
IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE KENT
AND JANE WHIPPLE TRUST,
DATED MARCH 17, 1969, JANE
WHIPPLE, CO-TRUSTEE
(ERRONEOUSLY NAMED AS
TRUSTEE), AND AMENDMENTS
THERE TO, JANE WHIPPLE.

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WARNER WHIPPLE, CO-TRUSTEE
OF THE KENT AND JANE
WHIPPLE TRUST, DATED MARCH
17, 1969, AS AMENDED,

Appellant,

vs.

JANE WHIPPLE, CO-TRUSTEE
OF THE KENT AND JANE
WHIPPLE TRUST, DATED
MARCH 17, 1969, AS AMENDED,
AND JANE WHIPPLE,

Respondents.

Supreme Court No. 69945

District Court Case No. CV930015
Appeal from the Seventh Judicial District
Court, The Honorable Steve L. Dobrescu,
Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, Appellant Co-Trustee Warner Whipple, by and through his counsel, states that he is an individual and as such there are no parent corporations and/or publicly held corporations owning 10% or more of Appellant's stock. Appellant is or has been represented in this case by Bingham Snow & Caldwell. These disclosures are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 15th day of September, 2016.

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ROUTING STATEMENT

This case is presumptively retained for Supreme Court review to hear and decide pursuant to NRAP 17(a)(11) because it is an appeal from an order denying a motion to compel arbitration. This statement is made pursuant to NRAP 28(a)(5).

JURISDICTIONAL STATEMENT

This is an appeal from an order denying Appellant's Motion to Dismiss/Stay Petition Pending Mandatory Arbitration filed on February 16, 2016.¹ The Order became appealable by way of a Notice of Entry of Order dated on March 7, 2016.² The Notice of Appeal was timely filed on March 11, 2016. This Court has original appellate jurisdiction pursuant NRS 38.247(1)(a).

STATEMENT OF THE ISSUE

Did the district court err in holding that disagreements between Co-Trustees of the Kent and Jane Whipple Trust regarding the filing of a Petition for Declaratory Relief and the relief requested therein were not subject to mandatory arbitration pursuant to the Trust's arbitration clause?

STATEMENT OF THE CASE

Appellant Warner Whipple ("Warner") and Appellee Jane Whipple ("Jane") are Co-Trustees of a trust (the "Trust") that explicitly requires both Co-Trustee unanimity in administration of the Trust and arbitration of any disagreement at any time between them. The Co-Trustees disagree about the filing of a court action regarding the ownership of certain Trust assets and Jane's authority vis-à-vis those assets. Despite the Trust's broad mandate to arbitrate and Nevada's policy strongly

¹ Appx., p. 186-193.

² Appx., p. 230-232.

encouraging arbitration, the district court denied Warner's motion to compel arbitration of the present disagreements between Co-Trustees. This appeal seeks to reverse the error and send the matter to arbitration where it belongs.

STATEMENT OF FACTS

A. The Kent and Jane Whipple Trust.

Jane and her husband, Kent Whipple, were the trustors of the Kent & Jane Whipple Trust, dated March 17, 1969 (the "Trust").³ The trustors transferred 100% of their assets to the Trust.⁴ During their mutual lifetimes, Jane and Kent had unlimited access to the Trust assets; however, upon Kent's death, Trust assets were to be divided into two sub-trusts, Sub-trust A and Sub-trust B.⁵

Sub-trust A was designated the survivor's trust to provide income to Jane; it was to be funded with Jane's share of the trustors' community property.⁶ Sub-trust B was to provide for the trustors' children and was to be funded with all Trust property not transferred into Sub-trust A.⁷ The Trust required that if Kent died first (as actually occurred) both sub-trusts were to be jointly administered by Co-

³ Appx., p. 73.

⁴ *Id.*

⁵ Appx., p. 76 (Sect. 6(d) of the Trust).

⁶ Appx., p. 77-79.

⁷ Appx., p. 80-85.

