties do not dispute that Appellants preserved the above issue for appeal. To the extent Appellants are seeking to argue matters beyond the issue set forth above, the USS Parties do not agree that Appellants preserved those matters for appeal.

² The issue on appeal concerns only whether the district court correctly granted the USS Parties' Motion. The USS Parties' Motion was not brought pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Nor did the Mariposa Group raise the district court's dismissal as an issue for appeal. Therefore, contrary to the Mariposa Group's argument, the standard of review governing motions to dismiss does not apply, and the only standard of review applicable to this appeal is the standard for the review of motions to compel arbitration.

III. DETERMINATIVE PROVISIONS OR PROVISIONS CENTRAL TO THIS APPEAL

Utah Code Ann. § 78B-11-108(1): “On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement . . . the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.”

Utah Code Ann. § 78B-11-108(4): “The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.”

Utah Code Ann. § 78B-11-107(2): “The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”

Utah Code Ann. § 78B-11-107(3): “An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”

IV. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

From February 16, 2011 to June 2011, and pursuant to a settlement agreement between the USS Parties and a group of former franchisees (the “Mariposa Franchisees”), the USS Parties attempted to have the Mariposa Franchisees identify what amounts, if any, they disputed as owing to the USS Parties under an indemnification provision in the parties’ settlement agreement. When certain of the Mariposa Franchisees (the Mariposa Group) took the position that they owed nothing under the indemnification provision, the

USS Parties sent a “Dispute Notice,” which, under the settlement agreement, triggered an expedited arbitration process. On July 12, 2011, and in anticipation of that notice, the Mariposa Group filed a complaint (“the Complaint”) in Third District Court, seeking to avoid the arbitration process to which they had agreed.

On August 1, 2011, the USS Parties filed the Motion, asking the district court to compel arbitration of the parties’ dispute. The Mariposa Group filed an opposition to the Motion and, after full briefing, the district court heard oral argument on the Motion on August 19, 2011. (*See* R. 807 (Transcript of Oral Argument regarding Motion), a full copy of which is attached hereto as Exhibit B.) At the end of the hearing, the district court determined that, as a matter of law, the terms of the settlement agreement required the parties to resolve their dispute through the arbitration procedure contained in the settlement agreement. (R. 807 at 28:7-20) (“I think [the arbitration provisions of the settlement agreement] are broad enough to allow for the kinds of information [the Mariposa Group] think[s] they need to see. . . . So I think as a matter of law, that’s the way I see and--and read this--this agreement to engage in arbitration.”).³ The district

³ The Mariposa Group correctly notes that the district court made no findings of fact, but claims that the court treated the motion as a Rule 12(b)(6) motion to dismiss and “did not consider any documents outside of the pleadings” (Aplts.’ Brief at 3). Both contentions are incorrect, but ultimately irrelevant.

On a motion to compel arbitration, a district court is not limited to the standard of review imposed by Rule 12(b)(6). The court may consider evidence and make findings of fact as necessary. *See, e.g.*, Utah Code Ann. §78B-11-107 & 108. In this case, while the district court considered the materials submitted by the parties (*see* R. 807 at 11:16-19; Order at 2, attached hereto as Exhibit C), it concluded that no findings of fact were

(continued . . .)

court entered a formal written order memorializing its ruling on September 6, 2011 (the “Order”). The Order provides, in pertinent part, as follows: “The Motion is granted. The parties are ordered to arbitrate their dispute in accordance with the arbitration procedures set forth in Paragraph 1.c. of the Settlement Agreement.” (*See* Order, attached hereto as Exhibit C.) The Mariposa Group filed a Notice of Appeal on September 16, 2011.⁴

(... continued)

necessary because the parties’ dispute, no matter how it was characterized by the Mariposa Group, was, as a matter of law, subject to the arbitration provision of the Settlement Agreement. (R. 807 at 28:4-10; 18-20). In other words, regardless of whether the dispute concerned the question of whether the Mariposa Group’s indemnification obligation had been triggered or whether the Mariposa Group owed any or all of the amounts alleged by the USS Parties, the dispute was within the scope of the arbitration provision. Given this, the district court’s order dismissing the case was not a Rule 12(b)(6) dismissal, as the Mariposa Group claims, but a recognition that the dispute was not properly before the court and had to be dismissed in favor of arbitration.

The Appellants’ attempt to cast the district court in an unfavorable light by asserting that the district court did not review the documents submitted by the parties is unfair. (*See* Aplt.’ Brief at 3.) Specifically, the Mariposa Group cites to the following statement by the district court and implies that the court did not read the materials submitted by the parties: “Well, to be quite honest with everybody, I didn’t read all this stuff, I flipped through it.” (*Id.*) What the district court was referring to in this statement was not the briefing, the Complaint, or the Settlement Agreement. Rather, the court was referencing certain of the exhibits attached to the parties’ briefing.

⁴ After the Mariposa Group filed its Notice of Appeal (and after some further delay by the Mariposa Group), the parties ultimately arbitrated their dispute before an agreed-upon arbitrator on January 31, February 7, and February 13, 2012. On February 22, 2012, the arbitrator issued a Memorandum Decision ordering the Mariposa Group to pay the USS Parties \$1,162,320.08, plus costs and reasonable attorneys’ fees. On February 28, 2012 (six days after the Memorandum Decision), the Mariposa Group filed their opening appellate brief.

B. Statement of the Facts

1. The Mariposa Franchisees Fail to Pay USS for Shipping Services Provided by DHL, and USS Is Forced to Pay for Those Services.

USS owns a franchise system that resells shipping services. Prior to November 2008, each of the Mariposa Group owned one or more franchises in the USS franchise system and resold shipping services to customers, using discounted rates USS and its affiliate USS Logistics, LLC (“USSL”) had negotiated with third-party shipping carriers. (R. 4-5, 149, 192-93). The primary provider of domestic and international shipping services to the USS franchise system was DHL Express (USA), Inc. (“DHL”), which provided these services to the USS franchise system under a reseller agreement (the “Reseller Agreement”) with USSL. (R. 149, 172). Under the Reseller Agreement and the franchise agreements between the franchisees and USS, each franchisee was required to pay USS for the services provided by DHL, and USS then tendered a collective payment for the franchise system to DHL. (R. 149, 175).

In 2008, DHL decided to cease domestic shipping operations in the United States and, on November 10, 2008, breached the Reseller Agreement by announcing that it would discontinue all express and ground shipping services in the United States by January 30, 2009. (R. 5, 149). Following DHL’s announcement, the Mariposa Franchisees unilaterally decided to stop paying USS for the DHL shipping services provided to their customers, even though their customers continued to ship with DHL. (R. 150). As a result of their non-payment, USS terminated the franchises of the Mariposa Franchisees. (*Id.*).

2. The DHL Lawsuit and the Mariposa Lawsuit.

On December 22, 2008, USSL, and in a later amended complaint USS and certain of its franchisees, filed suit against DHL in Utah State Court, entitled *USS Logistics, LLC, et al. v. DHL Express (USA), Inc.*, Case No. 080926254 (the “DHL Lawsuit”). In the DHL Lawsuit, USS and USSL alleged, among other things, that DHL had breached the Reseller Agreement and caused the USS franchise system to incur significant damages. (R. 150, 192-93). DHL answered the complaint and asserted a counterclaim against USSL, claiming that USSL was liable for the unpaid shipping services which the Mariposa Franchisees and their customers received, but for which they had not paid. (R. 150, 193). On March 31, 2009, the Mariposa Franchisees filed their own lawsuit against DHL in New York Supreme Court (the “Franchisee Lawsuit”), claiming that DHL was liable to the Mariposa Franchisees for breaching the Reseller Agreement. (R. 5, 150, 193).

In anticipation of the DHL Lawsuit, on December 3, 2008, the Mariposa Franchisees filed a lawsuit against the USS Parties in Utah State Court, entitled *Mariposa Express, Inc., et al. v. United Shipping Solutions, et al.*, Case No. 080925017 (the “Mariposa Lawsuit”). (R. 5, 151, 192). In the Mariposa Lawsuit, the Mariposa Franchisees sought to avoid all of their franchise obligations under their franchise agreements with USS. (R. 151). The USS Parties answered the complaint and counterclaimed, seeking to enforce the franchise obligations of the Mariposa Franchisees

and to obtain payment for unpaid freight and DHL shipments provided to them and their customers under the USS franchise system. (R. 151, 192, 268).

On December 16, 2008, the district court in the Mariposa Lawsuit entered a temporary restraining order (the “TRO”) which required, among other things, that (1) “[The Mariposa Franchisees] shall not further solicit employees of [USS and USSL]”; (2) “[The Mariposa Franchisees] are not relieved of any other post-termination obligations and shall not use or disclose any of [USS or USSL’s] confidential or proprietary information in any way”; (3) “[The Mariposa Franchisees] shall discontinue all use of [USS and USSL’s] trademarks and any claimed association with [their] franchise system.” (R. 151, 308).

On June 9, 2009, and because of evidence indicating that the Mariposa Franchisees had violated the TRO, the district court entered an Order Regarding Motion for Order to Show Cause Why Plaintiffs Should Not Be Held in Civil Contempt for Violating This Court’s Order Granting Plaintiffs’ Motion for Temporary Restraining Order and Sanctioned in Connection Therewith. (R. 151-52, 314). In the order to show cause, the district court enjoined the Mariposa Franchisees “from using or charging shipments to USS’s accounts with its shipping providers.” (R. 152). The court also scheduled an evidentiary hearing to determine whether certain of the Mariposa Franchisees should be held in contempt and, if so, the appropriate sanction. (*Id.*).

On September 1, 2009, the district court held the evidentiary hearing in the Mariposa Lawsuit. At the end of the hearing, the district court ruled that certain of the

Mariposa Franchisees, in particular Robert Harris and Sharon McWilliams—both parties to this case—violated the TRO. (R. 152, 354). After granting the motion for contempt, the district court took under advisement the question of the appropriate sanctions to impose and proceeded with a multi-day evidentiary hearing on the parties’ cross-motions for preliminary injunction. (R. 153, 354). Near the end of that hearing, but before the district court had imposed contempt sanctions, the Mariposa Franchisees approached the USS Parties about settling the Mariposa Lawsuit. (R. 153).

3. The Parties Enter into the Settlement Agreement and Agree to Resolve Disputes through Expedited Arbitration.

On September 15, 2009, the USS Parties and the Mariposa Franchisees settled the Mariposa Lawsuit by entering into a settlement agreement (the “Settlement Agreement”). (R. 6, 197; *see also* Settlement Agreement, attached as Exhibit A to Aplt’s Brief). In the Settlement Agreement, the Mariposa Franchisees agreed, among other things, to make three types of payments to the USS Parties. Specifically, the Mariposa Franchisees agreed to pay the USS Parties a settlement payment. (R. 197; *see also* Settlement Agreement ¶ 4). In addition, the Mariposa Franchisees agreed to pay USS for all amounts owing for unpaid freight shipments made by them or their customers. (R. 153, 193; Settlement Agreement ¶ 1). Finally, the Mariposa Franchisees agreed to indemnify the USS Parties against any amounts the USS Parties were determined to owe DHL for unpaid shipping services provided to the Mariposa Franchisees or their customers, regardless of whether that determination was through judgment or settlement of the DHL Lawsuit. (R. 6, 154, 196; Settlement Agreement ¶ 3). All other matters between the

parties were resolved and the Mariposa Lawsuit was dismissed. (R. 6, 153, 200; Settlement Agreement ¶ 8).

To determine the outstanding amount owing for freight services, the parties agreed in the Settlement Agreement that the USS Parties would provide the Mariposa Franchisees with access to certain shipping data (the “CAMS Data”).⁵ (R. 153, 193-94; Settlement Agreement ¶ 1.a). After disclosure of the CAMS Data, the Mariposa Franchisees were given time to review that data and indicate whether they disputed the amounts showing in the CAMS Data. (R. 193-94; Settlement Agreement ¶ 1.a). If a dispute arose, and because the USS Parties did not want to incur the expense and time associated with further litigation to resolve any disputes, the USS Parties insisted, and the Mariposa Franchisees agreed, that any dispute concerning the freight amounts, including whether any amount was owed at all, would “be fully and finally resolved exclusively by binding arbitration,” as set forth in Paragraph 1(c) of the Settlement Agreement—the mandatory arbitration provision. (R. 154, 195; Settlement Agreement ¶ 1.c).

With regard to the Mariposa Franchisees’ indemnification obligation to the USS Parties, Paragraph 3 of the Settlement Agreement provides as follows:

[T]he respective Mariposa Franchisees agree to indemnify and hold USS harmless for *any and all amounts* the USS Parties are determined to owe

⁵ The Settlement Agreement defines CAMS Data as “copies of the [USS] corporate payment screen and open franchise invoices for their respective franchises, showing the amounts USS believes each Mariposa Franchisee owes for . . . Services provided to each respective Mariposa Franchisee and/or his, her or its customers (the “CAMS Data”). (R. 193; Settlement Agreement ¶ 1.a.).

DHL through judgment or settlement for DHL services provided to the respective Mariposa Franchisees and/or their customers and which the respective Mariposa Franchisees or their customers have not already paid to USS or DHL (*regardless of whether that determination is by judgment or through settlement*, and regardless of whether the amount is determined through set-off amounts that may reduce any judgment in favor of the USS Parties and against DHL). The respective Mariposa Franchisees further agree to pay to USS all royalties, Wasatch Billing fees, and late fees charged by DHL resulting from non-payment by the respective Mariposa Franchisees, on the shipments the USS Parties are determined to owe to DHL.

