2017

Gold's Gym International, Inc., Appellant, v. Clark Chamberlain and Brent Statham, Appellees : Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

GOLD'S GYM INTERNATIONAL, INC., Appellant, v. CLARK CHAMBERLAIN and BRENT STATHAM, Appelleess.	Case No. 20170146-SC

SUPPLEMENTAL BRIEF OF APPELLEE CLARK CHAMBERLAIN

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INTRODUCTION

The Court has requested supplemental briefing on five issues: 1) the best reading of the district court's conclusion that "Plaintiffs have standing to bring their claims and those claims are not derivative"; 2) if the district court erred and should have found the claims derivative, whether the district court's decision affected the course of the litigation; 3) the application of Aurora Credit Services v. Liberty West Development closely held corporation exception to limited liability companies and third party claims and whether Aurora should be overruled; 4) whether there is a legal authority for a non-party to a contract to pay attorney fees based on accepting the benefits of the contract; and 5) whether there is a legal authority for a non-party to a contract to pay attorney fees because it steps into the shoes of a party to the contract.

First, based on Aurora and the district court's reasoning, the best reading of the district court's conclusion is that, while plaintiffs' causes of action were derivative, plaintiffs were excused from following the requirements of Utah Rule of Civil Procedure 23A under the closely held corporation exception.

Second, because Appellant ultimately prevailed, any error by the district court in holding that plaintiffs' claims were not derivative was harmless.

Third, given that Rule 23A has been extended to limited liability corporations, there is no compelling reason to distinguish between limited liability companies and corporations in applying the closely held corporation exception. In addition, given the already existing limitations on application of the closely held corporation exception, there is no compelling reason to adopt a blanket rule barring application of the exception to claims against third parties. Lastly, given the rationale behind the exception and its firm entrenchment over the more than twenty years since its adoption, Appellant has failed to establish that this Court should overrule Aurora.

Fourth, Appellant has failed to provide any reasonable basis supporting adoption of the broad and vague principle that a non-signatory to a contract who accepts the

benefits of the contract must also assume its burdens. The case law from Utah cited by Appellant applies solely to circumstances where both parties are signatories to the contract. And the cases from other jurisdictions cited by Appellant are limited to enforcement of specific contractual provisions such as arbitration and forum selection clauses. Most significantly, the California case law cited by Appellant in support of awarding attorney fees against non-signatories to the contract did so on the basis of California's reciprocal attorney fee statute. Finally, because Utah already has a reciprocal attorney fee statute that allows the award of attorney fees against a non-party who brings an action based on a contract, Appellant's proposed common law principle is unnecessary.

Fifth, Appellant has failed to provide any briefing responsive to why this Court should adopt the common law principle that a non-party is liable for attorney fees when it "steps into the shoes" of a party to a contract. In addition, under the limited circumstances when a non-party has standing to assert contract claims, the reciprocal attorney fee statute provides a basis for holding the non-party liable for attorney fees.

ARGUMENT

I. THE BEST READING OF THE DISTRICT COURT'S RULING IS THAT THE CLAIMS WERE DERIVATIVE AND THE CLOSELY HELD CORPORATION EXCEPTION APPLIED.

In its request for supplemental briefing, the Court set forth two possible interpretations of the district court's conclusion that "Plaintiffs have standing to bring their claims and those claims are not derivative." Appellee therefore understands that the Court has held that the district court's order is ambiguous and is requesting the best interpretation of the district court's intent. "An ambiguous judgment is subject to construction according to the rules that apply to all written instruments." Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239, 243 (Utah Ct. App. 1991). Therefore, "where an order is subject to two or more plausible constructions, the ambiguity is corrected by

adopting the construction "which will make the judgment more reasonable, effective, conclusive, and ... which brings the judgment into harmony with the facts and the law." Id. Here, this rule of construction favors interpreting the order as holding that plaintiffs could proceed under the closely held crporation exception.