Trustees, of whom Jane was to be one.⁸ Warner Whipple is the other current Co-Trustee.⁹

The Trust includes very specific provisions regarding the cooperation of the Co-Trustees in the management of all Trust assets.¹⁰ Article Ten of the Trust provides that Co-Trustees must be fully informed regarding all Trust matters and that Co-Trustees are jointly to manage and administer the assets of the Trust:

Each Successor Co-Trustee must at all times be fully informed of *each and every* official act performed by the other Trustees and must be furnished with an accounting of all income, expenditures and activities of the Trust at least quarterly. (emphasis added)

* * *

The concurring vote of two (2) Co-Trustees shall be necessary for the Trustees to act hereunder, when there are two (2) Co-Trustees.¹¹

Co-Trustees must resolve disagreements of any type and nature whatsoever through arbitration, not litigation, as follows:

In the event of a disagreement at any time when there are only two (2) Co-Trustees, then the dispute shall be submitted to arbitration in accordance with the Uniform Arbitration Act of the State of Nevada.¹²

⁸ Appx., p. 91.

⁹ Appx., p. 97-101 (order amending trust to designate alternate successor Co-Trustee); Appx., p. 103 (acceptance of trusteeship).

¹⁰ Appx., p. 91-92.

¹¹ *Id.*

¹² *Id.*

The only exception to mandatory arbitration is each Co-Trustee's individual right to demand an audit of the Trust, which is specifically exempted by the Trust language.¹³

The Trust includes a provision allowing Jane to demand that the Trust convey any of the assets in Sub-trust A to her as her personal property; however, this provision applies only to Sub-trust A, not Sub-trust B.¹⁴ Unless Jane exercises her right to withdraw assets from Sub-trust A, both the A and B Sub-trusts were to be jointly managed by Co-Trustees.¹⁵ Jane cannot access Sub-trust B unless the other Co-Trustee determines Sub-trust A is exhausted and assets from Sub-trust B are necessary for Jane's support and maintenance. Jane has never made or attempted to make such a claim.¹⁶

B. Death of Kent Whipple and Appointment of Successor Co-Trustees.

Kent Whipple died on February 5, 1977. Pursuant to Article Ten of the Trust, upon the death of Kent Whipple, Jane and the first Successor Co-Trustee, Keith Whipple, began to manage and administer the Trust.¹⁷ Warner assumed his

¹³ Appx., p. 92.

¹⁴ Appx., p. 78 (Jane's power to demand transfer of Sub-trust A assets); Appx., p. 81 (requiring exhaustion of Sub-trust A prior to withdrawals from Sub-trust B for Jane's support).

¹⁵ Appx., p. 91-92 (Trust Section Ten).

¹⁶ Appx., p. 3 (Petition admits that the sub-trusts were never funded).

¹⁷ Appx., p. 91 (Trust Section Ten).

position upon the prior Co-Trustee's resignation.¹⁸ The Petition concedes that despite the Trust's requirement that Sub-trusts A and B be funded following Kent Whipple's death, the Trust assets were never divided, neither Sub-trust A nor Sub-trust B were funded, and all assets (including Jane's share of the community property earmarked for Sub-trust A) remain to this day commingled in the Trust.¹⁹

C. The Current Disagreement Between the Co-Trustees.

Over time the Trust has received certain water rights from the Nevada State Engineer (the "Water Rights"), which have been stated in various correspondence with the State Engineer to be owned by either the "Kent Whipple Trust," the "Kent Whipple Ranch," or the "Kent Whipple Ranch, LLC."²⁰ Despite the different names occasionally used to describe the ownership of the Water Rights, the Trust is the admitted owner of the Water Rights.²¹

Jane desires to sell the Water Rights and is unable to do so because the Nevada State Engineer has refused to allow the sales without a court order clarifying the owner of the Water Rights.²² Jane unilaterally filed the Petition in an effort to satisfy the State Engineer's requirements without consulting or obtaining

¹⁸ Appx., p. 103.

