

NO. 09-0309

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

IN RE JOSEPH CHARLES RUBIOLA A/K/A J.C. RUBIOLA,
GREGORY ALLAN RUBIOLA, CATHERINE RUBIOLA, JGL DESIGN-BUILD
LLC A/K/A JGL DESIGN BUILD AND MICHAEL CORTEZ,
INDIVIDUALLY AND D/B/A THE HEIGHTS DESIGN AND CONSTRUCTION,

RELATORS

REAL PARTIES IN INTEREST'S BRIEF ON THE MERITS

* * *

Original Proceeding from the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2008-CI-13072; Honorable John Gabriel, Judge Presiding
Court of Appeals Number 04-09-00115-CV

* * *

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STATEMENT OF FACTS

Real Parties in Interest Brian and Christina Salmon (“the Salmons”) accept Relators’ Statement of Facts, except for the numerous misstatements and references to evidence not presented to the trial court or which are not properly before this Court.¹ All references to “SR-___” refer to documents in the sworn record. All references to “Exhibit ___” refer to documents attached to this brief.

¹ Since this Court’s review is based upon an abuse of discretion standard, the trial court could not have abused its discretion if Relators did not present the newly referenced evidence to which they now refer that was never presented to the trial court.

Throughout their brief (at least 27 times) Relators reference in bold print an entity called “*Rubiola Mortgage & Realty*”, hoping their repeated reference to this entity, which was not identified to the trial court, will further their unjustified argument that the January 20, 2007 real estate contract and the February 13, 2007 financing document should be construed together apparently since it has the words “mortgage” and “realty” in it. Rubiola Mortgage & Realty is not a party to either of these agreements and Relators never provided any evidence of its involvement to the trial court. Even the affidavit of Greg Rubiola (SR-C), which was hastily mentioned to the trial court at the end of the first hearing that occurred on December 4, 2008 (SR-M – page 25), was never filed (see Exhibit “2”), was not attached to either Relators’ initial motion (SR-K) or their Motion for Reconsideration (SR-O) and was not provided to the Salmons’ counsel prior to the institution of mandamus proceedings (despite the fact that it was signed on November 12, 2008 – 22 days before the first hearing) does not reference an entity called Rubiola Mortgage & Realty.

Similarly, throughout their brief Relators allege without supporting evidence that the Salmons were engaged in “one-stop shopping”.

Further, Relators imply that J.C. Rubiola was acting as a real estate agent on behalf of Rubiola Mortgage & Realty with respect to the real estate contract; **however, page 8 of the real estate contract references “Rubiola”, license no. 307521, as the responsible real estate broker for J.C. Rubiola. The Texas Real Estate Commission identifies license no. 307521 as the broker license number of Greg Rubiola – not Rubiola Mortgage & Realty (Exhibit “3”).** §1101.803 of Occupations Code (Vernons 2004) (licensed broker liable for salesperson associated with or acting for broker).

Further, Relators incorrectly state on page 2 of their brief that: “*J.C. Rubiola of Rubiola Mortgage & Realty was the listing broker...*”. As referenced herein, Greg Rubiola – not J.C. Rubiola or Rubiola Mortgage & Realty - was the listing broker. Further, the Texas Real Estate Commission identifies J.C. Rubiola as a salesperson, not a licensed broker (Exhibit “4”).

Similarly, the Salmons agree that the reference in footnote 4 of Relators’ brief regarding the sale of the Salmons’ home on Dover Road is patently irrelevant.

The Salmons further object to Exhibits D, F and V of the sworn record filed by Relators, together with Exhibit A attached to Relators’ brief. None of these documents were filed (see Exhibit “2”) or presented to the trial court for consideration.

The Salmons attach as Exhibit “5” an identification of the statements made by Relators in their Statement of Facts and Summary of Argument that are not supported by and are outside of the record in this cause.

SUMMARY OF ARGUMENT

The Salmons signed a real estate contract (SR-A) (Exhibit “1”) contracting to purchase the home and property located at 816 Garraty Road, San Antonio, Texas from Greg and Catherine Rubiola. **This contract, which does not contain an arbitration clause and authorizes the parties to resolve their disputes in the litigation system, is the sole agreement that gave rise to the Salmons’ claims in this cause.** The effective date of this contract was January 20, 2007 and contained a “termination option” which expired on January 30, 2007.² A financing addendum (SR-A) (Exhibit “6”) was attached to the real estate contract, which allowed the Salmons five days to terminate the contract (by January 25, 2007) based upon an inability to obtain financing.³ Thus, at the latest the Salmons were contractually obligated to purchase the home, **irrespective of whether they could obtain financing or not**, on January 30, 2007.