In its Response to Temporary Remand Order and Supplemental Findings of Fact and Conclusions of Law, the district court explained that the conclusion at issue "merely incorporated by reference Judge Appleby's 2013 ruling" and its "consideration of the standing issue in 2016 began and ended with Judge Appleby's prior rulings." See Response to Temporary Order and Supplemental Findings of Fact and Conclusions of Law at 4. In the 2013 ruling, Judge Appleby distinguished derivative actions, which "seek to enforce rights belonging to the corporation," from direct actions, where "the injury is one to the plaintiff as a stockholder and him individually, and not the corporation." See September 6, 2013 Memorandum Decision (R. 1427-1449) at 13 (citing Aurora Credit Services, Inc. v. Liberty West Development, Inc., 970 P.2d 1273, 1276 (Utah 1998)). Judge Appleby then stated that she was "not convinced that this is a derivative suit" because, in Aurora, "the Utah Supreme Court has noted that derivative actions may not be required where the corporation is closely held with a limited number of principals." Id. at 12-14 (citing Aurora, 970 P.2d at 1280-81).[1] Therefore, because the company at issue "was closely held with a very limited number of principals," Judge Toomey concluded that Plaintiffs "are not **improper parties**, and Gold's has not shown this is **a derivative action of the sort that would require Health Source to be named a Plaintiff**." Id. at 14 (emphasis added).

In Aurora, this Court considered whether "shareholders in a closely held corporation may bring directly claims **which are by nature derivative**." 970 P.2d at

[1] Judge Toomey also reasoned that "derivative actions are alleged against the corporation itself" because "Gold's does not to cite to authority requiring a derivative suit for claims against a party who is not a primary corporation." Id. at 14. However, this reasoning appears to be secondary to Judge Toomey's analysis under Aurora.

1280 (emphasis added). In reaching its decision, the Supreme Court cited to the America Law Institute's proposal that "[i]n the case of a closely held corporation ... the court in its discretion may **treat an action raising derivative claims as a direct action** [and] exempt it from those restrictions and defenses only applicable to derivative actions." Id. 1280-81 (emphasis added). Based on this proposal, the Supreme Court held that "a court may allow a minority shareholder in a closely held corporation to proceed directly against corporate officers." Id. (emphasis added). However, Aurora did not hold that the applicability of the closely-held corporation exception changed the underlying nature of the claim being brought. Instead, Aurora merely exempted a plaintiff from having to follow **the procedural requirements** for bringing a derivative claim if the claims were brought on behalf of a closely-held corporation. Accordingly, Judge Appleby's citation to the closely-held corporation exception in Aurora, followed by her finding that the company at issue "was closely held with a very limited number of principals," favors the interpretation that she found the plaintiffs' claims were derivative, but allow plaintiffs to proceed under Aurora's closely held corporation exception.

Such an interpretation is supported by the nature of the claims that were before Judge Appleby. Under Aurora, a direct action is one where the injury is "to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on contract **to which he is a party**, or on a right belonging severally to him, or on a fraud affecting him directly." 970 P.2d at 1280 (emphasis added). A derivative claim seeks to "enforce any right which belongs to the corporation" and "actions alleging ... appropriation or waste of corporate opportunities and assets generally belong to the corporation." Id. Because Appellant had already obtained dismissal of plaintiffs' negligence and breach of contract claims, Judge Appleby's determination regarding standing applied to plaintiffs' civil conspiracy, conversion, and intentional interference claims. In their conspiracy claim, plaintiffs alleged that Appellant had conspired with Vince Engle, the managing member of the company, to sell the company's assets and the

franchise rights without proper approval and then convert the proceeds from the sale for their own benefit. See Complaint (R. 1-151) at ¶¶ 127-28. In other words, plaintiffs claimed that the goal of the conspiracy was to appropriate the company's corporate assets and opportunities – a derivative claim that belonged to company rather than plaintiffs individually. In their conversion cause of action, plaintiffs alleged that Appellant had facilitated Vince Engle's conversion of the company's assets. See Complaint at ¶¶ 133-43. Again, this falls within Aurora's definition of a derivative claim. And in their intentional interference claim, plaintiffs alleged that Appellant's conduct was designed to interfere with and prevent the company from receiving the benefits of the licensing agreement. Since this was an opportunity belonging to the company, it too falls within Aurora's definition of a derivative claim. Therefore, the only interpretation of the conclusion that harmonizes the facts and the law is that the plaintiffs had asserted derivative claims subject to the closely held corporation exception.