(R. 154, 196; Settlement Agreement ¶ 3) (emphases added). As with the unpaid freight amounts, the parties agreed that, for purposes of determining any amounts owed by the Mariposa Franchisees for DHL shipments under the indemnification provision, the USS Parties would “provide the Mariposa Franchisees with access to the CAMS Data . . . necessary to show the DHL Services provided to the Mariposa Franchisees and/or their customers.” (R. 154-55, 196; Settlement Agreement ¶ 3.a). Again, because the USS Parties wanted to avoid a further lawsuit in the event of any dispute concerning amounts owing under the indemnification provision, the USS Parties insisted and the Mariposa Franchisees agreed that *any disputes* concerning the amounts owed to the USS Parties under the indemnification provision, *including whether any amount was owed*, would be resolved through the same expedited arbitration procedure used to resolve freight disputes:

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 the 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*. Likewise, 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[d] in accordance with the dispute resolution procedure set forth in Paragraph 1.c above.*** In the event of such a dispute, 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.

(R. 155, 196; Settlement Agreement ¶ 3.a) (emphases added).

The “dispute resolution procedures” applicable to freight disputes and disputes concerning the Mariposa Franchisees’ indemnification obligation are set forth in Paragraph 1.c of the Settlement Agreement. (R. 155, 195; Settlement Agreement ¶ 1.c). That provision also requires that “any dispute” be resolved “exclusively by binding arbitration” and on an expedited basis. Specifically, Paragraph 1.c. provides:

Dispute Resolution Procedure. The Parties agree that ***any dispute regarding [indemnification]⁶ will be fully and finally resolved exclusively by binding arbitration,*** as set forth in this provision.

i. If USS and any Mariposa Franchisee are unable to resolve any dispute regarding the amount owed by a Mariposa Franchisee under Section 1.a above, within ten (10) days after USS has delivered the Dispute Notice to such franchisee, 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. The accountant will be selected by USS and the Mariposa Franchisee within twenty (20) days following delivery of the Dispute Notice.

⁶ Paragraph 1.c refers to “Freight Payments.” However, Paragraph 1.c is also incorporated into Paragraph 3.a for purposes of addressing disputes about the indemnification.

ii. The Parties agree that any arbitration under this Paragraph 1 shall be conducted within forty (40) days following delivery of the Dispute Notice.

iii. Following the entry of an arbitration award, the Mariposa Franchisee shall pay to USS one-third of all amounts determined to be owing within ten (10) days and pay the remainder in accordance with Paragraph 1.b above.

iv. The Parties agree that the prevailing party in any arbitration conducted pursuant to this Paragraph 1 shall be entitled to recover his, her or its reasonable attorneys' fees and costs incurred in the arbitration. The Parties agree that a party shall be deemed a "prevailing party" if the arbitrator determines that the disputed amount is closer to the amount claimed to be due by that party than by the other party.

(R. 156, 195; Settlement Agreement ¶ 1.c) (emphasis added).

4. USSL Is Held Liable in the DHL Lawsuit for All Unpaid Shipments Provided by DHL.

Following the execution of the Settlement Agreement, USS and USSL continued to pursue the DHL litigation. (R. 156). In September 2010, DHL moved for partial summary judgment on its counterclaim that USSL was liable to DHL for all unpaid shipping amounts, including all amounts the Mariposa Franchisees had not paid. (*Id.*).

On October 13, 2010, the district court granted DHL's motion, ruling that USSL was liable to DHL for all unpaid shipping amounts for services provided to the USS franchise system. (R. 157, 361-362; Memorandum Decision at 6-7, also attached hereto as Exhibit D). The district court left the question of the amount owing to DHL for those services for trial. (R. 362; Memorandum Decision at 7).

Following the district court's ruling on DHL's Motion, DHL and the USS Parties entered into settlement negotiations and eventually executed a settlement agreement to resolve the DHL Lawsuit (the "DHL Agreement"). (R. 157). During the negotiations leading up to that agreement, DHL insisted that any amount paid to the USS Parties be reduced by the amounts owing to DHL for unpaid shipments. (*Id.*). As such, in the DHL Agreement, the USS Parties received payment from DHL in an amount that was offset by the amounts owing to DHL for unpaid shipping services, including the amounts owing due to the Mariposa Franchisees' failure to pay. (R. 142, 157).⁷

5. The USS Parties Notify the Mariposa Franchisees of the DHL Agreement, and the Mariposa Group Attempts to Avoid Their Indemnification Obligation and Arbitration.

After entering into the DHL Agreement, the USS Parties informed the Mariposa Franchisees of that agreement by letter dated February 16, 2011.⁸ In that letter, the USS Parties notified the Mariposa Franchisees of their indemnification obligation and, as they had previously done with the freight shipments, provided the Mariposa Franchisees with

⁷ At DHL's insistence, the DHL Agreement contains a confidentiality provision that requires the terms of the DHL Agreement to be maintained in confidence unless DHL consents to disclosure or unless disclosure is required by process of law. (R. 157).

⁸ In actuality, the Mariposa Franchisees were aware of the settlement between the USS Parties and DHL as early as October 18, 2010, as their counsel was present in the courtroom when the settlement was announced to the court in the DHL Lawsuit. (R. 157). Counsel for the Mariposa Franchisees discussed the settlement with counsel for the USS Parties. (R. 807 at 26:25 to 27:1-6). Contrary to the Mariposa Group's claim, at that time counsel for the Mariposa Franchisees never asserted that the USS Parties had failed to give them notice of the settlement or access to the CAMS Data. (*See* R. 482).

the CAMS Data for each of their respective franchises, showing the amounts owing for unpaid DHL services. (R. 158, 369).

On March 7, 2011, the Mariposa Franchisees responded by letter. (R. 159, 482). Rather than disputing the amounts showing in the CAMS Data, the Mariposa Franchisees merely stated they needed additional “information about the settlement,” without specifying what information they were requesting. (R. 159, 482). As a result, on March 9, 2011, and in a further attempt to identify whether the Mariposa Franchisees disputed their indemnification obligation, the USS Parties sent a second letter, providing the Mariposa Franchisees with information about the DHL settlement, including that “USS and USSL received payment in an amount that was offset by the amounts owing to DHL for shipping services provided to USS and its franchisees.” (R. 159, 484). The USS Parties further reminded the Mariposa Franchisees that they had not indicated whether they disputed any of the amounts showing in the CAMS Data. (R. 159, 485).⁹

⁹ Throughout the fact section of their brief, the Mariposa Group claims that they were repeatedly denied a copy of the DHL Agreement. (*See, e.g.*, Aplt’s Brief at 7, 17). The Mariposa Group misstates the record. Due to the confidentiality provision in the DHL Agreement, the USS Parties repeatedly told the Mariposa Group to subpoena a copy of that agreement, so that it could be released under the “legal process” exception to the confidentiality provision in that agreement. (R. 159). During the hearing on the Motion, that issue was again raised, and the district court encouraged the Mariposa Group to seek the document through legal process. (R. 807 at 27:1-6, 28:9-10). Despite this, the Mariposa Group declined to do so. It was not until the parties submitted the matter to arbitration that the Mariposa Group finally served a document request seeking disclosure of the document. In response, the USS Parties provided the Mariposa Group not only with a copy of the agreement, but also with copies of email correspondence exchanged with DHL leading up to that agreement.

Following this exchange, a number of the Mariposa Franchisees began complying with their indemnification obligation under the Settlement Agreement and executed promissory notes, as required under Paragraph 3 of the agreement. (R. 159). However, others continued to refuse to do so because they disputed any obligation to pay the USS Parties the amounts reflected in the CAMS Data. (*Id.*). Specifically, on March 17, 2011, counsel for the Mariposa Franchisees sent a letter in which he stated that, unless the DHL Agreement had been written in a specific manner advocated by the Mariposa Franchisees, “there is no indemnification obligation.” (R. 159-60, 487). He also stated that his clients objected to the amounts reflected in the CAMS Data as “inaccurate.” (R. 160, 488).

As a result of the continued refusal of certain Mariposa Franchisees to fulfill their indemnification obligation and in a continued effort to resolve the dispute, the USS Parties sent a third letter to the non-complying Mariposa Franchisees, attempting to resolve the dispute regarding the indemnification obligation owed to the USS Parties and to identify what amounts were disputed (the “June 1st Letters”). (R. 160, 490-528). In the June 1st Letters, the USS Parties provided the specific amount owed by each Mariposa Franchisee and again requested that each indicate whether that amount was disputed. (R. 160, 490-528). If not, the USS Parties requested that they execute Promissory Note # 2, as required by the Settlement Agreement. (R. 160, 490-528). If, however, the Mariposa Franchisee disputed the amount, the letter requested that each Mariposa Franchisee indicate the amount disputed, provide the basis for the dispute, and include any relevant documentation. (R. 160, 490-528).

In response, a few more of the Mariposa Franchisees fulfilled their indemnification obligation by executing the required promissory note, but the remaining group (the Mariposa Group) declined even to respond. (R. 161). As a result, on July 13, 2011, the USS Parties served the Mariposa Group with “Dispute Notices,” which, under Paragraphs 1.c and 3 of the Settlement Agreement initiated the expedited arbitration proceedings set forth in Paragraph 1.c to resolve the dispute concerning the amount owing to the USS Parties under the indemnification provision. (R. 161, 530-559). In anticipation of these Dispute Notices, and to avoid or delay the expedited arbitration process, on July 12, 2011, the Mariposa Group filed the Complaint in Third District Court. (R. 1, 161). Ten days later, the Mariposa Group sent a letter to the USS Parties’ counsel, stating that they would not engage in arbitration or participate in the selection of an arbitrator as required by the Settlement Agreement. (R. 161, 561).

In their Complaint, the Mariposa Group sought declaratory relief on four causes of action and an injunction through a fifth cause of action. *See* (R. 11-17, 161; Complaint at 11-17). Throughout the Complaint, the Mariposa Group disputes the amounts owed, the accuracy of the information provided, and ultimately, their indemnification obligation itself. (R. 11-17).

6. The USS Parties Move to Compel Arbitration of the Parties’ Dispute, and the District Court Grants the Motion.

As a result of the Mariposa Group’s refusal to participate in the arbitration process provided for in the Settlement Agreement and their filing of the Complaint, on August 1,

2011, the USS Parties moved to compel arbitration of the parties' dispute. (R. 136).¹⁰

The Mariposa Group filed an opposition to the Motion, and the district court heard oral argument on the Motion on August 19, 2011. (*See* R. 807.) At the end of the hearing, the district court determined that, as a matter of law, the terms of the Settlement Agreement required the parties to resolve their disputes in accordance with the arbitration procedure contained in Paragraph 1.c. (R. 807 at 28:7-20). On September 6, 2011, the district court entered the Order, which provides: "The Motion is granted. The parties are ordered to arbitrate their dispute in accordance with the arbitration procedures set forth in Paragraph 1.c. of the Settlement Agreement." (R. 703-04).

V. SUMMARY OF THE ARGUMENT

This appeal is the latest in a series of attempts by the Mariposa Group since 2008 to avoid or delay their payment obligations to the USS Parties. The facts are not in dispute. The parties entered into the Settlement Agreement, which contains an arbitration provision. Paragraphs 1 and 3 of the Settlement Agreement require the parties to arbitrate "any disputes" they have concerning any amounts owing to the USS Parties for unpaid shipments. The only question at issue is whether the district court correctly concluded that the parties' dispute falls within the arbitration provision of the agreement. The answer is clearly, yes.

¹⁰ Contrary to Appellants' claim, the USS Parties moved to compel arbitration of the parties' disputes concerning any amounts owing under the indemnification provision generally. The Motion was not limited to compelling arbitration of the disputes raised in the Complaint as characterized by the Mariposa Group.

The unambiguous language of the Settlement Agreement demonstrates that, at the time of execution, there were only two issues the parties left to be resolved in the future under specified procedures: (1) the amounts owing for unpaid freight shipments under Paragraph 1 of the Settlement Agreement, and (2) the amount, if any, owing for DHL shipments under Paragraph 3 of the Settlement Agreement. The language of both paragraphs requires any dispute regarding those amounts to be resolved pursuant to the expedited arbitration procedures of Paragraph 1.c, and not through costly and extended litigation (of the type they had just settled).

The Mariposa Group attempts to avoid this conclusion by advocating for a narrow, hypertechnical, and convoluted interpretation of Paragraph 3—one that would limit the arbitration only to certain categories, and even then, only to the issue of checking the “accuracy” of the shipping data. The plain language of the Settlement Agreement is not so limited. The agreement does not make arbitration conditional; it makes it mandatory. Moreover, the word “accuracy” (on which the Mariposa Group pins its argument) does not even appear in the Settlement Agreement.

Finally, it is clear that the dispute between the parties plainly concerns any amounts owing under the indemnification provision and, hence, must be arbitrated. Try as they might, the Mariposa Group cannot avoid the fact that the allegations of the Complaint (no matter how cleverly written to try to avoid arbitration) boil down to whether the Mariposa Group owes some amount to the USS Parties under the indemnification provision. Indeed, from February 2011 to July 2011, the parties

exchanged numerous communications—all of which concerned whether the Mariposa Group owed amounts to the USS Parties under the indemnification provision and, if so, how much was owed. The Mariposa Group took the position that they did not owe anything under that provision and, if they did, the amount indicated in the CAMS Data was incorrect. Such positions plainly fall within the scope of “any dispute between the USS Parties and the Mariposa Franchisees concerning these amounts.” (Settlement Agreement ¶ 3.a). As such, pursuant to Paragraph 3.a, the dispute “shall be resolved in accordance with the dispute resolution procedure set forth in Paragraph 1.c.” *Id.*

The district court saw through the Mariposa Group’s attempt to avoid their obligation to arbitrate the parties’ dispute. The district court’s decision should be affirmed.