On February 13, 2007, well after these dates, the Salmons approached Rubiola Mortgage Company (hereinafter “RMC”), **which the Salmons have not sued since they have no claim or complaint against it**, to obtain financing. Using strained arguments, some of which are based upon evidence and documents clearly outside the record,

² Paragraph 23 of the real estate contract states in pertinent part:

“23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer’s agreement to pay Seller \$100.00 (Option Fee) ..., Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within 10 days after the effective date of this contract.... **Time is of the essence for this paragraph and strict compliance with the time for performance is required.”**

³ The financing addendum states in pertinent part: “Buyer shall apply promptly for all financing described below and make every reasonable effort to obtain approval for the financing (Financing Approval).... If Buyer cannot obtain Financing Approval, Buyer may give written notice to Seller within 5 days after the effective date of this contract and this contract will terminate and the earnest money will be refunded to Buyer. **If Buyer does not give such notice within the time required, this contract will no longer be subject to Financing Approval. Time is of the essence for this paragraph and strict compliance with the time for performance is required.”**

Once the financing condition addendum expired on January 25, 2007 the contract was complete for financing purposes. Thus, the Salmons could have been exposed to a suit for specific performance and other remedies that Greg and Catherine Rubiola may have sought had the Salmons tried to terminate the contract, based upon lack of financing, once the cancellation time period in the financing addendum expired – see paragraph 15 of real estate contract.

Relators, nonsignatories to the February 13, 2007 financing document (Exhibit “7”), inappropriately request that this Court rewrite their real estate contract⁴ and construe the two clearly separate agreements as one.

Relators improperly employ several tactics to achieve their unjustified result. First, some of the Relators contend that they are signatories to the financing document; in reality, only the Salmons and RMC are signatories to the financing document - J.C. Rubiola signed the financing document clearly in a representative capacity on behalf of RMC. In addition, Relators did not plead, argue or prove that they were intended third party beneficiaries and thus failed to satisfy their heavy burden to overcome the strong presumption against third party beneficiary status.

Next, Relators wrongfully allege that the Salmons have engaged in “artful pleading” – an absolutely false allegation. Plaintiffs’ Original Petition (SR-I) (Exhibit “8”) does not mention financing, loans, points or any statement, misrepresentation or other act/omission of RMC, or any Relator related to financing, for a reason - this cause relates to the physical condition of the home/property that the Salmons purchased, not financing.⁵ The Salmons disavow and confirm to this Court that they are unaware of any misrepresentations made or other malfeasance by RMC, or any Relator relating to financing.

⁴ Contrary to Relators’ catch-phrase on page 5 of their brief that the Salmons “*cannot have their contract and defeat it too*” – Relators – not the Salmons- ask the Court to rewrite their contract. Greg and J.C. Rubiola chose the form and filled in the blanks of the real estate contract – see affidavit of Christina Salmon attached to the Salmons’ Response (SR-L) and Relators’ stipulation at page 41 and 42 of SR-P. Further, both Greg and J.C. Rubiola are very experienced real estate brokers/agents (Exhibits “3” and “4”) and thus are familiar with the terms of the TREC form of the contract they chose for this transaction.

⁵ Contrary to Relators’ contentions in their brief, counsel for Relators confirmed at the hearing regarding their Motion for Reconsideration that the Salmons were **not** engaged in “artful pleading”, stating on page 48 of the record (SR-O): “*They said that, and – and suggested that they aren’t suing about credit facilities, and I agree, that doesn’t seem to be the case...*”.

Further, Relators, as nonsignatories, incorrectly argue that the Salmons are equitably estopped to resist the arbitration provision in the financing document via concerted misconduct estoppel – a theory of estoppel that has been rejected by this Court. *In re Merrill Lynch Trust Company*, 235 S.W.3d 185, 191-195 (Tex. 2007). The Salmons are not estopped by direct benefits estoppel since the Salmons do not rely upon any terms of the financing document in pursuing their claims; further, the Salmons’ claims stand alone and are independent of the terms of the financing document.

Finally, contrary to established legal principles, Relators invite this Court to construe the real estate contract and financing document as one agreement.⁶ In reality, they are two separate, free-standing agreements which should not be construed together. Greg and J.C. Rubiola chose the form and filled in the blanks of the real estate contract (see affidavit of Christina Salmon (SR-L) and the Relators’ stipulation (SR-P, p. 41-42); further, paragraph no. 16 of the real estate contract authorizes the parties to seek relief related to any dispute “from a court of competent jurisdiction”.⁷ In addition, the real estate agreement contains an “entire agreement clause”⁸ and references a “*third party*

⁶ Once again, Relators’ position in their brief and statements made by their counsel during the motion for reconsideration conflict – counsel at that hearing stated: “*I don’t think that we contend that the real estate contract was not a complete real estate contract*” (page 46 of SR-P), thus conceding that the real estate contract and financing document are two separate, free-standing agreements.

⁷ Paragraph 16 provides in pertinent part:

16. MEDIATION: It is the policy of the State of Texas to encourage resolution of disputes through alternative dispute resolution procedures such as mediation.... This paragraph does not preclude a party from seeking equitable relief **from a court of competent jurisdiction**. (emphasis supplied)

⁸ Paragraph 22 states in pertinent part:

22. AGREEMENT OF PARTIES: This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (Check all applicable boxes):

Third Party Financing Condition Addendum

...