¹⁹ Appx., p. 3 (¶4).

²⁰ Appx., p. 3 (¶6).

²¹ *Id.*

²² Appx., p. 3 (¶7-8) (Trust's acquisition of the Water Rights and State Engineer actions); Appx., p. 185 (¶12) (Jane's intent to transfer the Water Rights).

Warner's approval.²³ Jane is seeking, by way of her Petition, a judicial declaration that the Trust is the owner of the Water Rights (which Warner does not dispute); 2) that the Water Rights are assets of Sub-trust A (which Warner does disagree with); and 3) that Jane has sole authority to make decisions regarding the Water Rights and to sell them without any input or consent from Warner (which Warner also disagrees with).²⁴ Warner disagrees with the filing of the Petition and so informed Jane shortly after it was filed.²⁵

The relief requested by Jane in her Petition violates several Trust provisions. First, Jane is trying to transfer the Water Rights assets from the Trust to currently unfunded Sub-trust A, an action that requires the agreement of both Successor Co-Trustees pursuant to Article Seven, Section (m) of the Trust.²⁶ Jane is also seeking an affirmation from the Court that she—and only she—has authority to sell or otherwise dispose of the Water Rights.²⁷ This request violates the Trust provision requiring that the sale of Trust assets only take place upon the agreement of both Successor Co-Trustees in accordance with Article Ten of the Trust.²⁸

²³ Appx., p. 1-9 (Petition for Declaratory Relief); Appx., p. 105-06.

²⁴ Appx., p. 6-7 (¶¶1-8).

²⁵ Appx., p. 105-06 (Letter from Warner's counsel to counsel for Jane stating disagreement with filing of Petition for Declaratory Relief).

²⁶ Appx. p. 185 (¶12).

²⁷ Appx., p. 7 (¶7).

²⁸ Appx., p. 91-92.

On October 8, 2015, Warner—acting through his attorney—sent notice to Jane that he disputed and disagreed with both the filing of the Petition and its contents, including Jane’s request for unilateral authority to dispose of the Water Rights.²⁹ Since that time, Jane has continued to pursue the Petition and has refused to provide any accounting for the Trust’s assets even though she is required to do so pursuant to Section Ten of the Trust.³⁰

Warner filed a motion to dismiss and/or compel arbitration on the basis that he disagrees with: 1) the filing of the Petition; and 2) Jane’s claim that the Trust’s water rights are assets of Sub-trust A or that they are subject to Jane’s sole authority. The district court denied Warner’s motion, holding that the dispute between Jane and Warner was not “a dispute or disagreement that falls within the arbitration language of the trust.”³¹

PROCEDURAL HISTORY

The Petition was filed on September 11, 2015.³² On November 24, 2015, Warner filed his Motion to Dismiss Petition or Alternatively to Stay Petition and to Compel Arbitration. Jane’s Opposition to Motion to Dismiss/Stay Petition Pending

²⁹ Appx., p. 105-06.

³⁰ Appx., p. 91.

³¹ Appx., p. 192-93.

³² It should be noted that Jane is represented by the Justice Law Center, which is a law firm owned by her son Bret Whipple, who is a beneficiary of the Trust and presently has both disciplinary proceedings and district court sanction appeals pending before this Court (NV Supreme Ct. Case Nos. 70951, 70219, and 68668).

Mandatory Arbitration was filed on December 11, 2015, and Warner's Reply in Support of Motion to Compel Arbitration and accompanying Request for Submission were filed on December 22, 2015. On January 7, 2016, Jane filed an "Errata" to her opposition and Warner filed his Opposition to the Errata on January 11, 2016. On February 16, 2016, the district court filed its Order denying Warner's motion. The Notice of Entry of Order and Petitioner's Notice of Appeal were filed on March 7, 2016. On April 21, 2016, the district court filed its Order staying the Petition pending resolution of the Appeal.