VI. ARGUMENT

A. The District Court Correctly Enforced the Arbitration Provision and Construed that Provision in Favor of Arbitration.

Because of Utah’s strong policy favoring arbitration, Utah law has implemented a clear and expedited procedure for resolving motions to compel arbitration. Section 78B-11-108(1) of the Utah Uniform Arbitration Act (the “UAA”) provides, “[o]n motion of a person showing an agreement to arbitrate and alleging another person’s refusal to arbitrate pursuant to the agreement . . . the court *shall* proceed *summarily* to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.” Utah Code Ann. § 78B-11-108(1) (2008) (emphases added); *see also Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 33, 44 P.3d 663 (“[I]f a party shows the

existence of an arbitration agreement, then the court shall order the parties to arbitrate.”

(internal quotation marks, citation, and brackets omitted)).

In interpreting this section, the Utah Supreme Court has held that “[w]here the evidence relating to a purported agreement to arbitrate is undisputed, the district court has no discretion under the statute. It must compel arbitration.” *McCoy v. Blue Cross & Blue Shield of Utah*, 2001 UT 31, ¶ 10, 20 P.3d 901.¹¹ Moreover, section 78B-11-108(4) of the UAA makes clear that “[t]he court may not refuse to order arbitration” even where “the claim subject to arbitration lacks merit or grounds for the claim have not been established.” Further, consistent with Utah’s policy encouraging arbitration, courts are to interpret the scope of arbitration provisions broadly and in favor of arbitration:

[I]f there is any question as to whether the parties agreed to resolve their disputes through arbitration or litigation, . . . we interpret the agreement keeping in mind our policy of encouraging arbitration. “It is the policy of the law in Utah to interpret contracts in favor of arbitration, ‘in keeping with our policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.’”

Cent. Fla., 2002 UT 3, ¶ 16 (citations omitted; emphasis added).¹²

In this case, it is undisputed that the Settlement Agreement contains an agreement to arbitrate. The Mariposa Group does not dispute that the arbitration provision is valid

¹¹ Section 78B-11-108 was previously codified as Utah Code Ann. § 78-31a-49.

¹² See also *Chandler v. Blue Cross Blue Shield of Utah*, 833 P.2d 356, 358 (Utah 1992) (stating “this court has also recognized the strong public policy in favor of arbitration ‘as an approved, practical, and inexpensive means of settling disputes and easing court congestion’” (footnote omitted)); *Docutel Olivetti Corp. v. Dick Brady Sys., Inc.*, 731 P.2d 475, 479 (Utah 1986) (“It is our policy to interpret arbitration clauses in a manner that favors arbitration.”).

and binding. The only question presented by the Mariposa Group's appeal is whether the district court correctly concluded that the dispute between the parties falls within the scope of the arbitration provision. A plain reading of the Settlement Agreement confirms that it did.

B. The Settlement Agreement Requires the Parties to Arbitrate "Any Dispute" Concerning Amounts Owed Under the Indemnification Provision.

The heart of the dispute between the parties is whether the Mariposa Group is 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. Throughout 2011, the Mariposa Group repeatedly took the position that they owed nothing under the indemnification provision or, if they did, they did not owe the amount claimed by the USS Parties. (R. 487-88, 561-62). The USS Parties disputed that position. The unambiguous language of the Settlement Agreement shows that the parties agreed that this dispute would be resolved through arbitration.

Whether a motion to compel arbitration was properly granted is, in the first instance, "a matter of contract interpretation" to "determine whether the parties bargained for arbitration as a method of resolving their disagreements." *Cent. Fla.*, 2002 UT 3, ¶ 10. As such, the court looks to the "four corners of the agreement to determine the intentions of the parties." *Id.* ¶ 12 (internal quotation marks and citation omitted). If the language is unambiguous, "the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Id.* In interpreting the arbitration agreement, the court "attempt[s] to harmonize all of the

contract's provisions and all of its terms." *Id.* Moreover, as already noted, the court must construe the contract in favor of arbitration. *Id.* ¶ 16.¹³ Here, the terms of the Settlement Agreement are unambiguous and show that the parties bargained to have disputes like the one between the parties resolved exclusively through arbitration.

The language of the Settlement Agreement is not ambiguous. In the agreement, the parties resolved all disputes between them, except for two issues they left to be resolved at a future date: (1) the amount USS was owed for unpaid freight (to be determined after the CAMS Data had been exchanged), and (2) the amount the USS Parties were determined to owe to DHL for unpaid DHL shipments provided to the Mariposa Franchisees or their customers, if any (regardless of whether that amount was established through settlement or judgment), which was to be determined once the DHL Lawsuit had been concluded. With respect to both of these issues, the parties made clear that "any dispute" would be resolved exclusively through the binding arbitration procedure of Paragraph 1.c. (*See* Settlement Agreement ¶¶ 1.c. & 3.a). In particular, as it relates to the indemnification provision of Paragraph 3, the agreement provides as follows:

3. Indemnification by the Mariposa Franchisees for DHL Services. By entering into this Agreement, the respective Mariposa Franchisees agree to indemnify and hold USS harmless for any and all amounts the USS Parties are determined to owe DHL ***through judgment or settlement*** for DHL services provided to the respective Mariposa

¹³ *See also Docutel Olivetti*, 731 P.2d at 479 ("It is our policy to interpret arbitration clauses in a manner that favors arbitration.").

Franchisees and/or their customers and which the respective Mariposa Franchisees or their customers have not already paid to USS or DHL (*regardless of whether that determination is by judgment or through settlement*, and regardless of whether the amount is determined through set-off amounts that may reduce any judgment in favor of the USS Parties and against DHL). . . .

(Settlement Agreement ¶ 3) (emphases added). The very next paragraph, Subparagraph 3.a (which specifically addresses the amount of the indemnification obligation set forth in Paragraph 3), states that, if “*any dispute*” arises between the parties concerning any amounts at issue, that dispute is a matter for arbitration:

a. 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 the 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 [(arbitration)] set forth in Paragraph 1.c. above.* Likewise, 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[d] in accordance with the dispute resolution procedure [(arbitration)] set forth in Paragraph 1.c above. . . .*¹⁴

¹⁴ Paragraph 1.c of the Settlement Agreement provides, in part:

Dispute Resolution Procedure. The Parties agree that *any dispute* regarding the [indemnification obligation] will be fully and finally resolved exclusively by binding arbitration, as set forth in this provision.

i. If USS and any Mariposa Franchisee are unable to resolve *any dispute* regarding the amount owed by a Mariposa Franchisee . . . within ten (10) days after USS has delivered the Dispute Notice to such

(continued . . .)

Id. ¶ 3.a (emphases added).

Interpreting paragraphs 3, 3.a and 1.c. together plainly shows that the parties wanted to avoid further extended litigation and intended to arbitrate, on an expected basis, “any dispute” concerning the amounts the USS Parties claimed to be owed under the indemnification provision, regardless of whether that dispute arose out of a settlement between the USS Parties and DHL or a judgment in the DHL Lawsuit. The use of the words “any dispute,” denotes that the parties intended *all disputes* regarding the amounts—whether the dispute centered on a discrepancy in the numbers or in the basic question of whether Mariposa Franchisees owed anything at all—to be resolved by arbitration. (R. 807 at 26:12-18).

C. The Mariposa Group’s Narrow, Hypertechnical Interpretation Is not Consistent with the Settlement Agreement and Is Unreasonable.

In their attempt to escape arbitration, the Mariposa Group advocates a narrow, hypertechnical, and unreasonable interpretation of Paragraph 3.a of the Settlement Agreement. To do so, they manufacture imaginary limitations and conditions that are not present in the agreement. Their interpretation does not comport with Utah law, does not

(. . . continued)

franchisee, 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.

Settlement Agreement ¶ 1.c (emphases added).

follow the requirement that arbitration provisions should be construed broadly in favor of arbitration, and should be rejected.

The Mariposa Group argues that the Settlement Agreement provides only three limited categories of disputes that the parties intended to be subject to arbitration. The first category they argue derives from Paragraphs 1.a & b of the Settlement Agreement and pertains only to freight disputes. (*See* Aplt.' Brief at 11-12). The second category of disputes they claim are subject to arbitration arises out of the last sentence of Paragraph 3.a, and, according to them, pertains only where a dispute arises after a judgment has been entered in the DHL Lawsuit. (*Id.* at 14-15). As no final judgment was entered in that case, the Mariposa Group claims this category is inapplicable. (*Id.*) Finally, the Mariposa Group asserts that the third category of arbitrable disputes comes out of Paragraph 3.a, but claims such disputes are only arbitrable if the USS Parties want to settle with DHL *and* if the USS Parties satisfy "certain specific" preconditions. (*See id.* at 14-15).¹⁵ If the USS Parties failed to satisfy any of those conditions, they claim the USS Parties "forfeit[ed] any right to arbitration." (*Id.* at 14). The Mariposa Group claims that, because the USS Parties did not satisfy each of these conditions precedent prior to settling with DHL, the USS Parties lost their right to submit the dispute to arbitration.

¹⁵ Specifically, the Mariposa Group identifies these "certain specific" conditions to consist of the following four steps: (1) "USS must desire to resolve the DHL Lawsuit through settlement"; (2) "USS must provide the Mariposa Franchisees with CAMS Data before entering into a settlement with DHL"; (3) "the Mariposa Franchisees must disagree with the amounts identified by USS through the CAMS Data"; (4) "USS must proceed with settlement." (Aplt.' Brief at 13).

(*Id.*) The Mariposa Group's interpretation finds no support in the Settlement Agreement, ignores the obvious breadth of the words "any disputes," and is unreasonable.

As already noted, Paragraph 3.a provides that "***any dispute***" concerning the amounts identified by the USS Parties must be resolved through arbitration. This language, particularly when read in light of Utah law that requires arbitration provisions to be construed broadly and in favor of arbitration, *see Cent. Fla.*, 2002 UT 3, ¶ 16, denotes that ***all*** disputes relating in any way to any amounts alleged to be owing fall within the arbitration requirement.¹⁶ Not only would the Mariposa Group's interpretation require a court to sidestep the words "any dispute" and applicable Utah law, the preconditions they seek to impose are unsupported by the language of the agreement. Paragraph 3.a ***does not state*** that, if the USS Parties do not inform the Mariposa Group of the settlement or provide the CAMS Data before a settlement, they forfeit their right to

¹⁶ The Mariposa Group cites to *Bybee v. Abdulla*, 2008 UT 35, ¶ 26, 189 P.3d 40, and *Ellsworth v. American Arbitration Ass'n*, 2006 UT 77, ¶ 14, 148 P.3d 983, for the proposition that the "presumption in favor of arbitration . . . applies only when arbitration is a bargained-for remedy of the parties as evidenced by direct and specific evidence of a contract to arbitrate." (Aplts.' Brief at 10 (quoting *Bybee*, 2008 UT App ¶ 26) Their reliance on these cases is misplaced. Those cases addressed whether there was any agreement to arbitrate in the first instance given the lack of direct and specific evidence. *See Bybee*, 2008 UT 35, ¶ 34 (holding arbitration agreement cannot bind a nonsignatory spouse bringing a wrongful death claim); *Ellsworth*, 2006 UT 77, ¶ 18 (holding that arbitration agreement with a person's name but no signature is not direct and specific evidence of an agreement to arbitrate). In contrast, in this case, there is no dispute that an agreement to arbitrate exists. Hence, the presumption in favor of arbitration unquestionably applies.

arbitration.¹⁷ Indeed, there is no mention anywhere in the agreement that the arbitration requirement is ever to be disregarded. Moreover, Paragraphs 1 and 3 do not contain any language that would indicate that disputes are to be resolved in a manner other than through arbitration.¹⁸

Adding to the problems with the Mariposa Group's interpretation is the fact that their alleged preconditions to arbitrability do not move this dispute away from arbitration. Rather, they require it. After all, the UAA provides that, while a court may decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate":

An arbitrator *shall decide* whether a *condition precedent* to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

¹⁷ The Mariposa Group has lost any right to argue that the USS Parties waived or forfeited the right to arbitrate as they did not raise that issue with the district court and did not preserve it for appeal. See *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 25, 266 P.3d 702; see also *Anderson v. Thompson*, 2008 UT App 3, ¶ 38, 176 P.3d 464 ("Because [appellant] raises his waiver argument for the first time on appeal, and has failed to cite where in the record his argument is preserved, we refuse to address the merits of this claim.").

¹⁸ The Mariposa Group claims the parties must have intended to narrowly limit arbitration to the categories they advocate because Paragraph 5 of the Settlement Agreement states that, in the event of a default by a Mariposa Franchisee, the USS Parties "may commence an action against him, her or it in Third Judicial District of Utah, file the Verified Confession of Judgment, and recover for any amount still owing to the USS Parties" (Aplts.' Brief at 15). This argument ignores the purpose of Paragraph 5. That paragraph addresses only the USS Parties' right to enforce the security provided by the Mariposa Franchisees—i.e., the verified confessions of judgment—by filing those confessions of judgment with the court to obtain a judgment by confession. Only a court can enter a judgment by confession.