Addendum for Sale of Other Property by Buyer

financing condition addendum”, which expired on January 25, 2007, well before the February 13, 2007 financing document was signed. In addition, neither the real estate contract nor financing document refer to each other, do not have the same signatories (the Salmons and Greg and Catherine Rubiola vs. the Salmons and RMC) and were not executed contemporaneously. Further, since the financing termination option in the real estate contract expired on January 25, 2007, the financing document signed on February 13, 2007 was not essential to the real estate contract since the Salmons were legally bound on January 26, 2007 to purchase the property, irrespective of whether they could obtain financing or not.

ARGUMENT

A. THE ARBITRATION AGREEMENT IN THE FINANCING DOCUMENT DOES NOT APPLY TO ANY CLAIMS RAISED IN THE SALMON LAWSUIT

1. WHO THE SIGNATORIES TO THE FINANCING DOCUMENT ARE, NOT THE BREADTH OF THE ARBITRATION CLAUSE, IS THE CENTRAL ISSUE; RELATORS ARE NOT SIGNATORIES TO THE FINANCING DOCUMENT AND THEREFORE THEY CANNOT ENFORCE THE ARBITRATION CLAUSE

Fundamentally, Relators must prove that they have the right to enforce the arbitration clause in the financing document. *In re Kellogg, Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005)⁹. The signatories to the financing document are the Salmons and RMC - none of the Relators are signatories to the agreement. Thus, as nonsignatories Relators may not enforce this agreement unless they provided competent evidence to the trial court of a recognized exception, which they did not. The presumption in favor of enforcing arbitration clauses is not triggered until “... *the party*

There are no written agreements between the Salmons and Greg and Catherine Rubiola, the sole signatories to the real estate contract, filed of record that alter the terms of the real estate contract

⁹ This Court held in *Kellogg*: “*Because arbitration is contractual in nature, the FAA generally ‘does not require parties to arbitrate when they have not agreed to do so’*, citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior University*, 489 U.S. 468, 478-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)”.

seeking to compel arbitration proves that a valid arbitration agreement exists”, Id. at 737-738, citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). Thus, as noted by this Court in *Kellogg*,¹⁰ who the signatories are to the financing document is the pivotal question in the instant cause, not the breadth of the arbitration clause, as argued by Relators.

**a. J.C. Rubiola signed the financing document
in a representative capacity only**

Relators improperly allege that J.C. Rubiola is a signatory to the financing document. However, it is clear that he signed the financing document in a representative capacity as President of RMC; thus, the Salmons and RMC, not J.C. Rubiola (or any other Relator), are the sole signatories to the financing document. *Virani v. Cunningham*, 2009 WL 2568349 (Tex. App. – Houston [14th Dist.] 2009, no pet.) (individual who signed arbitration agreement on behalf of homeowners’ association cannot be compelled to arbitrate claims made against him individually since he signed arbitration agreement in a representative capacity on behalf of homeowners’ association; trial court denial of motion to compel arbitration against individual affirmed); *Di Giammatteo v. Olney*, 794 S.W.2d 103, 105 (Tex. App. – Dallas 1990, no writ) (arbitration award against president of corporation individually invalid when president signed arbitration agreement in representative capacity on behalf of corporation; trial court granting of summary judgment affirming arbitration award against president individually reversed). As stated earlier, the Salmons have not brought any claims in this cause against RMC, or any Relator relating to the financing document (because they have none) and have expressly disavowed such claims.

¹⁰ This Court in *Kellogg* stated: “*But in this case, KBR is not a signatory to the fabrication subcontract between MacGregor and Unidymanics; therefore, the scope of that subcontract’s arbitration clause does not answer whether KBR must arbitrate...*”. Id. at 740. (emphasis supplied)

b. Relators are not third party beneficiaries of the financing document and therefore are not signatories to it

Realizing this weakness, Relators incorrectly focus on paragraph (d) of the financing document – the definition of “*the parties*”. Relators tacitly argue that this generic reference transforms individuals and entities other than RMC into signatories. However, Relators’ argument runs headlong into the strong presumption against third party beneficiary status in Texas law reinforced by this Court in *MCI Telecommunications Corporation v. Texas Utilities Electric Company*, 995 S.W.2d 647, 652 (Tex. 1999). This Court in *MCI* held that third party beneficiary status will not be created by implication. *Id.* A party claiming third party beneficiary status maintains a heavy burden to overcome the presumption against third party beneficiary status. *In re GGM, P.C.*, 165 F.3d 1026, 1030 (5th Cir. 1999) (shareholder of corporation not third party beneficiary of agreement between corporation and bank). All doubts regarding whether a non-party to an agreement has third party beneficiary status should be resolved against finding that third party beneficiary status exists. *Hinton v. Federal National Mortgage Association*, 945 F. Supp. 1052, 1058 (S.D. Tex. 1996). Further, a party alleging that they have third party beneficiary status must plead this assertion, which Relators did not (Exhibit “9” and Relators’ initial motion [SR-K] and Motion for Reconsideration [SR-O]). *Ace American Insurance Company v. Huntsman Corporation*, 255 F.R.D. 179, 199 (S.D. Tex. 2008). In addition, the fact that a non-party to a contract has a substantial interest or is directly affected by a contract is insufficient to prove third party beneficiary status. *Id.* at 199-200.