II. ANY ERROR BY THE DISTRICT COURT IN FAILING TO REQUIRE THE PLAINIFFS TO PROCEED DERIVATIVELY WAS HARMLESS.

If the district court erred in allowing plaintiffs to proceed directly under Aurora's closely held corporation exception, rather than derivatively under Utah Rule of Civil Procedure 23A, the error was harmless and did not affect the outcome of the litigation. Even if a district court errs, an appellant "has the burden to show that the error was 'substantial and prejudicial,' meaning that the appellant was deprived in some manner of a full and fair consideration of the disputed issues by the trier of fact." RJW Media Inc. v. Heath, 2017 UT App 34, ¶ 33, 392 P. 3d 956 (quotations and ellipses omitted). "An error is harmless when it is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." Id. (quotations omitted). In other words, "an error is harmful only if the likelihood of a

different outcome is sufficiently high as to undermine our confidence in the verdict." Id. (quotations omitted).

In this case, the ultimate outcome of the case was that Appellant prevailed and plaintiff's causes of action were dismissed. Therefore dismissal of plaintiffs' claims for failure to comply with Rule 23A would not have changed the final outcome of the case. In addition, because the Findings of Fact and Conclusion of Law was filed after the conclusion of trial and found in Appellant's favor, a dismissal for lack of standing rather than on the merits would have made little difference.[2]

In its supplemental briefing, Appellant appears to argue that the district court's failure to require plaintiffs to proceed derivatively was prejudicial because it allowed the litigation to continue, thus forcing Appellant to incur additional legal expenses and report the litigation in its federal and state disclosures. However, these "consequences" do not constitute harmful error under Utah law. Moreover, a different ruling would not have resolved the litigation more quickly or at less expense. And lastly, if Appellant believed that the 2013 decision was erroneous and a correct decision would have been dispositive, it could have filed an interlocutory appeal in order to save the time and expense of proceeding with discovery and trial. See Utah R. App. P. 5.

[2] Gold's Notice of Appeal and opening Brief have not challenged the district court's 2013 ruling. However, even if that ruling was the subject of this appeal and was held to be erroneous, it was still harmless. If Appellant had prevailed in 2013, the district court would have mostly likely permitted plaintiffs to amend their complaint to comply with Rule 23A. Had plaintiffs done so, the case would have still proceeded to trial, resulting in the same final outcome.

III. THE DISTRICT COURT DID NOT ERR IN APPLYING THE CLOSELY HELD CORPORATION EXCEPTION TO LIMITED LIABILITY COMPANIES OR THIRD-PARTY CLAIMS AND APPELLANT HAS NOT DEMONSTRATED THAT THIS COURT SHOULD OVERRULE AURORA.

As Appellant concedes in its supplemental brief, there is no compelling reason to distinguish between corporations and limited liability companies when applying the closely held corporation exception. While Rule 23A only expressly applies to "corporations and unincorporated associations," this Court has held that it governs "derivative actions brought on behalf of limited liability companies as well." See Utah R. Civ. P. 23A; Angel Investors, LLC v. Garrity, 2009 UT 40, ¶ 15 n.4, 216 P.3d 944. Therefore, in Banyan Inv. Co., LLC v. Evans, the Utah Court of Appeals saw "no reason to deny members of LLCs the opportunity to invoke the closely-held corporation exception, where appropriate, while subjecting them to the same requirements as shareholders of corporations under rule 23A … [because] closely held LLCs, like closely held corporations, are particularly 'vulnerable to malfeasance.'" 2012 UT App 333, ¶ 14, 292 P.3d 698, 703. As a result, the district court did not err in applying the closely held corporation exception to claims brought by members of a limited liability company.

Similarly, there is no reason to distinguish between application of the closely held corporation exception to claims asserted against other shareholders or corporate officers and claims against third parties. Appellant has argued that allowing the exception to apply to claims against third parties "permits nonsignators to a contract to assert contract claims that bind third-parties to submit to obligations they did not agree to" and seek "damages they personally suffered." See App. Sup. Br. at 14-15. However, Appellant's position does not make sense. The closely held exception allows a plaintiff to bring a derivative claim without following the requirements of Rule 23A. It does not change the fundamental derivative nature of the underlying claim. The plaintiff is still bringing a

claim belonging to the corporation on behalf of the corporation. As a result, a derivative claim against a third party based on breach of contract would seek enforcement of contractual obligations to the corporation that the third party had already agreed to. It could not, by definition, seek the plaintiff's personal damages because those types of damages would only be recoverable in a direct action.