Utah Code Ann. § 78B-11-107(2) & (3) (emphases added). By arguing that Paragraph 3.a imposes conditions precedent to arbitrability, the Mariposa Group renders this dispute all the more a dispute for an arbitrator, not a court.

Similarly, there is no merit to the Mariposa Group's contention that the only disputes that are arbitrable under Paragraph 3.a are those that relate to the "accuracy" of the amounts identified in the CAMS Data. (See Aplt's. Brief at 16). Notably, this argument, by its very nature, is flawed because it would require the court to read into the contract a term that is not there. The word "accuracy" does not appear in Paragraph 3.a or, for that matter, any paragraph of the Settlement Agreement. Rather, the language provides that, if there is "any dispute . . . concerning [indemnification] amounts," it "shall be resolved in accordance with the dispute resolution procedure set forth in Paragraph 1.c. above." (Settlement Agreement ¶ 3.a).

Finally, the Mariposa Group's interpretation should be rejected because it is unreasonable and would result in nonsensical outcomes. See *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 458 n.16 ("[C]ourts should avoid [an] unreasonable interpretation when [a] contract provision would be reduced to absurdity"); *McNeil Eng'g & Land Surveying, LLC v. Bennett*, 2011 UT App 423, ¶ 17, 268 P.3d 854 ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." (quoting Restatement (Second) of Contracts § 203(a) (1981))).

For example, under the Mariposa Group's interpretation of Paragraph 3.a, if the USS Parties had provided the CAMS Data prior to the settlement, any disputes regarding the amounts owing would have to be resolved through arbitration. If, however, the USS Parties provided the CAMS Data after settling with DHL, the parties would be required to resolve their dispute through court proceedings, even though the dispute may be about the very same issue and even though the USS Parties retained the unfettered right under Paragraph 3.a to settle the case with DHL irrespective of the Mariposa Franchisees' reaction to the settlement. The Mariposa Group offers no explanation for why the parties would have intended such an irrational result.

Moreover, if the Mariposa Group's interpretation were correct, the three categories of disputes they identify would have to be arbitrated, but all other disputes would have to be resolved in different tribunals, even if those disputes were all related to or arose out of the same set of circumstances as the matters being arbitrated. This would inevitably result in the need to resolve disputes piecemeal with the potential for overlapping and inconsistent rulings. The very same result would occur if only disputes regarding the "accuracy" of the CAMS Data were arbitrable. Using this case as an example, under the Mariposa Group's theory, the parties would first have to take their case to court to resolve all disputes other than the accuracy of the CAMS Data. Then, if the USS Parties prevailed in establishing a right to be indemnified, the USS Parties would have to file a separate arbitration to resolve the disputes regarding the accuracy of the CAMS Data.

Again, there is no indication that the parties intended such a result, and such an outcome is clearly not consistent with the parties' intent to arbitrate disputes and avoid litigation.

Simply put, by using the words "any dispute," the parties intended all disputes concerning any amount owing under Paragraph 3 to be arbitrated. The Mariposa Group's interpretation is not consistent with the terms of the agreement, is contrary to Utah law, and is unreasonable.

D. The Parties Dispute Falls Within the Scope of "Any Disputes" Under Paragraph 3 of the Settlement Agreement.

In a final effort to avoid arbitration, the Mariposa Group argues that the district court erred in granting the Motion because the "causes of action alleged in the Complaint" fall outside of the intended scope of the arbitration provision. (Aplts.' Brief at 17-18). This argument, like the Mariposa Group's other arguments, too narrowly construes the nature of the parties' dispute and inaccurately portrays the Complaint. The parties' dispute, including the claims in the Complaint, all center on the question of the amount, if any, that the Mariposa Group owes the USS Parties under Paragraph 3. As such, the dispute is subject to the arbitration provision.

As an initial matter, the Mariposa Group's argument regarding the nature of the parties' dispute is flawed because it is based on the assumption that the parties' dispute is defined only by the contents of the Mariposa Group's Complaint. That assumption is incorrect. Utah Code Ann. § 78B-11-108 (the provision governing motions to compel arbitration) allows a party to compel arbitration of any issue that is subject to arbitration, not only issues that were improperly filed in court through a complaint.

In this case, and after nearly six months of the Mariposa Group challenging that they owed the amounts identified by the USS Parties and refusing to sign promissory notes in those amounts, the USS Parties sent out “Dispute Notices” triggering an arbitration to resolve the dispute. (R. 161, 530-559). It was only in July 2011, and after that dispute had ripened, that the Mariposa Group filed the Complaint. (R. 1). Even then, the Complaint was an obvious effort by the Mariposa Group to avoid the arbitration by attempting to re-characterize the nature of the parties’ dispute. The district court saw through the Mariposa Group’s effort, concluded that the parties’ dispute fell within the scope of the arbitration provision, and ordered the parties to resolve their dispute through arbitration. (R. 807 at 28:7-20). In doing so, the district court did not base its ruling only on the content of the Complaint. (R. 703-04; 807 at 11:16-19).

Even setting aside the parties’ larger dispute, the Mariposa Group’s contention that the claims in the Complaint do not fall within the scope of the arbitration provision misrepresents the Complaint. As set forth above, Paragraph 3.a makes clear that, pursuant to Paragraph 1.c, the arbitrator shall hear “*any dispute* between the USS Parties and the Mariposa Franchisees concerning [the] amounts [identified by the USS Parties]” Settlement Agreement ¶ 3.a (emphasis added); *see also id.* ¶ 1.c (“The Parties agree that *any dispute* . . . will be fully and finally resolved exclusively by binding arbitration, as set forth in this provision”) (emphasis added). Certainly then, “any dispute” would include a dispute concerning the accuracy of the CAMS Data, but also any claim by the Mariposa Group that they cannot tell what they owe or a claim that they

only owe a certain percentage of what is being sought or that they owe nothing at all.

Each of the claims in the Complaint are subsumed within these issues and are a subset of the larger question of the amount, if any, owed to the USS Parties under Paragraph 3 of the Settlement Agreement.

For example, the Mariposa Group's First cause of action contains the following statement: "Accordingly, *the dispute over the amounts owed under Paragraph 3* of the Settlement Agreement has sharpened into an imminent clash of legal rights and obligations between Plaintiffs and USS." (R. 12; Compl. ¶ 82) (emphasis added).

Likewise, their second cause of action states, "Plaintiffs have clearly informed USS that they have not received sufficient information to determine the amounts they owe and *that they . . . dispute the amounts contained in the CAMS database.*" (R. 13; Compl. ¶ 89 (emphasis added)).

Similarly, in their third cause of action, the Mariposa Group disputes the amounts the USS Parties allege to be owing because they claim that "the CAMS database had not been updated to reflect the actual amount of the alleged offset," (R. 14, Compl. ¶ 96; "the CAMS database contains errors," (R. 14; Compl. ¶ 99); and USS failed to provide Plaintiffs with any determination of the amounts owed to DHL for the Mariposa Franchisees unpaid shipments. (R. 14; Compl. ¶ 97).¹⁹ Finally, in their fourth cause of

¹⁹ In addition, Paragraph 60 of the Complaint alleges that the Mariposa Group disputes the amounts reflected in the CAMS Data provided by the USS Parties: "When Plaintiffs accessed the CAMS database, they realized that it contained errors with respect
(continued . . .)

action, the Mariposa Group seeks a declaration that they “are not in default of the Settlement Agreement” by failing to sign the promissory note in the amounts identified by the USS Parties. (R. 16; Compl. ¶ 114). All of these matters center on what is owed, if anything, to the USS Parties under Paragraph 3 and are, therefore, subject to mandatory arbitration.

The Mariposa Group fails to show how these claims fall outside of the arbitration provision. While they feign that their claims were to obtain the DHL Agreement and, as such, were not about the amount they owe, that contention is disingenuous. (*See* Aplt.’ Brief at 17-18.) Prior to filing of the Complaint and then at oral argument, counsel for the USS Parties (and the district court also) suggested to the Mariposa Group’s counsel that he subpoena the document. (*See* R. 807 at 26:20 to 27:6, 28:9-10). For whatever reason, he chose not to do so. When the parties proceeded to arbitration, the Mariposa Group received the DHL Settlement Agreement and related documents in response to a discovery request.²⁰ Moreover, as the district court recognized, any claims related to obtaining the DHL Agreement were part and parcel of the larger question of what is owed under Paragraph 3 of the agreement and could be addressed by the arbitrator. (R. 807 at 24:16-17, 27:7-12, 28:3-13).

(... continued)

to royalties due to USS and adjustments credited to Plaintiffs for ‘Problem Shipments’ (R. 9; Compl. at 9).

²⁰ Given this, were this case remanded to the district court, any claims related to obtaining the DHL Agreement would be moot.

Finally, the nature of the Mariposa Group's claim cannot be determined only by looking at the way the Mariposa Group pled their claims or by their own allegations. If this were not the case, a party could merely avoid arbitration by creatively pleading claims so that they would appear to be beyond the scope of the arbitration provision. Claims should be assessed as they really are. The Utah Supreme Court confirmed as much in the *Central Florida Investments, Inc. v. Parkwest Associates* case.

In that case, the parties had agreed to an arbitration provision that required that "[a]ny disagreement over the terms of this agreement shall be arbitrated" 2002 UT 3, ¶ 4. After the plaintiff had filed claims for breach of contract, breach of the covenant of good faith and fair dealing, and specific performance, it attempted to avoid arbitration by claiming that the dispute did not fall within the arbitration provision "because it [was] a dispute over the *enforcement* of the agreement, as opposed to a dispute over the *terms* of the agreement." *Id.* ¶ 17. The Supreme Court rejected this argument. In doing so, it stated:

In this instance, to distinguish between the terms themselves and enforcement of the terms would be meaningless--a distinction without a difference.

To interpret the agreement in this way would, in effect, nullify the agreement to arbitrate. Put otherwise, an agreement to arbitrate only terms of an agreement is of no effect if the parties can simply bring suit to enforce their interpretation of the terms of the agreement. . . . The language of the addendum indicates an intent to arbitrate. If the exception advocated by [the plaintiff] . . . were permitted, it would swallow the bargain that "any disagreement over the terms of this agreement shall be arbitrated." Moreover, [the plaintiff's] proposed interpretation would be contrary to the parties' intent, apparent from the four corners of the agreement, to avoid litigation and resolve any disputes through arbitration.

Id. ¶¶ 17-18 (footnote omitted).

The same is true here. The Mariposa Group attempts to interpret the Settlement Agreement and their Complaint in such a way as to nullify the agreement to arbitrate. Despite the parties' clear intent, as expressed in the four corners of the document, that "any dispute" concerning the amounts owing under Paragraph 3 would be resolved through arbitration, the Mariposa Group advocates an interpretation that so narrowly construes that provision as to render it of no effect and to "swallow the bargain." *Id.* ¶ 18. The district court agreed. It found the Mariposa Group's arguments unconvincing. In reading the arbitration provisions of the Settlement Agreement, the district court held that the language is "broad enough" and requires the parties "to engage in arbitration" to resolve the disputes between the parties. (R. 807 at 28:7-9,11-13,18-20). The USS Parties respectfully request this Court do likewise and affirm the district court's decision ordering the parties to engage in mandatory arbitration.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's Order granting the Motion to Compel Arbitration.

DATED this 2nd day of April 2012.

STOEL RIVES LLP



David J. Jordan

Cameron L. Sabin

Joseph W. Loosle

Attorneys for Appellees

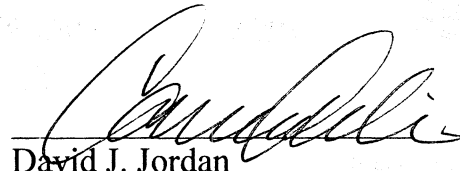
VIII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 10,353 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because it has been prepared in a proportionally spaced typeface using the word processing program Microsoft Word in 13-point Times New Roman font.

DATED this 2nd day of April 2012.

STOEL RIVES LLP

A handwritten signature in black ink, appearing to read "David J. Jordan", is written over a horizontal line.

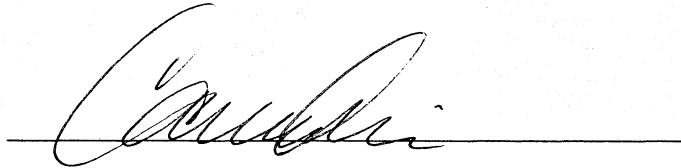
David J. Jordan
Cameron L. Sabin
Joseph W. Loosle

Attorneys for Appellees

CERTIFICATE OF SERVICE

On the 2nd day of April 2012, I hereby certify that I caused to be served two true and correct copies of the foregoing **BRIEF OF APPELLEES** and a courtesy brief on CD in searchable Portable Document Format (PDF) on the following by first class mail, postage pre-paid: .

Karthik Nadesan
Ivan LePendu
NADESAN BECK P.C.
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Telephone: (801) 363-1140
Facsimile: (801) 534-1948
Attorneys for Plaintiffs/Appellants

A handwritten signature in cursive script, appearing to read 'K. Nadesan', is written over a horizontal line.

ADDENDUM

EXHIBIT A

Title/Chapter/Section: [Search Code by Key Word](#)[<< Previous Section \(78B-11-106\)](#)[Next Section \(78B-11-108\) >>](#)[Utah](#)[Code](#)[Title](#)[78B](#)

Judicial Code

[Chapter](#)[11](#)

Utah Uniform Arbitration Act

[Section](#)[107](#)

Validity of agreement to arbitrate.