None of the Relators in this cause are third party beneficiaries of the financing document; Relators did not plead that they were third party beneficiaries and failed to present any evidence (or even argument) to the trial court that the Salmons and RMC

entered into the financing document **directly** for Relators' benefit. *MCI, supra* at 651.¹¹ Since Relators presented no evidence (or even argument) of their alleged third party beneficiary status in relation to the financing document (presumably because there is none), as nonsignatories Relators have no standing to enforce the arbitration clause without fitting within recognized exceptions, which they do not, as discussed later in this brief.

Further, from a policy perspective accepting Relators' position would establish a dangerous precedent, since the mere generic reference to "*partners, affiliates, officers...*" would transform multiple unnamed individuals and entities into signatories, thus triggering their potential exposure for breach of contract allegations in a wide variety of cases.¹²

In addition, throughout Relators' brief, Relators attempt to utilize J.C. Rubiola's status as the agent for the listing broker Greg Rubiola (as stated earlier, Relators incorrectly argue that the listing broker was the unidentified "Rubiola Mortgage & Realty") and his alleged role as agent for RMC as a conduit to bind several infirm arguments together. However, J.C. Rubiola signed the financing document clearly in a representative capacity on behalf of a disclosed principal – RMC. Thus, J.C. Rubiola, as

¹¹ This Court held in *MCI*: "*The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract.... A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit.*" (emphasis supplied) *Id.*

¹² To the extent that Relators attempt to contend that the generic references to: "*partners, affiliates, officers, directors, ...*", etc in paragraph (d) of the financing document makes them third party beneficiaries, this generic reference creates at best an incidental, not direct, benefit and does not overcome the strong presumption against third party beneficiary status. *G.E. Lawrence v. United States*, 378 F.2d 452, 461-462 (5th Cir. 1967): ("*A person is not made a party to a contract merely by being named and described in it...*"); *Love v. Harvest Financial Group, Inc.*, 2001 WL 1098061 (Tex. App. – Houston [14th Dist] 2001, no writ) (generic reference to "*officers, directors, etc.*" in release does not make officer of corporation intended third party beneficiary of release agreement); *Haddad v. Bagwell*, 317 S.W.2d 781, 785-786 (Tex. App. – El Paso 1958, writ refused n.r.e.) (repeated references to duties and obligations of architect in contract between owner and contractor does not make architect third party beneficiary of contract).

agent for RMC, has no authority, absent limited exceptions not proven (or even alleged) by Relators, to enforce the terms of the financing document. *Perry v. Breland*, 16 S.W.3d 182, 187 (Tex. App. – Eastland 2000, rev. denied) (agent acting on behalf of disclosed principal, absent limited exceptions, may not enforce contract made on behalf of disclosed principal).

2. EVEN IF RELATORS WERE SIGNATORIES TO THE FINANCING DOCUMENT, WHICH THEY CLEARLY ARE NOT, NONETHELESS THEY ARE NOT ENTITLED TO ENFORCE THE ARBITRATION PROVISION IN THE FINANCING DOCUMENT, SINCE IT IS AMBIGUOUS AT BEST

This Court held in *In Re. Merrill Lynch Trust Company*, supra at 192 that arbitration agreements are “as enforceable as other contracts, but not more so” (citing *Prima Paint Corporation v. Flood & Conklin Manufacturing Company*, 388 U.S. 395, 404 n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 [1967]). Thus, all ambiguities in the financing document should be resolved in favor of the Salmons and against Relators, since Greg and J.C. Rubiola are the drafters of both the real estate contract and the financing document (see affidavit of Cristina Salmon – SR-L and Relators’ stipulation p. 41 and 42 of SR-P). *Gonzalez v. Mission American Insurance Company*, 795 S.W.2d 734, 737 (Tex. 1990) (ambiguities in contract resolved against drafters). Even if Relators could be considered signatories/third party beneficiaries, which they are not, significant ambiguity exists regarding who the signatories to the financing document are.

First, the financing document states in its opening paragraph: “*This Arbitration Agreement is made by and between Brian and Cristina Salmon (Customer) of 816 Garraty Road, San Antonio, Texas 78209 (“Address”) and Rubiola Mortgage Company. In the event that any other term, provision or covenant of any other agreement entered into between Rubiola Mortgage Company and Customer conflicts with any term, provision or covenant of this Arbitration Agreement, then such term, provision or*

covenant of the Arbitration Agreement shall control to the extent of conflict.” (emphasis supplied). Thus the lead paragraph of the financing document makes clear that it is solely an agreement between the Salmons and RMC.