SUMMARY OF ARGUMENT

The district court erred, as a matter of law, in refusing to stay court proceedings and refer the parties to arbitration. The arbitration clause in the Trust is extremely broad, requiring any disagreements between the Co-Trustees to be referred to arbitration without regard to the nature of the disagreement, and the district court incorrectly held that the arbitration clause's requirements applied only to Co-Trustee "acts." The district court also erred in holding that "legal" disputes between the Co-Trustees, as opposed to "factual" ones need not be referred to arbitration. The district court committed even further error by making findings of fact going to the merits of the case, which should only be done by an arbitrator. Jane also failed to overcome the presumption in favor of arbitration applied by the Nevada courts such that it was error for the district court not to

compel arbitration. Finally, the district court's order, if preserved, will deny the Trustors' reasonable expectations that disputes between co-trustees would be arbitrated rather than litigated. For these reasons, the district court's order should be reversed.

STANDARD OF LEGAL REVIEW

Whether a matter is subject to arbitration is a question of law and is reviewed *de novo*.³³ Appellate review of an order denying arbitration is guided by the following rules and principles: 1) the fact that, "[a]s a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses" with the goal of arbitrating disputes whenever possible;³⁴ 2) an arbitration clause that is clear on its face should be enforced as written;³⁵ and 3) because there is a judicial presumption in favor of arbitration, a party seeking to exempt a dispute from arbitration must show beyond a reasonable doubt that the dispute is not subject to arbitration.³⁶

³³ *Masto v. Second District Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2011).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

LEGAL ARGUMENT

A. The Trust’s Arbitration Clause is Extremely Broad, Meaning That Any and All Disagreements between Warner and Jane Regarding the Trust Must Be Arbitrated.

Arbitration clauses are to be interpreted as written and given the meaning imposed by their plain language whenever possible.³⁷ Only when an arbitration clause is ambiguous will courts consider looking beyond the plain language.³⁸ An arbitration clause is ambiguous only if it is susceptible to more than one reasonable interpretation.³⁹

Arbitration clauses are of two types: those that call for arbitration in limited circumstances⁴⁰ and unlimited arbitration clauses, which require arbitration of all disputes between parties.⁴¹ Limited arbitration agreements demonstrate their limited nature by way of terms or language showing a discrete set of potential

³⁷ *Masto*, 125 Nev. at 44.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Rice v. Downs*, 203 Cal. Rptr.3d 555, 564 (Cal. Ct. App. 2016) (*as modified on denial of rehearing*).

⁴¹ NRS 38.219 (West 2015); *Kindred v. Second District Court*, 116 Nev. 405, 411, 996 P.2d 903, 907 (2000) (*disapproved on other grounds in Tallman v. District Court*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 117 n. 1 (2015); *see also Painewebber v. Bybyk*, 81 F.3d 1193, 1199 (2nd Cir. 1996) (noting that use of “any” and “all” in arbitration agreement indicates an unlimited requirement to arbitrate).

disputes to be arbitrated.⁴² Regardless of the specific words used to limit arbitration to specific, discrete matters.⁴³

Broad or unlimited arbitration agreements, on the other hand, include expansive language requiring arbitration of any claim or dispute and are given as broad an interpretation as possible by the courts.⁴⁴ When an arbitration agreement is of the broad or unlimited variety, any controversy between parties—however tangentially related to the agreement itself—must be arbitrated rather than litigated in the courts.⁴⁵ As one court noted, once it is determined that an arbitration clause is unlimited, “[...]factual allegations [of a dispute] need only ‘touch matters’ covered by the contract containing the arbitration clause [for arbitration to be ordered] and all doubts are to be resolved in favor of arbitrability.”⁴⁶ Another court has described the enforcement of broad arbitration clauses as follows: “Where the arbitration clause is broad, we have directed courts to compel arbitration whenever a party has asserted a claim, however frivolous, that on its face is governed by the contract.”⁴⁷

⁴² *Rice*, 203 Cal. Rptr.3d at 564.