More significantly, as Appellant recognizes, this Court adopted limitations to the closely held corporation exception in Aurora. An action may not proceed under the closely held corporation exception if doing so will "(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." Aurora, 970 P.2d at 1280 (quoting ALI, *Principles of Corporate Governance: Analysis and Recommendations* § 7.01(d)). And even if none of the three limitations applies, a district court **still** has discretion to not allow a plaintiff to proceed under the exception. See GLFP, Ltd. v. CL Mgmt., Ltd., 2007 UT App 131, ¶ 22, 163 P.3d 636. Therefore, given the presence of these safeguards, district courts should be given the discretion to determine the applicability of the closely held corporation exception on a case by case basis.[3]

Lastly, Appellant has failed to meet its burden of showing that this Court should no longer recognize Aurora's adoption of the closely held corporation exception. As this

[3] Appellant argues that a derivative claim against a third party will always run afoul of the three limitations. However, Appellant fails to provide a reasonable explanation for why this is so. Whether a derivative claim would "leave the third-party exposed to suit by other members (or shareholders) and also by the management and company itself" would be depend on the specific facts of the claim. Similarly, unless they were defendants in a direct action, it is unlikely that creditors would be "forced to defend claims asserted by individuals with whom they did not contract or agree to be subject to potential liability." Lastly, given that the underlying claim remains derivative, any recovery by the plaintiffs would belong to the corporation rather than the plaintiffs personally. It is therefore difficult to understand why Appellant claims that "only a minority of members are parties to collect proceeds … [and] it is likely to be unclear just who is entitled to any proceeds that may be recovered."

Court recently explained in Rutherford v. Talisker Canyons Finance Co., LLC, "we do not overrule our precedents lightly" and "those asking us to overturn prior precedent have a substantial burden of persuasion." 2019 UT 27, ¶ 27 (ellipses and quotations omitted). Therefore, "an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent." Id. Instead, to evaluate the weight that precedent must be afforded, this Court examines "the persuasiveness of the authority and reasoning on which the precedent was originally based" and "how firmly the precedent has become established in the law since it was handed down … the age of the precedent, the public reliance on the precedent, the workability of the precedent, and the consistency of the precedent with other principles of law." Id. at ¶ 28. In its briefing, Appellant fails to address either of these factors and therefore fails to meet its burden of persuasion.

Furthermore, the stare decisis factors favor preserving the closely held corporation exception. In adopting the closely held corporation exception, Aurora recognized that "the rationale for requiring an action to proceed derivatively is often absent in a closely held corporation, where it is unlikely that there is a disinterested board because the majority shareholders are often the corporation's managers." 970 P.2d at 1280-81. In addition, "the concept of a corporate injury that is distinct from any injury to the shareholders approaches the fictional in the case of a firm with only a handful of shareholders." Id. at 1281. These rationales for the closely held corporation exception remain as persuasive today as at the time of the exception's adoption. Furthermore, the American Law Institute recommendation upon which the exception was based continues to be influential. See *Principles of Corporate Governance: Analysis and Recommendations* § 7.01 (d) (Am. Law Inst. 1994). Since this Court adopted the exception in Aurora, at least nine other states have adopted or applied a similar exception. See Tully v. Mirz, 198 A. 3d 295, 301-02 (NJ App. Div. 2018); Kesling v. Kesling, 83 N.E.3d 111, 116-117 (Ind. Ct. App. 2017); Clark v. Sims, 219 P. 3d 20, 24-25 (N. M. Ct.

App. 2009); Marsh v. Billington Farms, LLC, No. 04-3123, 2006 WL 2555911 (R.I. Super. Aug. 31, 2006); Durham v. Durham, 871 A.2d 41, 46 (N.H. 2005); Redeker v. Litt, No. 04-0637, 2005 WL 1224697, *5-6 (Iowa Ct. App. May 25, 2005); Trieweiler v. Sears, 689 N.W.2d 807, 838 (Neb. 2004); Mynatt v. Collis, 57 P.3d 513 (Kan. 2002).