As discussed earlier, Relators may incorrectly assert that paragraph (d) transforms Relators into signatories. This paragraph reads:

*“For purposes of this provision, ‘the parties’ means Rubiola Mortgage Company, and each and all persons or entities signing this agreement or any other agreements between or among any of the parties **as part of this transaction.** ‘The parties’ shall also include individual partners, affiliates, officers, directors, employees, agents and/or representatives of any party **to such documents**, which shall include any other owner or holder of this agreement.”*¹³ (emphasis supplied).

Even if the generic reference to “*partners, affiliates, officers*”, etc makes Relators third party beneficiaries, which it does not, Relators failed to present any evidence to the trial court of what “*transaction*” (i.e., financing, real estate contract) to which paragraph (d) refers. Again, the terms of the real estate contract were final well before the financing document was signed, since the financing and termination options in the real estate contract had expired on January 25 and 30, 2007, respectively.

In addition, Relators failed to properly present any evidence of who are the “*partners, affiliates, officers...*”, etc. are of RMC. As stated in footnote 1 herein, the affidavit of Greg Rubiola (SR-C) is not properly part of the record in this cause since it was not filed (see Exhibit “2”) and was not an attachment to either Relators’ initial

¹³ Additional ambiguities in the financing document exist. For instance, paragraph (c) states: “*This arbitration provision shall survive any termination, amendment or expiration **of the agreement in which this agreement is contained**, unless all of the parties otherwise expressly agree in writing*”. Relators presented no evidence of another agreement which “contained” the financing document.

Motion to Compel Arbitration or Motion for Reconsideration (SR-K and SR-O, respectively). While opposing counsel at the December 4, 2008 hearing (SR-M – page 25) may have recited some verbiage from this affidavit, nonetheless same constitutes argument – not evidence - since this affidavit was never filed and thus is not properly part of the record before this Court. *In re. Bill Heard Chevrolet, Ltd.*, 219 S.W.3d 311, 314 (Tex. App. - Houston [1st Dist.] 2006, orig. proceeding) (relator in mandamus proceeding has burden to bring forth sufficient record to show clear abuse of discretion; mandamus properly denied when relator failed to present sufficient record substantiating clear abuse of discretion). Nonetheless, even if Relators had properly proven that they were the partners, affiliates, etc. of RMC, which they did not, this Court in *Merrill Lynch* rejected a similar argument, holding that a corporate affiliation with a signatory is an insufficient basis to “rewrite” the contract of nonsignatory corporate affiliates. *Id.* at 191.

Similarly, as noted in footnote 1, in desperation Relators refer in bold at least 27 times to an unidentified entity called Rubiola Mortgage & Realty. Relators failed to present any evidence (or even argument) to the trial court of what Rubiola Mortgage & Realty is (corporation, LLC, etc.) or its role/connection in or to the real estate contract or financing transaction, this case, the Salmons, Relators or RMC. In addition, even if they had, Rubiola Mortgage & Realty is not a party to this dispute and is not a signatory to either the real estate contract or financing document. Further, it is clear that J.C. Rubiola was acting solely as the agent for RMC (not Rubiola Mortgage & Realty) with respect to the financing document since he signed it as President of RMC; with respect to the real estate contract, he was acting solely as the agent of his broker, Greg Rubiola (Exhibit “1” and “3”). Finally, even if Relators had presented some evidence of what Rubiola Mortgage & Realty is and its role/connection, nonetheless Relators continued references

to it are immaterial since this Court held in *Merrill Lynch* that: “...a contract with one corporation – including a contract to arbitrate disputes – is generally not a contract with any other corporate affiliates”. Id at 191.

3. THE SALMONS’ COMPLAINTS AGAINST J.C. RUBIOLA RELATE ONLY IN HIS ROLE AS AGENT FOR THE LISTING BROKER, GREG RUBIOLA, NOT AS AGENT OF RMC

Next, Relators improperly allege that the Salmons’ complaints against J.C. Rubiola in his role as the agent for the listing broker Greg Rubiola have a “*significant relationship*” to or are “*inextricably enmeshed*” with the financing document. Not only is this argument without factual foundation, and Relators presented no evidence in support of this bald allegation, nonetheless as discussed later in this brief this Court has rejected this argument, holding that concerted misconduct estoppel does not allow a nonsignatory to enforce an arbitration provision. *Merrill Lynch, supra* at 191-195.¹⁴

Further, Relators incorrectly allege that the Salmons have engaged in “artful pleading”, stating: “*The Salmons avoided suing Rubiola Mortgage & Realty even though J.C. was clearly acting as an agent for the company at all relevant times*”. Nothing could be further from the truth. First, page 8 of the real estate contract identifies the “*Listing Broker*” as “*Rubiola*”, license number of 307521 (which matches the broker’s license number of Greg Rubiola, not Rubiola Mortgage & Realty – see Exhibit “3”). Thus, J.C. Rubiola was acting as the agent for Greg Rubiola, not Rubiola Mortgage & Realty (or