⁴³ *See e.g. Id.*

⁴⁴ *Id.*

⁴⁵ *See Simula v. Autoliv*, 175 F.3d 716, 721 (9th Cir. 1999).

⁴⁶ *Id.*

⁴⁷ *Peerless Importers v. Wine, Liquor & Distillery Workers Union*, 903 F.2d 924, 927 (2nd Cir. 1990).

The policy adopted by jurisdictions across the country strongly favoring arbitration—particularly in the case of broad or unlimited arbitration agreements—is consistent with this Court’s prior decisions, which heavily favor arbitration whenever possible, so as to fulfill the purpose of the Nevada Uniform Arbitration Act, “which is to prevent courts from intervening when a provision for arbitration has been contractually provided for by the parties.”⁴⁸

In *Masto v. Second District Court*, this Court explained how to determine whether an arbitration clause is limited or unlimited and how to apply unlimited arbitration clauses in Nevada. *Masto* centered around a disagreement between the State of Nevada and various tobacco companies regarding the tobacco companies’ unilateral reductions in their mutually-agreed settlement payments to the state. When the State of Nevada sued, the tobacco companies filed a motion to compel arbitration, claiming that—pursuant to the settlement agreement with the state—any disputes regarding calculations of the settlement payments were subject to arbitration.⁴⁹ The State of Nevada opposed arbitration because—it claimed—the arbitration agreement between the parties only required arbitration of disputes related to payment calculations made by an independent auditor and the tobacco companies had unilaterally reduced payments without using the auditor’s

⁴⁸ *Kindred*, 116 Nev. at 411, *quoting Phillips*, 106 Nev. at 417.

⁴⁹ *Masto*, 125 Nev. at 42-43.

calculations. According to the State of Nevada, other issues related to settlement payments but not directly arising out of the auditor's calculations were not subject to arbitration. The tobacco companies argued that since the arbitration clause required arbitration of disputes about not only the auditor's calculations, but also any dispute "arising out of or relating to" the calculations, their reductions in payments to the state were still subject to arbitration.⁵⁰

This Court agreed with the tobacco companies and upheld a district court order compelling arbitration.⁵¹ It did so for two reasons: 1) because the "arising out of or relating to" language of the arbitration agreement indicated an expansive intent to arbitrate disputes, not just those related to the specific issue of the auditor's calculations; and 2) because of Nevada's strong policy of encouraging arbitration.⁵² In so holding, this Court affirmed once again, its position that parties should arbitrate disputes whenever possible and that the party opposing arbitration has a significant burden to overcome the presumption in favor of arbitration.⁵³

In this case, the clear and plain terms of the Trust show that any disagreement at any time between the Co-Trustees, must be resolved by arbitration:

⁵⁰ *Masto*, 125 Nev. at 45.

⁵¹ *Id.*

⁵² *Id.*, at 45, n.6.

⁵³ *See Id.*, at 44.

In the event of a disagreement at any time when there are only two (2) Co-Trustees, then the dispute shall be submitted to arbitration in accordance with the Uniform Arbitration Act of the State of Nevada.⁵⁴

The arbitration clause does not require any particular type of disagreement between the Co-Trustees to trigger the arbitration requirement.⁵⁵ Likewise, the plain language of the Trust’s arbitration clause does not make any distinction between “acts” and “authority” in requiring arbitration. Indeed, the only limitation on the absolute and unlimited arbitration requirement in Section Ten of the Trust is each Co-Trustee’s specific right to demand an accounting of trust assets, which is expressly exempted from the arbitration requirement.⁵⁶

The only reasonable reading from the plain language of the Trust is that the Co-Trustees are required to arbitrate any disagreement they might have related in any way to the administration of the Trust.⁵⁷ Despite this clear and unmistakable language, the district court concluded that “Section Ten reveals a focus on acts of a trustee...” and that, according to the district court, only proposed Co-Trustee “acts” are subject to arbitration.⁵⁸ The district court went on to conclude that since Jane is seeking authority from the district court to consummate a sale of the Water Rights, her petition somehow does not raise any issues regarding her “acts” and is not

⁵⁴ Appx., p. 92.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Appx., p. 191.

arbitrable.⁵⁹ Like the appellant in *Masto*, who sought to limit arbitration in spite of an expansive arbitration clause, Jane and the district court are ignoring the unlimited language of the arbitration clause in the Trust. Because the district court erroneously concluded that only Co-Trustee “acts” are subject to Arbitration rather than any disagreement of any kind, the order denying arbitration should be reversed.