In addition, Aurora's closely held exception is well established in Utah corporate jurisprudence. In the more than 20 years since Aurora was decided, the exception has been cited in at least six appellate cases, the majority of them after this Court expressed skepticism about the exception in Dansie v. City of Herriman in 2006. See Torian v. Craig, 2012 UT 63, ¶ 14, 289 P. 3d 479; Angel Investors, LLC v. Garrity, 2009 UT 40, ¶ 29, 216 P. 3d 944; Dansie v. City of Herriman, 2006 UT 23, ¶ 16 134 P. 3d 1139; Arndt v. First Interstate Bank of Utah, NA, 1999 UT 9, ¶ 16, 991 P. 2d 584; Banyan Inv. Co., LLC v. Evans, 2012 UT App 333, ¶ 14, 292 P.3d 698; 703.GLFP, LTD. v. CL Management, Ltd., 2007 UT App 131, ¶ 20, 163 P. 3d 636. As a result, the exception has been relied on by the public in numerous district court cases. In addition, the exception was not repudiated by the legislature when the statutes governing corporations and limited liability corporations were revised. Finally, there have been no issues with the workability of the exception or its consistency with other principles of law. As a result, the stare decisis framework does not favor overruling Aurora.

IV. THERE IS NO LEGAL RATIONALE FOR ADOPTING APPELANT'S PROPOSED COMMON LAW PRINCIPLE THAT "ONE CANNOT ACCEPT THE BENEFITS OF A CONTRACT WITHOUT ALSO ASSUMING ITS BURDENS."

Appellant has failed to provide any legal basis supporting adoption of the principle that "one cannot accept the benefits of a contract with also assuming its burdens" with respect to non-parties. The Utah case law cited by Appellant is limited to claims between parties to the contract. See Prudential Fed. Sav. & Loan Ass'n v. Hartford Acc. & Indem. Co., 325 P.2d 899, 903 (1958) (noting that "Hartford did become a party to the

supplemental contract by giving its approval to the modifications of the portions of the original contract which it desired to have modified without expressly limiting its agreement to the other parts of the supplemental agreement"); Richardson v. Rupper, 2014 UT App 11, ¶ 10-11, 218 P.3d 1218 (involving enforcement of an agreement signed by both parties); Francisconi v. Hall, 2008 UT App 166 (involving contract between both parties). None of the cases involves a non-signatory being treated as a party to the underlying contract.

Furthermore, Appellant has failed to provide any reason why Utah law should be expanded to impose contractual liability on non-parties based on Appellant's new principle. As Appellant admits, Utah law recognizes certain specific circumstances where a non-party may be bound by a contract. See Ellsworth v. American Arbitration Ass'n, 2006 UT 77, ¶ 19 n. 11, 148 P. 3d 983 (identifying circumstances where a non-signatory to a contract may be bound by an arbitration agreement). However, Appellant does not (and has never previously argued) that its claim for attorney fees is based on any of these circumstances, including non-signatory estoppel. Nor does Appellant provide any explanation for why Ellsworth should be expanded beyond the context of arbitration agreements or why the Court should adopt an overarching principle of liability that that is extremely broad in scope. And, while Appellant points to cases from other jurisdictions where a non-signatory could be bound by an arbitration provision, a forum selection provision, or its assumption of the contract, it does not explain why these specific circumstances justify adoption of a broader principle.[4]

[4] Indeed, the principle is so broad that it could result in nonsensical situations. For example, under the broadest interpretation of the principle, if a party to a contract assigned a breach of contract claim to a non-party, the non-party assignee might be liable for a counterclaim based on the non-party assignee's or the assignor's failure to fulfill obligations under the contract under the theory that the assignee had accepted "the benefits of the contract." This would conflict with existing Utah law, which holds that "[a]bsent an assumption of liability … the assignment of a contract does not impose on the assignee the assignor's duties or liabilities under the contract." Winegar v. Froerer