¹⁴ In *Merrill Lynch*, this Court held: “*We too have applied estoppel when nonsignatories seek a direct benefit from a contract with an arbitration clause. But we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here.*

...
It is true that other federal circuit courts have estopped signatory plaintiffs from avoiding arbitration with nonsignatories using an ‘intertwined-claims’ test. For example, the Second Circuit has compelled arbitration when a nonsignatory defendant has a ‘close relationship’ with one of the signatories and the claims are ‘intimately founded in and intertwined with the underlying contract obligations’. But the ‘close relationship’ requirement has generally limited this exception to instances of strategic pleading by a signatory who, in lieu of suing the other party for breach, instead sues the party’s nonsignatory principals or agents for pulling the strings.” Id. at 193-194

RMC), with respect to the real estate contract. §1101.803 of the Occupations Code (Vernons 2004) (licensed broker liable for salesperson associated with or acting for broker). Further, Plaintiffs' Original Petition does not mention financing or RMC. In addition, the Salmons disavow any knowledge of any claim or cause of action against RMC, or Relators regarding financing. The clear substance of the Salmons' claims relate to the physical condition of the home/property that they purchased. Thus, the real estate contract, which does not contain an arbitration clause and expressly authorizes to the parties to resort to the litigation system, is the sole contractual wellspring of their claims/causes of action.¹⁵ Since the Salmons have disavowed such claims, J.C. Rubiola's role as agent for RMC is immaterial, since RMC could not be potentially liable in this cause, either directly or through the acts/omissions of J.C. Rubiola or any other Relator.¹⁶

4. NONE OF THE EXCEPTIONS WHICH ALLOW NONSIGNATORIES TO ENFORCE AN ARBITRATION PROVISION APPLY IN THIS CASE

This Court noted in *Kellogg*, supra at 738-739 that: "*Federal Courts have recognized six theories, arising out of common principles of contract and agency law, that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary*".¹⁷ As nonsignatories to the financing document, Relators incorrectly argue they should be entitled to enforce its terms pursuant to the theory of incorporation by reference and equitable estoppel.

¹⁵ As noted in footnote 5, Relators have tacitly admitted that the Salmons do not bring any claims relating to the financing document.

¹⁶ This Court in *Merrill Lynch* stated: "*An agreement to arbitrate disputes with someone necessarily includes claims against his agents if he can be held liable for those claims because of the agency relationship*". Id. at 197. (emphasis supplied) Since the Salmons have confirmed that they have no claims against RMC, it cannot be liable for the acts/omissions of J.C. Rubiola, or any other Relator, acting in his/their role as agent for RMC.

¹⁷ However, in *Kellogg* this Court noted that most federal courts do not identify third-party beneficiary as a separate ground. Id. at 739.

a. The real estate contract and financing document are two separate, free-standing instruments which should not be construed together.

Contrary to established principles of contract law, Relators invite this Court to construe the real estate contract and financing document as one agreement. In order for two separate agreements to be construed together they must be executed contemporaneously, by the same parties, for the same purposes and as part of the same transaction. *Personal Security & Safety Systems, Inc. v. Motorola*, 297 F.3d 388, 393 (5th Cir. 2002); *I.D.E.A. v. WC&R Interests*, 545 F. Supp. 2d 600, 608 (W.D. Tex. 2008) (court properly denied motion to compel arbitration when movant alleged that business relationship agreement that contained arbitration clause should be incorporated by reference into manufacturing agreement signed by same parties that did not; neither agreement referred to each other and the manufacturing agreement contained an “entire agreement” term); *In re. Sino Swearingen Aircraft Corporation*, 2004 WL 1193960 (Tex. App. – Dallas 2004, orig. proceeding) (trial court properly denied motion to compel arbitration when movant attempted to incorporate by reference arbitration clause in distributorship agreement to purchase agreement that did not contain arbitration clause, despite the fact that distributorship agreement referenced purchase agreement as an exhibit; “entire agreement” provision in purchase agreement revealed parties’ intent that it was a separate contract not subject to terms of distributorship agreement); *Woodhaven Homes, Inc. v. Alford*, 143 S.W.3d 202, 204-206 (Tex. App. – Dallas 2004, no writ) (trial court’s denial of a motion to compel arbitration affirmed since the plaintiff’s claims did not depend on the parties’ earlier contract that contained an arbitration provision).¹⁸

¹⁸ The *Alford* court held: “However, the Alford’s claims depend solely on the October 4 purchase agreement that pertains to the house they actually purchased at 316 Raintree and the limited warranty obtained on that property. Neither the October 4 purchase agreement nor the limited warranty contains an arbitration clause.