B. The District Court Erred In Holding That The Co-Trustees’ Disagreement Need Not Be Submitted To Arbitration Because It Relates To Purely Legal, Rather Than Factual Issues.

The district court’s order denying arbitration expressly conceded that any dispute between the Co-Trustees over the allocation and disposition of Trust assets falls within the plain language of the Trust’s arbitration clause. However, the district court erroneously concluded that the current disagreement between the Co-Trustees was not about asset allocation and disposition, but about the extent of their respective authority under the Trust documents, which raised a question that could be answered “as a matter of law” and was exempt from arbitration.⁶⁰ Even assuming *arguendo* the district court correctly characterized the present disagreement between the Co-Trustees as a purely legal issue, the denial of Warner’s motion to compel arbitration was still erroneous because “legal” disagreements must be arbitrated to the same extent as “factual” disagreements.

⁵⁹ Appx., p. 191-92.

⁶⁰ Appx., p. 192.

Nevada’s version of the Uniform Arbitration Act specifically states that *any* controversy may be submitted to arbitration and does not distinguish between purely factual or purely legal controversies, or mixed questions of law and fact.⁶¹ Arbitrators are capable and able to make all findings of fact and conclusions of law necessary to decide a dispute.⁶² The deciding factor in whether a disagreement between parties must be submitted to arbitration, is not—as the district court concluded—whether resolution of the dispute hinges on the interpretation of law or determination of facts, but rather on the language of the arbitration clause itself.⁶³

The Trust’s arbitration clause does not distinguish between disagreements about “facts” and disagreements about “law;” all disagreements between Co-Trustees must be arbitrated.⁶⁴ When an agreement to arbitrate is unlimited (as in this case) disputes about purely legal issues are subject to arbitration in the same manner as purely factual disputes.⁶⁵

The present dispute comes within the express language of the arbitration clause. There are only two Successor Co-Trustees: Jane and Warner. Jane is

⁶¹ NRS 38.219 (West 2015).

⁶² *Benson Pump v. S. Central Pool Supply*, 325 F. Supp.2d 1152, 1158 (D. Nev. 2004).

⁶³ *McAlister v. Sentry Ins.*, 958 F.2d 550, 553-54 (3rd Cir. 1992).

⁶⁴ Appx., p. 91.

⁶⁵ See NRS 38.219 (West 2015) (stating that, “any existing or subsequent controversy arising between the parties...” may be submitted to arbitration); *Izzi v. Mesquite County Club*, 231 Cal. Rptr. 315, n. 6 (Cal. Ct. App. 1986) *overruled on other grounds in Sandquist v. Lebo Auto.*, 205 Cal. Rptr. 3d 359 (Cal. 2016).

claiming (and is seeking the district court's blessing for her claim) that the Water Rights are assets (by way of the Kent Whipple Ranch, LLC entity) of never-funded Sub-trust A and are therefore subject to her sole and exclusive authority.⁶⁶ Even assuming that the Water Rights or ownership of Kent Whipple Ranch, LLC could somehow fall into never-funded and thus non-existent Sub-trust A (which is also disputed), Warner disagrees with and disputes Jane's claim that she has exclusive authority over assets in Sub-trust A because the Trust itself makes no such distinction in the requirement of Co-Trustee unanimity. The disagreement over Jane's authority must be arbitrated. Section Ten of the Trust requires all disagreements between Co-Trustees to be arbitrated, without regard to the legal or factual nature of the disagreement. Accordingly, the Court should reverse the District Court's error and order this matter submitted to arbitration.