78B-11-107. Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Renumbered and Amended by Chapter 3, 2008 General Session

Download Code Section [Zipped](#) WordPerfect [78B11_010700.ZIP](#) 1,965 Bytes[<< Previous Section \(78B-11-106\)](#)[Next Section \(78B-11-108\) >>](#)

Title/Chapter/Section: [Search Code by Key Word](#)[<< Previous Section \(78B-11-107\)](#)[Next Section \(78B-11-109\) >>](#)[Utah](#)[Code](#)[Title](#)

Judicial Code

[78B](#)[Chapter](#)

Utah Uniform Arbitration Act

[11](#)[Section](#)

Motion to compel arbitration.

[108](#)**78B-11-108. Motion to compel arbitration.**

(1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(a) if the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and

(b) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(3) If the court finds that there is no enforceable agreement, it may not, pursuant to Subsection (1) or (2), order the parties to arbitrate.

(4) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(5) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court. Otherwise a motion under this section may be made in any court as provided in [Section 78B-11-128](#).

(6) If 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 the court renders a final decision under this section.

(7) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

Renumbered and Amended by Chapter 3, 2008 General Session

Download Code Section [Zipped](#) [WordPerfect](#) [78B11_010800.ZIP](#) 2,432 Bytes

[<< Previous Section \(78B-11-107\)](#)[Next Section \(78B-11-109\) >>](#)

EXHIBIT B

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

-o0o-

MARIPOSA EXPRESS, INC.,)	
COLD SPRING INVESTMENTS,)	
LLC., COLD SPRING)	Case No. 110915908
INVESTMENTS NO. 1, COLD)	
SPRING INVESTMENTS NO. 2,)	DEFENDANTS' MOTION TO
NEWBURYPORT CAPITAL, LLC,)	COMPEL MANDATORY ARBITRATION
HANNAH ENTERPRISES, INC.,)	AND TO DISMISS OR,
USS HOLDINGS, LLC,)	ALTERNATIVELY, STAY
USS COLUMBIA LLC, METRO MAR)	PROCEEDINGS PENDING
VENTURES, LLC, MICHAEL)	ARBITRATION
JONES, LLC, STIRLING, LLC,)	
MICHAELSON VENTURES, INC.,)	
USS OBRIEN, INC., USS)	
HIGHLAND PARK, INC.,)	
SHARON McWILLIAMS, GEORGE)	
AMMIRATO, WILLIAM DEMET,)	
ROBERT HARRIS, MICHAEL)	
JONES, TED MICHAELSON, JIM)	
OBRIEN, STEFAN)	

1 TRIANDAFILOU,)
2)
3 Plaintiffs,)
4)
5 vs.)
6)
7 UNITED SHIPPING SOLUTIONS,)
8 LLC, USS LOGISTICS, LLC,)
9 ROBERT ROSS, CHARLES DERR)
10 and JESSE MOORE,)
11)
12 Defendants.)

-o0o-

BE IT REMEMBERED that on the 19th day of August, 2011, commencing at the hour of 1:38 p.m., the above-entitled matter came on for hearing before the HONORABLE WILLIAM W. BARRETT, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

A P P E A R A N C E S

For the Plaintiffs: KARTHIK NADESAN
Attorney at Law
Nadesan Beck
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

For the Defendants: DAVID J. JORDAN
JOSEPH W. LOOSLE
Attorneys at Law
Stoel, Rives
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111

* * *

P R O C E E D I N G S

(Transcriber's Note: Speaker identification

a

may not be accurate with audio recordings.)

THE COURT: Be right with you.

Okay. This is Mariposa Express, Inc. and others vs.
United Shipping Solutions, LLC and others.

May I have appearances, please?

MR. NADESAN: Karthik Nadesan on behalf of the
plaintiffs, Mari--we'll just call them the Mariposa group.

THE COURT: Okay.

MR. JORDAN: David Jordan and Joe Loosle of Stoel
Rives on behalf of USS.

THE COURT: It's your motion.

MR. NADESAN: Actually, your Honor, it's--

MR. JORDAN: My motion.

MR. NADESAN: --their motion.

THE COURT: Your motion. That's right. I'm sorry.

Mr. Jordan, are you going to argue this?

MR. JORDAN: I am. Thank you, your Honor.

A little procedural history may be helpful to the
Court here. This case arises out of to different pieces of
predecessor litigation. USS is a company that re-sold

1 shipping services through a DHL and they conducted their
2 business through a franchise system. USS contracted with
3 franchisees who had territories throughout the United States
4 and within their territories, they had the authority to re-
5 sell at wholesale rates the shipping services of DHL.

6 There came a time in 2008 when DHL decided that it
7 was going to get out of the domestic shipping business in the
8 United States. In doing so, they breached their contractual
9 obligations to USS and its franchise organization. That
10 spawned litigation in which USS was the plaintiff suing for
11 breach of contract and other claims based on DHL's unilateral
12 decision to exit the market.

13 At the same time, when DHL pulled out of the
14 domestic market, certain franchisees of USS made the
15 unilateral decision to stop paying their bills, although they
16 continued to sell and use DHL shipping services for a period
17 of time. So there was a window within which the plaintiffs'
18 clients were selling DHL services and--and DHL was shipping
19 for those franchisees, for their customers and those
20 franchisees were not paying for those shipping services.
21 That resulted in litigation between USS and certain of its
22 franchisees.

23 Those two cases give rise to this litigation in the
24 following way: In the USS franchisees litigation, which was
25 before Judge Toomey, a TRO was entered against the franchisees

1 which the franchisees violated, Judge Toomey entered an order
2 to show cause why they shouldn't be held in contempt. Before
3 that order to show cause was fully heard and sanctions were
4 granted on the contempt ruling, USS and its franchisees
5 entered into a settlement agreement. That settlement
6 agreement has the arbitration clause, which is the subject of
7 today's motion.

8 That arbitration clause is part of a larger
9 agreement which provides in part that if DHL and the USS
10 parties desire to resolve the DHL lawsuit through a
11 settlement, the USS parties shall provide the Mariposa
12 franchisees with access to the CAMS data, that's just the
13 financial data showing all the shipments that all the
14 franchisees made and all the invoices that they rendered. If
15 the Mariposa franchisees do not agree with the amount
16 identified by the USS parties, the USS parties shall have the
17 right to proceed with the settlement and any dispute between
18 the USS parties and the Mariposa franchisees concerning these
19 amounts shall be resolved in accordance with the dispute
20 resolution procedure set forth in Paragraph 1(C) above.
21 Paragraph 1(C) above is a comprehensive arbitration clause
22 that say any dispute between the parties has to be submitted
23 to a single arbitrator or arbitration within certain time
24 limits.

25 There's another important section of this same

1 paragraph and it says, likewise, if the USS parties are
2 determined to owe DHL through a judgment any amount for
3 services provided to the Mariposa franchisees or their
4 customers, any dispute between the USS parties and the
5 Mariposa franchisees concerning such amounts shall be resolved
6 in accordance with the dispute resolution paragraph set forth
7 in Paragraph 1(C) above. Both referring back to 1(C) which is
8 the general alternative dispute resolution arbitration clause
9 in the agreement.

10 Well, a little bit more history. After the Mariposa
11 franchisees and USS had entered into the settlement agreement
12 containing this dispute resolution language, DHL and USS
13 proceeded down the road with the litigation in their case,
14 which was--which was then pending.

15 What ultimately happened in that case is a little
16 bit of judgment and a little bit of settlement. There was a
17 summary judgment motion filed by DHL on its counterclaim and
18 DHL's counterclaim said, your franchisees have continued to
19 ship and they have incurred charges for which they haven't
20 paid and you owe us for all of those shipments that we've
21 made--DHL speaking--and for which we haven't been paid.

22 Judge Maughan heard that case and Judge Maughan
23 entered a memorandum decision granting summary judgment in
24 DHL's favor. I'll just read to the Court the language in his
25 order in that regard. USS's failure in this regard, failure

1 to pay for all the charges, creates liability as a matter of
2 law in an amount to be determined at trial. DHL is therefore
3 entitled to summary judgment on the issue of liability under
4 its--under its breach of contract counterclaim. So we were
5 claiming various defenses to their counterclaim, Judge Barrett
6 ruled against us, we represented USS in that DHL case as well
7 and summary judgment was ordered against us saying,
8 effectively, whatever charges you've incurred for shipments
9 that you've used and haven't paid for, you owe it.

10 Liability--

11 THE COURT: This is to the Mariposa--

12 MR. JORDAN: It's all the franchisees, including--

13 THE COURT: All the franchisees. Okay.

14 MR. JORDAN: --the--the Mariposa franchisees.

15 They're a sub-set of the large--

16 THE COURT: So--

17 MR. JORDAN: --group of franchisees.

18 THE COURT: Okay. So that--but no dollar amount?
19 You're going to go to trial.

20 MR. JORDAN: No dollar amount was affixed, would--
21 that would be determined at trial.

22 After that summary judgment was entered against us,
23 it took one of the issues out of the case, obviously, and our
24 claims against them then were resolved by settlement. But
25 obviously, in that settlement negotiation, the parties had to,

1 in fact, offset what we'd already been adjudged to owe.

2 There wasn't a serious dispute between USS and DHL
3 about what we owe them, a little bit of accounting
4 disagreements, but we essentially knew what we'd shipped and
5 hadn't paid for and so that obviously was part of the
6 settlement discussion 'cause judgment had already been entered
7 against us that we were going to wind up owing amounts that we
8 obviously couldn't dispute.

9 After the settlement, we notified the Mariposa
10 franchisees and the other franchisees that we had settled and
11 that we had had to set off the amounts that we actually owed
12 because they actually shipped and incurred expenses for which
13 they actually hadn't paid. And under the settlement
14 agreement, that was supposed to trigger a process by which
15 they would then examine our financial data, which we call the
16 CAMS data, all the invoice information, and see if they
17 disagreed with us about what their individual piece of that
18 was. Our discussions with DHL level were at a macro level
19 about total amounts owed as opposed to what is--what is any
20 single franchisee's piece of the whole thing.

21 So we provided them with CAMS data, we said, this is
22 what we think you owe use, do you dispute it in any way and if
23 you do, then let's have the arbitration that's called for and-
24 -and then things would roll out from the arbitration with an
25 amount determined specific to each franchisee, 'cause they

1 each have their own franchise, they each have their own
2 business.

3 Instead of going through arbitration with us and
4 specifically disputing the amount that we said, this is our
5 calculation of what you individually owe us, they filed this
6 lawsuit. And I could speculate as to the motives, but let me
7 just say in a very general way, I think they would like to
8 delay the date of reckoning on what they owe us until after
9 they have fully litigated their own third case against DHL.
10 There is pending in the State of New York a Mariposa
11 franchisee case against DHL in which they claim damages for
12 DHL having pulled out of the market in violation of their
13 contractual obligations. I think they'd like to get their
14 money from DHL before they have to pay money out to our
15 clients.

16 And hence, this particular case and I think the
17 Court will see in their briefing efforts to hyper-technically
18 construe the arbitration clause in such a way as to say that
19 this particular dispute, which they say they're trying to
20 raise is somehow outside the scope of the arbitration
21 agreement. So, that's the history that brings us here today.

22 Just a little piece of law now that I think is
23 helpful. In the Central Florida Investors case, which was
24 decided by our Supreme Court in 2002, the court said this: It
25 is the policy of the law in Utah to interpret contracts in

1 favor of arbitration in keeping with our policy of encouraging
2 extra-judicial resolution of disputes when the parties have
3 agreed not to litigate.

4 So, I think that sets up a presumption and the
5 thought that if it sort of seems murky at all, we resolve
6 those kinds of concerns in favor of arbitration. That's the
7 policy of the State as announced by the Supreme Court.

8 What I think is critical here is the language that I
9 was quoting to the Court which says: I'll take it from the
10 second part here. If the parties are determine to owe DHL,
11 through a judgment, any amount for services provided to the
12 Mariposa franchisees and/or their customers, any dispute
13 between the USS parties and the Mariposa franchisees
14 concerning such amounts shall be resolved in accordance with
15 the dispute resolution procedure, the arbitration clause,
16 single arbitrating within certain specified time limits.

17 So whether you're resolving it by settlement, which
18 is the first part of the Paragraph 3(A) of the clause or
19 whether you're resolving it by judgment, which is the second
20 part and in this case, it's both. Judgment was entered as to
21 liability and then ultimately, settlement as to a macro amount
22 was--was made in the case as to what would be owing under the
23 Court's summary judgment. In either case, you get back to
24 Paragraph 1(C) and in both cases, the same language is used,
25 which is any dispute, any dispute.

1 Given the State's policy in favor of arbitration and
2 construing doubts in favor of arbitration and presuming that
3 arbitration should be the appropriate remedy where the parties
4 have agreed to--agreed to arbitration, I think this is a very
5 straightforward case.

6 Now they--they want to raise what I consider to be
7 hyper-technical issues about whether we should have given them
8 data before we settled or whether they should have gotten the
9 data after we settled or whether or not that's important.
10 What is true is that they have all the data, all the financial
11 data, they have our calculation of what we consider that they
12 owe, individually, by plaintiff, and now is the time for each
13 individual franchisee to step up and say, I think it's less
14 than that, that's to be determined by arbitration and not by
15 this Court.