Further, merely because two claims arise from the same transaction is not a justification for construing two contracts together. *Merrill Lynch*, supra at 192.¹⁹

Both the real estate contract and financing document fail the tests identified in *Personal Security, I.D.E.A.* and *Woodhaven*. First, neither the real estate contract nor financing document refer to each other; in addition, the real estate contract contains an entire agreement clause, thus indicating that the parties intended to form “*the complete agreement of the parties*”. *I.D.E.A.*, supra at 607, citing from *Perlstein v. D. Steller 3, Ltd.*, 109 S.W.3d 36, 41 (Tex. App. – Corpus Christi 2002, pet. denied). Further, the real estate contract is an agreement between the Salmons and Greg and Catherine Rubiola while the financing document is an agreement between the Salmons and RMC. In addition, the documents were not executed contemporaneously (January 20, 2007 v. February 13, 2007).

In addition, the real estate contract, the sole contractual agreement which gave rise to the Salmons’ claims, expressly authorizes the parties to resort to the trial system to resolve their disputes.²⁰ Further, the financing condition addendum specifies that all contingencies regarding financing expired on January 25, 2007.²¹ Therefore, the February 13, 2007 financing document was immaterial for purposes of the real estate contract.

However, documents cannot be considered together unless they reference each other or they refer to the same subject matter.

...
More specifically, their claims center on the limited warranty from Woodhaven, Inc. obtained by the Alford's at closing. Contrary to Woodhaven's assertion the Alford's do not and need not rely on the terms of the March 26 purchase agreement in asserting its claims against Woodhaven, Inc.” Id.

¹⁹ In *Merrill Lynch*, this Court analyzed several contracts clearly related (agreement between plaintiffs and Merrill Lynch and agreements between plaintiffs and Merrill Lynch Trust and Merrill Lynch Insurance that were part of an overall financial plan) yet held the agreements to be separate, and not construed as one.

²⁰ See paragraph 16 of the real estate contract.

²¹ As noted in footnote 6, counsel for Relators admitted that the real estate contract was complete before the financing document was signed – see p. 46 of SR-P.

The cases cited by Relators are readily distinguishable. First, the court in *AutoNation USA Corporation v. Leroy*, 105 S.W.3d 190 (Tex. App. – Houston [14th Dist] 2003, orig. proceeding) held that since the plaintiffs’ petition in that case referenced rights (overcharge for “vehicle preparation fee”) provided by the purchase agreement that contained an arbitration clause, the plaintiffs’ claims were subject to arbitration. In contrast, Plaintiffs’ Original Petition in the instant cause does not reference any cause of action relating to RMC or the financing document or rights provided in same. The *AutoNation* court noted that: “*However, if the facts alleged in support of the claims stand alone, are completely independent of the contract and the claim could be maintained without reference to the contract, the claim is not subject to arbitration,*” *Id* at 195, citing *Pennzoil Co. v. Arnold Oil Company*, 30 S.W.3d 494, 498 (Tex. App. – San Antonio 2000, no pet.). The Salmons’ claims, which relate to the physical condition of the home/property and have nothing to do with RMC or financing, are “*completely independent*” of the terms of the financing document.

Similarly, both *Kirby Highland Lakes Surgery Center, LLP v. Kirby, M.D.*, 183 S.W.3d 891 (Tex. App. – Austin 2006, orig. proceeding) and *Personal Security & Safety Systems, Inc., supra*. are distinguishable. First, the agreements in those cases that did not reference arbitration did not expressly authorize the parties to resort to the trial system, which is the case here. In addition, contrary to the instant cause, in these cases the same parties signed both contracts at issue and the agreements referred to each other. Further, the contracts in these cases were both signed at the same time and the opinions do not mention whether either of the agreements had an “*entire agreement*” clause (presumably because they did not). Further, in *Kirby* the plaintiffs admitted in their pleadings that they were suing in part pursuant to the terms of the contract that contained the arbitration

clause. All of these facts distinguish *Kirby and Personal Security* from the instant cause.²²

b. Though the real estate agreement and financing document should not be construed together, nonetheless pursuant to general contract construction principles, Relators' arguments should be rejected

Clearly the real estate contract and financing document should not be construed together. However, even if they are Relators' arguments fail. Arbitration provisions are construed pursuant to general contract principles. To the extent that this Court determines that any ambiguities exist involving the joint construction of the real estate contract and financing document (i.e., trial term v. arbitration clause), all ambiguities should be resolved against the drafters of these documents (Relators) and in favor of the Salmons. *Gonzalez, supra*. In addition, terms stated earlier in an agreement are favored over conflicting terms stated later in the document. *La Vaca Bay Auto World v. Marshall Pontiac Buick Oldsmobile*, 103 S.W.3d 650, 658 (Tex. App. – Corpus Christi Edinburg 2003, no writ). Thus, the trial term in paragraph no. 16 of the real estate contract should be favored over the later appearing arbitration provision. In addition, the words chosen by Relators in the financing document are known by the company they keep; pursuant to the

²² Further, *Pennzoil, supra* does not deal directly with the issues in this cause – the existence of two contracts, one with a litigation term and the other with an arbitration clause signed by different parties at different times, etc. However, the *Pennzoil* court noted that if the facts alleged stand alone and are completely independent of the contract that contains the arbitration clause the claim is not arbitrable. *Id.* at 498. *Ft. Worth Independent School District v. City of Ft. Worth*, 22 S.W.3d 831 (Tex. 2000) does not deal with the construction of an arbitration clause, etc. and is based upon a unique set of facts regarding ordinances and agreements dating back to 1927.