C. The District Court Inappropriately Made Findings Of Fact Going To The Merits Of The Case.

In failing to order arbitration as required by the Trust documents, the district court mischaracterized the nature of the Trust's ownership of the Water Rights and Warner's disagreement with Jane. In so doing, the district court inappropriately made factual findings (based on nothing more than a Petition since Warner has not even filed an answer to the Petition) going to the heart of the disagreement

⁶⁶ Appx., p. 6-7.

between Jane and Warner, and which are according to the district court's own order, the exclusive realm of an arbitrator.

NRS 38.221 explicitly requires that a district court deciding a motion for arbitration must do so “summarily” and, if it finds that there is a valid arbitration agreement, order the matter arbitrated.⁶⁷ The only “fact” to be found by the judge deciding such a motion is whether an agreement to arbitrate exists. It may not refuse to order arbitration, “because the claim subject to arbitration lacks merit or grounds for the claim have not been established.”⁶⁸ All other factual findings beyond the existence of an agreement to arbitrate are the exclusive province of the arbitrator.⁶⁹ A motion to compel arbitration is, by necessity, not a fact intensive proceeding because the district court is deciding the motion based solely on a complaint (or in this case, petition) and the language of the arbitration agreement itself.⁷⁰ Additionally, the uniform arbitration act (including Nevada's version) requires that findings going to the merits of the case are left to the arbitrator, not the district court, to decide.⁷¹ The district court is simply not in a position or authorized to make factual findings going to the merits of the case.⁷²

⁶⁷ NRS 38.221(1) (West 2015).

⁶⁸ NRS 38.221(4) (West 2015).

⁶⁹ *Local 1119 v. Mesqabi Regional*, 463 N.W.2d 290, 297 (Minn. 1990).

⁷⁰ See NRS 38.221 (West 2015).

⁷¹ See *In re H2O Plumbing*, 115 S.W.3d 79, 80-81 (Tex. Ct. App. 2003) (striking district court's findings of fact based on holding that Texas's version of the

The district court committed reversible error by making findings of fact—based on no evidence—going to the heart of the disagreement between Jane and Warner related to the Water Rights and Jane’s authority over them.⁷³ Specifically, the district court stated,

On the record before the court, it appears that all of Warner’s disagreements or concerns relate to actions taken prior to the resignation of Warner’s predecessor...Neither party cited to any law to support Warner’s authority to dispute actions taken before his appointment as Co-Trustee.⁷⁴

This finding from the Court encapsulates all of the problems that arise when a district court attempts to address the merits of a case in the context of a motion to compel arbitration. The district court’s finding was based on nothing more than the Petition’s allegation regarding transfers of the Water Rights; an allegation Warner has not even had a chance to answer in any pleading and which Jane has never been required to prove.

The only “record” before the district court was Jane’s Petition and the uncorroborated arguments of her attorney in the briefing, nothing more; it was far

uniform arbitration act strictly limits district courts’ authority in the face of arbitration agreements, “If the arbitration agreement encompasses the claim at issue and there are no defenses to its enforcement of the arbitration agreement itself, the trial court has no discretion but to compel arbitration and stay its own proceedings.”).

⁷² See NRS 38.221(4) (West 2015).

⁷³ Appx., p. 191-92.

⁷⁴ *Id.*

too early in the case for the district court to make sweeping findings of the kind it did. This is precisely why NRS 38.221 specifically forbids district courts from denying arbitration motions based on its perception of the merits or facts of a case.

The disagreement between the two Successor Co-Trustees here falls within the plain language of the Trust's arbitration clause which creates an unlimited requirement to arbitrate all disagreements between Successor Co-Trustees. That should have been the end of the district court's factual inquiry and its decision to look further was an error requiring reversal.