16 If I can answer any questions, I'd be happy to.

17 THE COURT: No. I don't have any right now.

18 MR. JORDAN: Thank you.

19 THE COURT: I've looked through this stuff, though.

20 And it's Nadesan?

21 MR. NADESAN: Nadesan.

22 THE COURT: I'm sorry?

23 MR. NADESAN: Karthik Nadesan.

24 THE COURT: Nadesan. How do you spell that?

25 MR. NADESAN: N-a-d-e-s-a-n.

1 THE COURT: I've got--I'm sorry. Run that by me one
2 more time.

3 MR. NADESAN: N-a-d-e-s-a-n.

4 THE COURT: N-a-d-e-s-a-n. Nadesan. Okay.

5 Mr. Nadesan. Sorry.

6 MR. NADESAN: Your Honor, this matter stems from
7 something that rather troublesome about the settlement between
8 DHL and USS. Specifically, that settlement agreement USS has
9 represented as being confidential; however, at the same time,
10 even in open court here today, they represent to you what the
11 contents of that settlement agreement is. Specifically, they
12 say under the settlement agreement, we had to pay DHL a
13 certain amount.

14 The problems my clients have had and have had--
15 repeatedly requested from DHL--I'm sorry, from USS, is some
16 sort of substantiation of whether amount as actually paid.
17 What was the actual exchange? Because--

18 THE COURT: Why do you--why do you need to know
19 that?

20 MR. NADESAN: Because the fact is, how do we know
21 that a payment has actually occurred? Because under the
22 settlement agreement, it says--and let me give you a copy. Do
23 you have a copy, your Honor?

24 THE COURT: Yeah. I think--I think I've got two
25 copies.

1 MR. JORDAN: Somewhere in there.

2 MR. NADESAN: Well, let me--let me give you one.

3 THE COURT: No. I've got it right here.

4 MR. NADESAN: Okay.

5 THE COURT: This is--in fact, this is what I've been
6 looking at. Had a little blue tag right here on it.

7 MR. NADESAN: Sure. Well, what it says under
8 Section 3 is that by entering into the--this agreement, the
9 first sentence of that says: By entering into this agreement,
10 the respective Mariposa--

11 THE COURT: Are you talking Paragraph 3 or Section
12 3?

13 MR. NADESAN: Section 3.

14 THE COURT: Is--can you give me a page number?

15 MR. NADESAN: Sure. It's Page 5.

16 THE COURT: 5?

17 MR. NADESAN: Says by entering into this agreement,
18 the respective Mariposa franchisees agree to indemnify and
19 hold USS harmless for any and all amounts the USS parties are
20 determined to owe DHL through judgment or settlement for DHL
21 services provided to the respective franchisees.

22 There--there's a little bit extending this. It says
23 regardless of whether that determination is by judgment or
24 through settlement and regardless of whether the amount is
25 determined through set-off amounts that may reduce any

1 judgment in favor of the USS parties against DHL.

2 For the Mariposa franchisees, the key issue is
3 whether USS was determined to owe DHL, through either judgment
4 or settlement for DHL services provided to the respective
5 Mariposa franchisees. Now, what's clear is that there was no
6 judgment in which the amount that they were determined to owe
7 was entered. It's clear that that--that the judgment issue
8 isn't--isn't a factor here. What it is, is the amount that
9 USS parties are determined to owe DHL through settlement for
10 DHL services provided; however, the issue is at this point,
11 they basically--there's a heated--this is the result of--the
12 settlement agreement is the result of a heated dispute between
13 the parties and they basically walked up to my clients and
14 said, well, just take our word, we paid DHL the full amount.

15 And our clients have said, well, please provide us
16 some sort of substantiation. And what they've said is, well,
17 we'll get our--our accounting books; however, their accounting
18 books don't show whether they actually made a payment to DHL
19 or not. What their accounting books show is at the start of
20 the DHL, their litigation with DHL, the amounts that were owed
21 to DHL for services provided, but what it doesn't show is how
22 much they were actually determined to owe DHL as part of their
23 settlement agreement.

24 And that's what this litigation is about. It's not
25 about our--my client trying to avoid its responsibilities or

1 delay. In fact, one thing to note is that my client filed
2 their--this complaint for declaratory judgment on July 1st and
3 served USS on July 12th. And then on July 13th, USS sent out
4 its arbi--demand for arbitration.

5 In addition--they're not trying to skip out on and
6 steal--or steal USS' money because under the very terms of
7 this agreement, they're not obligated to make any payments to
8 USS until their lawsuit in New York is resolved.

9 So the real issue that--that's arisen is, what--

10 THE COURT: Where is that referenced in the
11 settlement agreement?

12 MR. NADESAN: It is on Paragraph 3, where it says--
13 it's the last sentence of Paragraph 3 before Section A. And
14 what it says is, the parties agree that the Mariposa
15 franchisees shall not be required to make payment to USS under
16 this provision until such time as the franchisee lawsuit is
17 resolved, either through a final, non-appealable judgment or
18 against the Mariposa franchisees or through settlement.

19 So this isn't a matter of them trying to take the
20 money and leave town. This is a matter of them trying to make
21 a determination of what they actually owe USS under the
22 indemnification provision. And the problem is that USS is
23 unwilling or unable to provide some sort of substantiation
24 other than its bald-faced assertions. But that--the problem
25 with that is, how can USS, on the one hand say, we have a

1 confidential agreement, we can't talk about it, we can't
2 disclose it, the other hand, saying, under this confidential
3 agreement, we were determined to owe DHL the full amounts of
4 all the amounts that were in our CAMS system.

5 And so we brought this case, not to dispute the
6 actual amounts, but to find out what is USS' burden of proof,
7 what must they do in order to show that there--there actually
8 is a determination of the amount they owe under the settlement
9 agreement.

10 And in fact, one of the items in our complaint is
11 for an injunction requiring them to disclose the actual
12 settlement agreement. If the settlement agreement shows that
13 they paid the actual amounts, then yes, if the arbitration
14 clause is applicable, then the parties can go into arbitration
15 and decide whether their CAMS data is correct or not; however,
16 what the--the problem is, is that the settlement agreement
17 doesn't contain this offset for this full amount or doesn't
18 off--document an offset at all.

19 For instance, if the settlement agreement doesn't
20 mention at all the amount that USS is determined to owe DHL,
21 then my clients would have no obligation to pay DHL anything
22 under the settlement agreement. If the settlement agreement
23 says that there--that they have to pay a fifty percent offset,
24 so I think DHL was asking for approximately \$6 million and
25 there was a dispute between the parties in the exact amounts

1 owed. Now, if DHL says--will pay us \$3 million in offset as
2 part of the settlement agreement, then my clients would be
3 only be obligated to pay fifty percent of the amounts in this
4 CAMS database.

5 So the issue is not one of whether the parties are
6 fighting about what's in the CAMS database, it's at issue--
7 it's a more--it's a larger issue than that, specifically, it's
8 the issue of whether USS paid anything or is determined--more
9 accurately, is determined to owe anything to DHL for services
10 provided to my clients under the settlement agreement.

11 Now, USS has made the case that any dispute,
12 including the more global dispute about whether they were
13 determined to owe anything on the settlement agreement, is
14 covered by the arbitration clause. I don't think that's the
15 case, Utah law favors arbitration and where there are
16 ambiguities or there's a dispute about the meaning of the
17 arbitration clause, it favors arbitration. However, what it
18 also says is that it cannot--a party cannot be forced to
19 arbitration where it hasn't agreed to it.

20 And so we have to look at the agreement to determine
21 what exactly the Mariposa--Mariposa group agreed to arbitrate.
22 What they agreed to arbitrate--well, they--first of all, they
23 agreed to arbitration under two circumstances. The first is
24 if a judgment was entered in USS in favor of DHL. We know
25 that that has never happened, there was never a judgment,

1 there was a settlement.

2 Number two, it says if there is a settlement, the
3 Mariposa franchisees--and let me read this so I'm not--not
4 misrepresenting--

5 THE COURT: Where are you at? Paragraph (A)?

6 MR. NADESAN: Paragraph 3(A). It says, if--the
7 parties agree that if DHL and the USS parties desire to
8 resolve the DHL lawsuit through settlement, the USS parties
9 shall provide the Mariposa franchisees with access to the CAMS
10 data necessary to show the DHL services provided to the
11 Mariposa franchisees or their customers. If the franchisees
12 do not agree with the amount identified by the USS parties,
13 the USS parties shall nevertheless have the right to proceed
14 with the settlement and any dispute between the USS parties
15 and the Mariposa franchisees concerning these amounts shall be
16 resolved in accordance with the dispute resolution procedures
17 set forth in Paragraph 1(C) above.

18 What that says, in my understanding of it, is that
19 prior to a settlement, USS will contact Mariposa, say--the
20 Mariposa franchisees, say we're going to settle this, but in
21 order to settle it, to determine whether there's going to be
22 an offset of fifty percent, whether they're paying the entire
23 amount, what the exact amount of that settlement determination
24 is going to be, we'd like to make sure you check our books and
25 you tell us how--whether those books are correct.

1 The Mariposa franchisees then say yes, your books
2 are correct, or they say, no, we think your books are not
3 correct. At that point, USS goes and says, well, we're going
4 to go settle it anyway, but we'll decide afterwards whether
5 our books are correct or not.

6 What this doesn't mention is what--is the issue
7 raised on the first page of--sorry--the first sentence of
8 Paragraph 3, which is the indemnification amount. These
9 amounts, as it says here, that refers just to the CAMS data,
10 not to the determination of the--of what USS owes DHL.

11 As a result, we think that, first of all, it's
12 entirely possible that the arbitration provision doesn't even
13 apply now because USS concedes that prior to entering into
14 settlement with DHL, it never informed Mariposa of the
15 settlement, it never provided them with the CAMS data,
16 Mariposa never disputed that amount because it never had the
17 opportunity to prior to that settlement.

18 Now the settlement has happened, USS has come in and
19 it said, well, here's the amount that we paid, it's the same
20 as in our CAMS system, that's how much you owe us. But again,
21 that places us in a difficult spot because we don't know
22 whether--what the determination was as part of that settlement
23 agreement.

24 Now, the other issue that arises is, what 1(C)
25 actually says. Now, 1(C), if we turn to that, your Honor, is,

1 first of all is 1(C), as you can read in the first sentence,
2 was not intended to fully apply to Paragraph 3, because it
3 starts that the parties agree that any dispute regarding the
4 freight payments will be fully and finally resolved
5 exclusively by binding arbitration.

6 However, as a piece of background, the freight
7 payments resolved--referred there are not to Paragraph 3, it's
8 actually to Paragraph 1. If you turn to Page 2, you'll see
9 that Paragraph 1 define what freight payments are. So, that
10 first sentence does not apply--that first sentence of
11 Paragraph 1(C) does not apply to Paragraph 3. Instead, what
12 Paragraph 3 says is that the procedures in 1(C) will apply.

13 And then I think it's important to see what those
14 procedures are in terms of determining the extent of this
15 arbitration procedure. And specifically what 1(C) says is, if
16 USS and--sorry, 1(C)(i). If USS and any Mariposa franchisee
17 are unable to resolve any dispute regarding the amount owed by
18 a Mariposa franchisee under Section 1(A) above, the parties
19 will--USS will deliver a dispute notice, then the parties
20 shall submit the matter to binding arbitration before one
21 forensic accountant who shall review the parties'
22 documentation and establish the amount owed to USS, if any, on
23 any disputed invoices.

24 As a result, it's clear that this is just talking
25 about the CAMS data. It's--it's specifically the parties will

1 look at the CAMS data, they will see whether there are any
2 disputed invoices in the CAMS data and then they will hand
3 those disputed invoices to a forensic accountant and that
4 forensic accountant will determine whether the invoices
5 contain errors or not. And then he will render a decision.,

6 What it doesn't say is that the forensic accountant
7 is going to make a determination or is going to make a
8 judgment on how much the USS parties are determined to owe DHL
9 through judgment or settlement. And that is the essence of
10 what we've asked today.

11 And another example of the fact that this entire,
12 rather lengthy settlement agreement is not determined by that
13 arbitration provision, you can look at Paragraph 6. And what
14 Paragraph 6 is, is a default provision. And if you look at
15 the last two sentences of Paragraph 6--sorry, Section 6. It
16 says the Mariposa franchise--franchisees agree that upon
17 default, they shall have no further rights to cure the default
18 after expiration of the cure period and may only oppose the
19 entry of judgment on the grounds that no default occurred.
20 All other defenses and equity of law are waived. But what it
21 says here, if you read the whole paragraph is that the
22 Mariposa franchisees sign confessions of judgment and then USS
23 was allowed to enter those confessions of judgment if there's
24 a default; however, in the court system as opposed to
25 arbitration, the Mariposa franchisees are allowed to contest

1 whether or not they were in default.

2 Again, it's another example that the parties did not
3 expect or intend that this entire agreement was governed by
4 arbitration laws. Instead, the only thing to be governed is
5 whether the CAMS database numbers are correct or not. But
6 here, what we've asked for in our first cause of action is the
7 Court to interpret what this determined to owe DHL through
8 settlement or judgment language means and more specifically,
9 what USS needs to do to establish its burden of proof.

10 Our second cause of action was whether procedures
11 defined in 1(A) are applicable. It appears now that that is a
12 moot issue because USS fairly concedes that 1(A) is not
13 applicable; however, in correspondence to us, they had said
14 that.

15 The third cause of action is actually what we're
16 deciding today, which is, is 1(C) applicable to the issue of
17 determining whether--of this determination of liability or is
18 it just for looking at the CAMS database. So we're actually
19 deciding the burden--

20 THE COURT: Liability?

21 MR. NADESAN: Be--on the--

22 THE COURT: You mean on the indemnification?

23 MR. NADESAN: On the indemnification.

24 And so we're--we're doing number three today because
25 that was our--our request in number three, is--is 1(C)

1 applicable to determining our liability under the
2 indemnification provision or just to whether the CAMS figures
3 are correct or not?