Most significantly, the cases cited to by Appellant in favor of a non-party being liable for attorney fees are all based on application of California's version of the reciprocal attorney fee statute, which states that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." CAL. CIV. § 1717. Thus, in Brusso v. Running Springs Country Club, Inc., the California Court of Appeals held that "the trial court correctly awarded fees to the signatory defendants from the nonsignatory plaintiffs **under the mutuality theory of Civil Code section 1717**, doing so on the grounds that, had plaintiffs prevailed, they would have been entitled to attorney's fees pursuant to the substantial benefit doctrine." 228 Cal. App. 3d 92, 110 (Cal. Ct. App. 1991) (emphasis added). Similarly, in California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc., the court awarded attorney fees under Section 1717. 117 Cal. Rptr. 2d 390, 396–97 (Cal. Ct. App. 2002) (noting that the California Supreme Court had "interpreted Civil Code section 1717 to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant" (quotations omitted)). And, yet again, in Heppler v. J.M. Peters Co., attorney fees were awarded pursuant to Section 1717. 73 Cal. App. 4th 1265, 1290 (Cal. Ct. App. 1999) (holding that "[p]laintiffs were primed to take the benefits of an award of attorney fees if they won; thus it was reasonable for the court to infer plaintiffs were prepared to take the concomitant obligation to pay attorney fees under Civil Code section 1717 if they lost").

Corp., 813 P. 2d 104, 107 (Utah 1991).

Appellant has therefore failed to identify any jurisdiction that has adopted the general principle it urges or used it as the sole basis for awarding attorney fees against a non-party. Just as importantly, Utah has already adopted its own reciprocal attorney fee statute, which states that "[a] court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing … when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees." UTAH CODE § 78B-5-826. The statute has been interpreted as allowing courts to award attorney fees to the prevailing party "when the provisions of a contract would have entitled at least one party to recover its fees had that party prevailed in a civil action based upon the contract." Hooban v. Unicity International Inc., 2012 UT 40, ¶ 32, 285 P.3d 766. As a result, Hooban affirmed the award of attorney fees against a non-party to the underlying contract when the non-party "asserts the writing's enforceability as basis for recovery." Id. at ¶ 22. In other words, Appellant's principle, at least with respect to attorney fees, appears to have already been addressed by the reciprocal attorney fee statute. There is no need for it to be adopted as a separate common law principal by this Court. Significantly, at no point in either the underlying district court case or this appeal, has Appellant argued that it is entitled to attorney fees under the reciprocal attorney fees statute.

V. THERE IS NO LEGAL RATIONALE FOR DEPARTING FROM THE RECIPROCAL ATTORNEY FEES RULE AND ADOPTING APPELANT'S PROPOSED COMMON LAW PRINCIPLE THAT WHEN A NON-PARTY "STEPS INTO THE SHOES" OF A PARTY TO A CONTRACT, IT CAN BE LIABLE FOR ATTORNEY FEES.

Appellant has failed to meet its burden of explaining why this Court should adopt a common law principle holding that "stepping into the shoes" of a party to the contract renders a non-party liable for attorney fees. Indeed, other than citing to its prior argument, Appellant makes no effort to brief this issue. Furthermore, given Utah's

adoption of the reciprocal attorney fee statute, such a common law principle would be redundant. Utah law has already enumerated the specific circumstances when a party has standing to assert claims based on a contract to which it is not a signatory. See e.g. Sunridge Dev. Corp. v. RB & G Engineering, Inc., 2010 UT 6, ¶ 13, 230 P.3d 1000 (holding that an assignee "stands in the shoes of the assignor") (ellipses and quotations omitted); Richardson v. Arizona Fuels Corp., 614 P. 2d 636, 639 (Utah 1980) (defining derivative actions as suits "which seek to enforce any right which belongs to the corporation and is not being enforced, such as … to enforce rights of the corporation by virtue of its contract with a third person); Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 506 (Utah 1980) (holding that "[t]hird-party beneficiaries are persons who are recognized as having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration." (quotations omitted)). And, in each of these cases, the reciprocal attorney fees statute would allow recovery of attorney fees against the third party beneficiary, assignee, or derivative action plaintiff if they were not the prevailing party. As a result, there is no need to adopt the principle espoused by Appellant.

CONCLUSION

For the foregoing reasons, Appellee Clark Chamberlain respectfully requests that the district court's March 29, 2017 Ruling and Order be affirmed and Gold's appeal denied.

RESPECTFULLY SUBMITTED this 29th day of July, 2019.

NADESAN BECK P.C.

/s/ Karthik Nadesan

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the page limit set forth in the Court's April 29, 2019 Order and complies with Utah Rule of Appellate Procedure 21(g) because it does not contain any non-public information.

/s/ Karthik Nadesan

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF APPELLEE** was emailed to the following:

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