D. Respondent Failed to Overcome the Presumption in Favor of Arbitration.

In the face of an enforceable arbitration provision, a party opposing a motion to compel arbitration bears a heavy burden in seeking to overcome the presumption in favor of arbitration. In opposing the motion below, Jane had the burden of proving beyond a reasonable doubt that the instant controversy is not subject to arbitration.⁷⁵ Jane failed to meet her burden.

Jane claimed below that she is, in essence, the sole trustee of Sub-trust A and as such, Article Ten's arbitration clause doesn't apply to her.⁷⁶ As an initial matter, this argument fails because, as Jane's own Petition states, Sub-trust A has never been funded and even if it had, both Sub-trust A and Sub-trust B are subject

⁷⁵ *Dryer v. Los Angeles Rams*, 709 P.2d 826, 830 (Cal. 1985) (*In Bank*).

⁷⁶ Appx., p. 7-8.

to joint Co-Trustee administration.⁷⁷ The only way Jane could come into exclusive control of any Trust assets and be exempt from the arbitration clause is if: 1) Sub-trust A and Sub-trust B were actually funded; and 2) if she had made written demand on the Trust that it transfer Sub-trust A assets to her personally. Jane admits in the Petition that neither of these steps have been taken and that the Water Rights are simply Trust assets subject to unanimous joint Co-Trustee administration.

Jane next argued that the Water Rights were Sub-trust A assets because they were acquired by the Trust subsequent to her husband's death and by her own efforts. Even assuming that this argument has any basis in fact, it has no support whatsoever in law. Property acquired by a trustee by way of trust assets are trust property as a matter of law and, as such, are subject to the trust's governing documents.⁷⁸ Thus, when a trustee applies for water rights, asserting an intent to make beneficial use of any water grant on trust property, all water rights ultimately obtained by the trustee are assets owned by the trust and are not a personal right or benefit owned by the trustee.⁷⁹

⁷⁷ *Id.*, at p. 90.

⁷⁸ *See generally* NRS 164.067 (West 2015).

⁷⁹ *See Benson v. State Engineer*, 131 Nev. Adv. Op. 78, 358 P.3d 221, 222, n. 1 (2015) (opining that even though a petition for review of State Engineer actions was filed individually, the right was actually held by the trust due to the fact that the trust was the manager of real property for which the water right was applied).

Jane's only other argument against arbitration is her claim that the disagreement between her and Warner was about their respective authority and not any proposed acts. As discussed at length above, the arbitration clause itself makes no distinction between "authority" and "acts" and both Jane's argument and the district court's holding to the contrary are incorrect. These arguments are insufficient to overcome the strong presumption in favor of arbitration and, accordingly, the district court's order denying the motion to compel arbitration should be reversed.

E. Failure To Compel Arbitration Will Defeat The Trustors' Expectations.

"Courts are not to deprive the parties of the benefits of arbitration they have bargained for, and arbitration clauses are to be construed liberally in favor of arbitration."⁸⁰ The express terms of the Trust show the trustors intended to protect Trust assets from the costs and expenses of in-court litigation. The district court's order denying arbitration—if left unchanged—completely frustrates that purpose. To fulfill the intent of the parties, including Jane's as a signer of the Trust, this current dispute should be arbitrated.

⁸⁰ *Phillips*, 106 Nev. at 417; see *Exber, Inc. v. Sletten Construction Co.*, 92 Nev. 721, 730, 558 P.2d 517, 522 (1976).

CONCLUSION

For the foregoing reasons, Appellant Warner Whipple respectfully requests that this Court reverse the district court and order the parties to arbitrate their current disagreement.

Respectfully submitted this 15th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRPA 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using MS Word 2010 in Times New Roman 14.

I further certify that this brief complies with the page or type/volume limitations of NRAP 32(a)(7)(ii) because it contains 5,020 words, as counted by MS Word 2007.

I further certify that I have read Appellant's brief and, to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the costs of litigation.

Respectfully submitted this 15th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on September 15, 2016.

The following individuals have been served by electronic mail and U.S. Mail, First Class pre-paid as follows:

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Dated this 15th day of September, 2016,

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