4 THE COURT: Well, when you say liability, are you
5 telling me that what you're asking the Court to find is the
6 amount of the--

7 MR. NADESAN: No--well, it's either the amount--

8 THE COURT: I mean, you can say you're liable,
9 you've agreed to indemnify.

10 MR. NADESAN: Well, that's correct, your Honor.

11 THE COURT: So now the question is, how much?

12 MR. NADESAN: Exactly, your Honor. And what we're
13 asking for is, what does USS--well, first of all, 1(C) is
14 asking the Court to determine where this arbitration provision
15 first in to the grand scheme of the agreement. Is it just
16 about the amounts in the CAMS database or is it about the
17 entire--about the amount of the liability?

18 Because as I've explained to you, the amount of the
19 liability and the amount on the CAMS database can be
20 different. The only way to find out whether they're the same
21 is to actually have USS provide some sort of substantiation of
22 what it was determined to owe under the settlement agreement.

23 THE COURT: So what do you think they're asking in
24 terms of the arbitration?

25 MR. NADESAN: They're asking for us to go into the

1 arbitration and determine the amount of liability.

2 THE COURT: Each franchise owes; right?

3 MR. NADESAN: They're--what they've said to us, your
4 Honor, is that take us at our word, under the settlement
5 agreement, we paid the amounts in the CAMS database. And so
6 the CAMS database--the amounts in the CAMS database, you can
7 contest whether that amount is correct or not, but that's what
8 you owe. And what we're saying is, no, that is not what we
9 owe under the liability provision. What we owe under the
10 liability provision is the amount that you were determined to
11 owe on behalf of each of individual franchisee under the
12 settlement agreement. So, show us the settlement agreement,
13 provide us an affidavit from DHL, provide us with some
14 substantiation.

15 And what we're asking the Court to do--

16 THE COURT: Well, does that not need to be part and
17 parcel of any arbitration?

18 MR. NADESAN: No. Because--

19 THE COURT: Wouldn't the forensic accountant need to
20 know that information?

21 MR. NADESAN: No. Because--your Honor, because
22 under this, the forensic accountant is only determining
23 whether the CAMS data is accurate.

24 And to give a little bit of background, the issue
25 that arose in the earlier trial was that the CAMS information

1 was not accurate, that there were mistakes in--and errors in
2 terms of the charges that USS was billing the franchisees.

3 So the CAMS data and the analysis of the CAMS data
4 is to analyze whether the CAMS invoices are in fact, correct,
5 whether those amounts need to be adjusted because they're
6 billing errors and discrepancies and payments were not
7 properly applied to the CAMS data. But that's separate from
8 determining from going--that's a separate leap from going to
9 the CAMS data represents the amount of the indemnification
10 obligation, because the indemnification is tied to the
11 settlement agreement.

12 And if the Court does find that, then it--well, then
13 we need to go into arbitration and then the arbi--the forensic
14 accountant needs to look at the settlement agreement or some
15 sort of substantiation, but what we've asked the Court to do
16 is interpret the agreement to determine what the burden of
17 proof on USS is to establish that--that there was a
18 determination in the settlement that monies--amounts were
19 owed. And what they said is, we don't need to make that
20 determination, the CAMS data is simply enough.

21 And that's what we're saying is outside the bounds
22 of the arbitration. The arbitrator was not meant to interpret
23 the contract, simply to look at documentation and determine
24 whether the CAMS amounts are correct or not.

25 THE COURT: Okay.

1 MR. JORDAN: Well, your Honor, maybe I can put this
2 to rest right now.

3 THE COURT: You could do that.

4 MR. JORDAN: Yeah. Counsel has not accurately
5 interpreted our position. We're certainly not saying that the
6 arbitrator is restricted to looking at the CAMS data. We're
7 not saying that the arbitrator can't look at the settlement
8 agreement. We're not saying that the arbitrator can't decide
9 how much is owed. All the questions he says that he wants to
10 have determined, we acknowledge the arbitrator has the
11 jurisdiction to decide.

12 Because the--the language here is any dispute and as
13 your--as your Honor correctly noted, it's any dispute over any
14 amount. So if they say it's zero, that's a dispute over the
15 amount; if they say it's fifty percent, that's a dispute over
16 the amount. If we say it's a hundred percent, that's a
17 dispute over the amount. That's all in front of the
18 arbitrator.

19 And will the arbitrator have to look at the
20 settlement agreement? Sure. Right now, I can't voluntarily
21 produce it. Can they subpoena it from me? Absolutely. Will
22 I have to produce it in response to a subpoena? That's one of
23 the ar--things the arbitrator will rule on, but I presume I
24 will. All right?

25 They've had their litigation going in New York.

1 I've said to them in their litigation in New York, I've said
2 to counsel, counsel, subpoena it from me so that I--I can
3 produce it consistent with the--with the confidentiality
4 provision of the settlement agreement. They won't subpoena it
5 from me, I can't imagine why not. But I--

6 THE COURT: I can't either.

7 MR. JORDAN: --I'm talking about all these disputes
8 and--and their statement to the Court that the--that the
9 arbitrator is in some way restricted to looking at the CAMS
10 data is not consistent with Paragraph 1(C). It doesn't even
11 mention CAMS data.

12 THE COURT: Huh-uh (negative).

13 MR. JORDAN: CAMS data is not even in Paragraph
14 1(C). It says the parties shall submit the matter to binding
15 arbitration before one forensic accountant who shall review
16 the parties' documentation, whatever documentation, doesn't
17 restrict it, they can submit whatever they want as
18 documentation and establish the amount owed. That's it. They
19 can submit any documentation they want, including the
20 settlement agreement and the arbitrator will establish the
21 amount owed, if any. That's the scope of this arbitration
22 authority, it couldn't be broader and we agreed to submit any
23 dispute as to any amount to the arbitrator under that clause.

24 MR. NADESAN: Your Honor?

25 THE COURT: Uh-uh. He gets the last say.

1 MR. NADESAN: Okay.

2 THE COURT: The way it works.

3 Well, to be quite honest with everybody, I didn't
4 read all this stuff, I flipped through it. My concern was
5 basically this settlement agreement and that's what I was
6 interested in. And I can--I can appreciate what the
7 plaintiffs are saying, but I agree with you, Mr. Jordan, I
8 think this is broad enough to allow for the kinds of
9 information they think they need to see. I would suggest they
10 subpoena that settlement agreement so they have it.

11 And I'm going to dismiss the case without prejudice
12 and order--order that it--that you engage in arbitration to
13 determine the amounts owed.

14 MR. JORDAN: If any.

15 THE COURT: You can prepare an order to that effect.

16 MR. JORDAN: I will.

17 THE COURT: I don't think I need to make any
18 findings, it's a motion to dismiss. So I think as a matter of
19 law, that's the way I see and--and read this--this agreement
20 to engage in arbitration.

21 MR. JORDAN: I'll prepare the order.

22 THE COURT: Okay.

23 MR. JORDAN: Thank you, your Honor.

24 THE COURT: It's without prejudice so...

25 MR. JORDAN: Thank you for your time today.

1 THE COURT: You're welcome. Thank you.

2 TRANSCRIBER'S CERTIFICATE

3
4
5 STATE OF UTAH :

6 : ss.

7 COUNTY OF SALT LAKE :
8
9

10 I, Toni Frye, do hereby certify:
11

12 That I am a Certified Court Transcriber of Tape
13 Recorded Court Proceedings; that I received the electronically
14 recorded files of the within matter and have transcribed the
15 same into typewriting, and the foregoing pages, to the best of
16 my ability, constitute a full, true and correct transcription,
17 except where it is indicated the Electronically Recorded Court
18 Proceedings were inaudible.
19

20 Dated this ____ day of _____, 2011.
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22
23
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1 Toni Frye, Transcriber

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3

4 I, RENEE L. STACY, Registered Professional Reporter,
5 Certified Realtime Reporter and Notary Public for the State of
6 Utah, do hereby certify that the foregoing transcript,
7 prepared by Toni Frye, was transcribed under my supervision
8 and direction.

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17 My Commission Expires:

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EXHIBIT C

David J. Jordan (1751)
djjordan@stoel.com
Cameron L. Sabin (9437)
clsabin@stoel.com
Joseph W. Loosle (12154)
jloosle@stoel.com
STOEL RIVES LLP
201 S Main Street, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 328-3131

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

MARIPOSA EXPRESS, INC, ET AL.,

Plaintiffs,

v.

UNITED SHIPPING SOLUTIONS,
LLC; USS LOGISTICS, LLC;
ROBERT ROSS; CHARLES DERR,
and JESSE MOORE,

Defendants.

W.B.
**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO COMPEL
MANDATORY ARBITRATION AND
TO DISMISS OR, ALTERNATIVELY,
STAY PROCEEDINGS PENDING
ARBITRATION**

Civil No. 110915908

Judge William W. Barrett

On August 19, 2011, this matter came before the Court for hearing on Defendants' Motion to Compel Mandatory Arbitration and to Dismiss or, Alternatively, Stay Proceedings Pending Arbitration (the "Motion"), filed by United Shipping Solutions, LLC, USS Logistics, LLC, Robert Ross, Charles Derr, and Jesse Moore (collectively, the "USS Parties"). The USS Parties were represented by David J. Jordan and Joseph W. Loosle of Stoel Rives LLP. Plaintiffs (collectively, the "Mariposa Group,") were represented by Karthik Nadesan of Nadesan Beck P.C.

FILED
THIRD DISTRICT COURT
SEP - 6 2011
SALT LAKE DEPARTMENT

BY
DEPUTY CLERK

FILED DISTRICT COURT
Third Judicial District

SEP - 6 2011
SALT LAKE COUNTY
Deputy Clerk *W*


After considering the memoranda and other materials submitted by the parties in support of, and in opposition to, the Motion; having listened to and considered the arguments of counsel; and thus, being fully advised and good cause appearing therefor, THE COURT HEREBY ORDERS AS FOLLOWS:

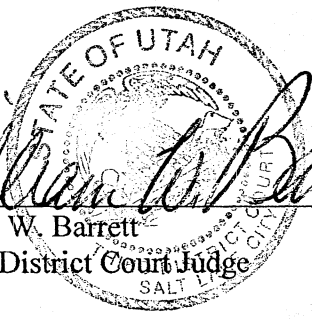
1. The Motion is granted. The parties are ordered to arbitrate their dispute in accordance with the arbitration procedures set forth in Section 1.c. of the Settlement Agreement.

2. The Mariposa Group's Complaint is dismissed without prejudice.

IT IS SO ORDERED.

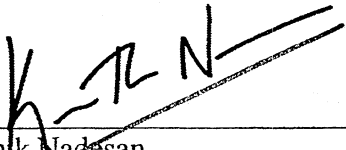
DATED this 6 day of Sept, 2011.


Judge William W. Barrett
Third Judicial District Court Judge



APPROVED AS TO FORM:

NADESAN BECK P.C.


Karthik Nadesan
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August 2011, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO COMPEL MANDATORY ARBITRATION AND TO DISMISS OR, ALTERNATIVELY, STAY PROCEEDINGS PENDING ARBITRATION** to the following:

Via Email and US mail: Karthik Nadesan
 Ivan LePendu
 David Bernstein
 Nadesan Beck P.C.
 39 Exchange Place, Suite 100
 Salt Lake City, Utah 84111

Attorneys for Plaintiffs

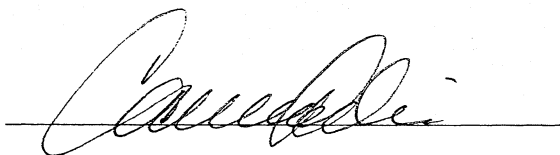


EXHIBIT D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

USS LOGISTICS, LLC, a Utah limited liability company; UNITED SHIPPING SOLUTIONS, LLC, a Utah limited liability company; HERE2THERE WEST, LLC, a New York limited liability company; HERE2THERE EAST, LLC, a New York limited liability company; EASTMAN-HILL ENTERPRISES, LLC, a Nevada limited liability company; FULLERTON INDUSTRIES INC., an Ohio corporation; UNITED SHIPPING SOLUTIONS OF SEATTLE, LLC, a Washington limited liability company; PEARL SHIPPING SERVICES, L.L.C., a Louisiana limited liability company; 10-12 SHIPPING SERVICES, L.L.C., a Louisiana limited liability company; PGP OVERNIGHT INC., a New York corporation; KATANA CORPORATION, a California corporation, BRAUN RESOURCES, INC., a California corporation; BRUCE CONREY, an individual; IRON LOGISTICS, LLC, a Pennsylvania limited liability company; ASTOUNDING LOGISTICS, INC., a Georgia corporation; PORTLAND WEST SHIPPING, LLC, an Oregon limited liability company; DELIVERY SOLUTIONS, LLC, an Oregon limited liability company; GARY E. SMITH, an individual; ELITE SHIPPING SYSTEMS, LLC, a Utah limited liability company; EXPEDITED SHIPPING SERVICES, LLC, a Nevada limited liability company; EXPRESS LOGISTICS, LLC, a Utah limited liability company; POINT TO POINT LOGISTICS, LLC, a California limited liability company; PV	MEMORANDUM DECISION CASE NO. 080926254
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TREE, INC., a California corporation;
UNITED SHIPPING SOLUTIONS
SACRAMENTO, a California general :
partnership; MILE HIGH SHIPPING,
LLC, a Colorado limited liability :
company; THE OUTFIELD GROUP, LLC, a
Missouri limited liability company;:
NAV SHIPPING, LLC, a Maryland
limited liability company; MAREN :
EQUIPMENT LEASING, INC., a
California corporation; AJ :
LOGISTICS, INC., a California
corporation; EJ CAPITAL HOLDINGS, :
LLC, a Nevada limited liability
company; KGHI, INC., a Michigan :
corporation; and ELITE AIR &
FREIGHT, LLC, a Kansas limited :
liability company,

Plaintiffs,

vs.

DHL EXPRESS (USA), INC., an Ohio
corporation,

Defendant.

DHL EXPRESS (USA), INC.,

Counterclaim Plaintiff,

vs.

USS LOGISTICS, LLC, and JOHN DOES
1 through 150,

Counterclaim Defendants.

This matter came before the Court for hearing on October 4, 2010,
in connection with the following Motions: (1) The "Franchisee's" Motion
for Partial Summary Judgment; (2) defendant DHL Express (USA), Inc.'s

("DHL") Motion for Summary Judgment on its Counterclaims; (3) DHL's Motion for Summary Judgment on Plaintiffs' Claims; (4) Plaintiffs USS Logistics, LLC ("USSL") and United Shipping Solutions, LLC's ("United") Motion in Limine to Exclude Portions of Dr. Greg Hallman's Report and Testimony; (5) United/USSL's Motion in Limine to Exclude Evidence of Damages of Defendant DHL; (6) United/USSL's Motion in Limine to Exclude Evidence Related to the Marioposa Lawsuit and Evidence Regarding Unasserted Claims; (7) United/USSL's Motion in Limine to Exclude Evidence of Certain Claims and Defenses of DHL; (8) DHL's Motion in Limine No. 1 re: Documents Subject to the Attorney-Client Privilege and Work Product Doctrine; (9) DHL's Motion in Limine No. 2 re: References to other Resellers; (10) DHL's Motion in Limine No. 3 re: Hank Gibson December 18, 2007, e-mail; (11) DHL's Motion in Limine No. 4 re: Public Relations Statements Prepared for Project Woodstock; (12) DHL's Motion in Limine No. 5 re: Post Termination Damages; (13) DHL's Motion to Dismiss Certain Franchisees for Failure to Prosecute; and (14) United/USSL's Motion to Strike Addendum to Expert Report of Dr. Greg Hallman Dated September 20, 2010, and Related Testimony.

Following the October 4, 2010, hearing, the parties again appeared before the Court on October 12, 2010. At the October 12th hearing, the Court made further inquiries into the legal issues raised in DHL's Motion for Summary Judgment on its Counterclaims. At the conclusion of the

Court's dialogue with counsel, it indicated its intent to grant this Motion and take the remaining Motions under further consideration.

While the Court made certain observations during the dual hearings mentioned above, it will nevertheless address each parties' Motions herein.¹ The Court notes that since taking this matter under advisement, it has had an opportunity to review the parties' legal authorities, rulings from other jurisdictions in cases involving DHL, the parties' written submissions and counsel's extensive oral argument. Being now fully informed, the Court rules as stated herein.

At the outset, the Court notes that it will generally address the Motions in the order in which they were raised during the October 4th oral argument. Further, because of the number of Motions involved, the Court will avoid restating the parties' respective legal positions. Finally, it should be noted that United/USSL's Motion to Strike Addendum to Expert Report of Dr. Greg Hallman Dated September 20, 2010, has not been fully briefed, with the filing of a reply Memorandum still pending. Nevertheless, counsel addressed this Motion at the October 4th hearing, the Court has had the benefit of reviewing the moving and responding Memoranda concerning this Motion and will therefore rule on the Motion herein.

¹ DHL's Motion to Dismiss Certain Franchisees will not be addressed because it is unopposed and has been granted.

The Court turns to consider the merits of each of the parties' Motions, beginning with the Franchisee's Motion for Partial Summary Judgment. The Court determines that Paragraph 5 of Amendment No. 1 of the Reseller Agreement is ambiguous and cannot be construed as a matter of law based on the four corners of the agreement. Specifically, DHL has persuaded the Court that a jury needs to consider whether the language in Paragraph 5 was intended to merely clarify that USSL would be permitted to have franchisees resell DHL's services on USSL's behalf or whether it was indeed intended to grant the Franchisees enforcement rights against DHL.

In reaching this conclusion, the Court considered the ruling in Avail Shipping, Inc. v. DHL Express (USA), Inc., a copy of which was provided to the Court by counsel for the Franchisees. Counsel had indicated during oral argument that the court in Avail had ruled that the franchisees in that case qualified as third-party beneficiaries under precisely the same language as Paragraph 5 in this case. However, upon close examination of that case, it appears that Amendment No. 1 to the Reseller Agreement in that case was different from the present case in that it stated: "This Agreement will be extended to United Shipping Solutions, LLC and their franchisees. . . ." (Emphasis added.) In this case, Paragraph 5 uses the term "franchises," rather than "franchisees." The Court believes that this variation is not a mere distinction without a difference. Indeed, counsel for DHL focused on the use of the term

"franchises" in Paragraph 5 as a basis for his argument that there is no specific language in Amendment No. 1 to indicate an express or explicit intent to make the Reseller Agreement inure to the benefit of the Franchisees themselves.

Further, the Court is satisfied that the parol evidence cited by the Franchisees highlights the factual issues regarding the parties' intent and understanding with respect to the language in Amendment No. 1. The differing views on what the language means and at least one deponent's uncertainty as to the meaning at all, confirms for the Court that these are issues which cannot be resolved on a summary judgment basis. Accordingly, the Franchisees' Motion for Partial Summary Judgment is denied.

Next, as indicated at the October 12th hearing, the Court grants DHL's Motion for Summary Judgment on its Counterclaims. The Court observes that it is undisputed that DHL continued to provide services to USSL's customers even after its announcement that it was terminating domestic shipping services. It is also undisputed that USSL accepted these services, but failed to pay for them for a period of time.

Counsel for United/USSL has argued that DHL merely has an offset for any amounts outstanding because DHL repudiated the Reseller Agreement, thereby excusing or providing justification for USSL's subsequent failure to pay. The Court is not persuaded by this line of reasoning and instead concludes that USSL elected to keep the Reseller Agreement alive despite

DHL's alleged breach by accepting the benefits of DHL's shipping services. Local 659, I.A.T.S.E. v. Color Corp. of America, 302 P.2d 294 (Sup.Ct.Cal. 1956). While USSL may have been the non-repudiating party to begin with, it ultimately defaulted on the Reseller Agreement by failing to pay for shipping services rendered in the time frame required, thereby creating in DHL the right to act upon that default through a direct breach of contract counterclaim and not merely as a set-off to the damages allegedly incurred by USSL/United. Silver Air v. Aeronautic Dev. Corp., 656 F. Supp. 170, 177 (S.D.N.Y. 1987) (citing Taylor v. Johnston, 539 P.2d 425, 430 (Sup.Ct.Cal. 1975)). Again, the Court is not persuaded that having accepted the benefit of the exchange under the Reseller Agreement, namely the receipt of shipping services, USSL is excused from its corresponding obligation of tendering payment as required under that Reseller Agreement. USSL's failure in this regard creates liability as a matter of law, in an amount to be determined at trial. DHL is therefore entitled to summary judgment on the issue of liability under its breach of contract counterclaim.²

² The Court notes that DHL's Motion in Limine No. 5 re: Post Termination Damages and the portion of DHL's Motion for Summary Judgment concerning USSL's breach of contract counterclaim are inter-related in the sense that USSL's failure to pay DHL's invoices potentially created the basis for DHL's termination of the Reseller Agreement and, in turn, potentially precludes USSL from seeking damages beyond the date of that termination. The scope of permissible damages under these unique circumstances presents a complex set of issues which the Court reserves and will address in the context of the parties' proposed jury instructions on damages.

However, the Court denies DHL's Motion for Summary Judgment as to its "account stated" Counterclaims. The elements of these Counterclaims are clearly in dispute. For instance, it does not appear that there has been any express acknowledgment by USSL of indebtedness. USSL has merely acknowledged that Invoices were sent representing amounts claimed to be owing by DHL. Also, USSL disputes that the amounts invoiced are accurate.

The Court next considers DHL's Motion in Limine No. 1 re: Documents Subject to the Attorney-Client Privilege and Work Product Doctrine. To reiterate what was discussed in Court, counsel will meet and confer regarding the documents which are the subject of this Motion and submit for *in camera* review any documents which they cannot agree upon. The remaining documents are to be immediately returned to DHL.

Next, the parties addressed DHL's Motion in Limine No. 2 re: References to Other Resellers. Upon further reflection, the Court determines that this Motion is granted and that United/USSL may only introduce evidence of system-wide issues or glitches with DHL's billing software and invoicing process, as it pertains to United/USSL's claims that they were not properly billed in this case.

As to DHL's Motion in Limine No. 3 Re: Hank Gibson December 18, 2007, email, the Court reserves judgment regarding Mr. Gibson's email pending the plaintiffs' ability to lay the predicate foundation, including how the contents of this email have relevance to the Project

ultimately carried out by DHL. Otherwise, the Court will grant DHL's Motion or require the email to be redacted.

As to United/USSL's Motion in Limine to Exclude Evidence of Certain Claims and Defenses of DHL, the Court denies this Motion. The Court determines that DHL did not act wrongfully with respect to providing a Rule 30(b)(6) witness to testify regarding its affirmative defenses. The Court is not persuaded by the suggestion that a Rule 30(b)(6) witness is required to be schooled in the legal concepts surrounding affirmative defenses and then made to testify regarding the elements and factual underpinnings of such defenses. Further, to the extent that United/USSL believed otherwise, it should have raised these issues previously rather than going directly to seeking sanctions.

As to United/USSL's Motion in Limine to Exclude Evidence Related to the Marioposa Lawsuit and Evidence Regarding Unasserted Claims, the Court determines that statements and testimony adduced in the "Mariposa" lawsuit may be used in the present action for the limited purpose of impeachment. The Court is not persuaded that such evidence, used in this limited purpose, is irrelevant or prejudicial. Accordingly, United/USSL's Motion is denied, as framed, but the evidence is limited nonetheless in the manner discussed herein.

The Court next considers the dual Motion in Limine and Motion to Strike concerning portions of Dr. Hallman's report and Addendum. Counsel for United/USSL persuasively argued that DHL should have presented Dr.

Hallman's opinions regarding DHL's claims of offset and damages as part of an initial expert report by the August 9, 2010, deadline. However, the Court is not persuaded that there has been any actual prejudice, particularly since it appears that Dr. Hallman's testimony in this regard is limited. In addition, the Addendum appears to merely provide the supplementation alluded to in Dr. Hallman's original Report. Finally, the Court is satisfied that the plaintiffs have had sufficient time to examine both the Report and Addendum and will, of course, have the opportunity to cross-examine Dr. Hallman at trial with respect to those areas of his opinion which they view to be faulty or incorrect. Clearly, these types of assertions go to the weight of Dr. Hallman's opinions and not their admissibility. Accordingly, United/USSL's Motion in Limine to Exclude Portions of Dr. Greg Hallman's Report and Testimony and their Motion to Strike Addendum to Expert Report of Dr. Greg Hallman Dated September 20, 2010, and Related Testimony are denied.

Next, the Court denies United/USSL's Motion in Limine to Exclude Evidence of Damages of Defendant DHL. Foremost, the Court is not persuaded by United/USSL's position that Ms. Miller "did not know anything" about DHL's claimed damages. Indeed, having reviewed the entirety of Ms. Miller's testimony, attached as Exhibit L to the Maxfield Declaration, the Court is satisfied that Ms. Miller provided sufficient responses, particularly in light of the scope of the identified topics for her deposition. Finally, as DHL points out, to the extent that the

plaintiffs believe that Ms. Miller's testimony is lacking, that is a matter for cross-examination.

Next, as to DHL's Motion in Limine No. 4 re: Public Relations Statements Prepared for Project Woodstock, before the Court will permit the plaintiffs to introduce the statements at issue, they must first establish how they are relevant to the specific claims of tortious interference and that they mitigated their damages. At this juncture, the probative value of these statements remains unclear and their prejudicial effect may ultimately be found to outweigh any such value.

Finally, the Court denies DHL's Motion for Summary Judgment on Plaintiffs' Claims in the entirety. The Court is not persuaded that the plaintiffs' claims are preempted by the ADA or the FAAA and is satisfied that the reasoning in Judge Faust's Memorandum Decision, which reached the same conclusion, is sound.

This Memorandum Decision will stand as the Order of the Court.

Dated this 13 day of October, 2010.

/S/
PAUL G. MAUGHAN
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 13 day of October, 2010:

David J. Jordan
Marc T. Rasich
Cameron L. Sabin
Attorneys for Plaintiffs
201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111

George M. Haley
Blaine J. Benard
Attorneys for Defendant
299 S. Main Street, Suite 1800
Salt Lake City, Utah 84111

Edwin V. Woodsome, Jr.
D. Barclay Edmundson
Christopher S. Ruhland
Attorneys for Defendant
777 S. Figueroa Street, Suite 3200
Los Angeles, California 90017

Mark F. James
Phillip J. Russell
10 W. Broadway, Suite 400
Salt Lake City, Utah 84101

Barclay Edmundson & Associates
316 Redwood Drive
Pasadena, California 91105

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