Relators also cite three unreported decisions, *In re. Oakwood Mobile Homes, Inc.*, 1999 WL 1073846 (Tex. App. – San Antonio 1999, orig. proceeding); *In re. International Bank of Commerce*, 2008 WL 192260 (Tex. App. – Corpus Christi 2008, orig. proceeding) and *Netherlin Homes v. Love*, 2007 WL 700996 (Tex. App. – Corpus Christi 2007, orig. proceeding) in support of their arguments. In addition to being unreported decisions, they likewise are readily distinguishable. The *Oakwood* court did not deal with two separate contracts, etc. However, the *Oakwood* decision supports the Salmons' argument since that court refused to enforce an arbitration provision in another party's contract against the Zuerns, who had no such contract. Similarly, in *Netherlin* the Court did not deal with two separate contracts, one with a litigation term and the other with an arbitration clause. Instead the court construed one retail installment contract. Last, the *International Bank of Commerce* court dealt with issues regarding waiver of the right to arbitration and misrepresentations regarding the meaning and validity of the arbitration clause, which are not issues in this appeal.

doctrine of *ejusdem generis*, Relators use of the specific phrase in the financing document “*future credit facilities*” frames the meaning of the general words in the arbitration term. *Dawkins v. Meyer*, 825 S.W.2d 444, 447 (Tex. 1992).

c. “Direct benefits” estoppel does not apply since the Salmons do not rely upon the terms of the financing document in asserting their claims

As stated earlier, this Court in *Merrill Lynch* rejected the “*substantially interdependent and concerted misconduct*” prong of equitable estoppel allowing nonsignatories to enforce an arbitration provision. *Merrill Lynch, supra.* at 191-195; *In re Trammell*, 246 S.W.3d 815, 820-821 (Tex. App. – Dallas 2008, orig. proceeding) (recognizing that this Court in *Merrill Lynch* rejected “*substantially interdependent and concerted misconduct*” prong of equitable estoppel and clarified that its holding in *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 [Tex. 2006] was limited to grounds other than substantially interdependent and concerted misconduct estoppel).²³

This Court in *Kellogg* discussed direct benefits estoppel in depth, noting that it generally applies only if the party resisting arbitration nonetheless seeks to enforce the terms of the contract that contains the clause.²⁴ Further, in *Kellogg* this Court noted that if the Salmons’ claims “*stand independently of the underlying contract, then arbitration generally should not be compelled under this theory*”, citing *R.J. Griffin & Co.*, 384 F.3d at 164; *Bridas SAPIC V. Gov’t of Turkin*, 345 F.3d 347, 362 (5th Cir. 2003).

²³ Relators miscite *Meyer* for the proposition that “*substantially interdependent and concerted misconduct*” is still a recognized ground for equitable estoppel in Texas law, a position contrary to this Court’s opinion in *Merrill Lynch*. Thus, numerous arguments made by Relator (i.e. that J.C. Rubiola was acting as listing broker, or as agent for Rubiola Mortgage & Realtor as listing broker – both of which are incorrect - and as agent for RMC, the Salmons’ claims with respect to the real estate contract and financing document are intertwined, etc.) are immaterial.

²⁴ In fact, in *Kellogg* this Court noted with approval that “*Direct benefits estoppel applies when a nonsignatory ‘knowingly exploits the agreement containing the arbitration clause’*”, quoting *E.I. DuPont de Nemours & Co.*, 269 F.3d at 199. Id at 739. The Salmons are clearly not “*exploiting*” the financing document since they do not bring any claims against RMC, or Relators relating to financing and have expressly disavowed such claims.

Thus, to invoke estoppel, Relators as nonsignatories must have proven to the trial court (to the abuse of discretion threshold), which they did not, that the Salmons were seeking a “*direct benefit*” from the financing document, were exploiting its terms and that the Salmons’ claims can not “*stand independently*” of the financing document. Relators presented no evidence justifying such a position and, as stated earlier in this brief, the Salmons’ claims and causes of action have nothing to do with RMC, or any Relator regarding financing. Thus, “direct benefits” estoppel is inapplicable.²⁵

d. Relators did not allege and have not proven that they are third party beneficiaries of the financing document

As stated earlier, Relators did not plead, prove (or even argue) to the trial court that they were third party beneficiaries to the financing document. This Court in *MCI* held that a strong presumption against third party beneficiary status exists, that such status will not be presumed and for one to be a third party beneficiary of a contract that party must prove that the contracting parties entered into the agreement for the **direct** benefit of the third party. Relators provided no such evidence.

B. ALL OF RELATORS ARE NONSIGNATORIES AND THEREFORE ARE NOT ENTITLED TO ENFORCE THE ARBITRATION PROVISION IN THE FINANCING DOCUMENT

As stated earlier, all of Relators are nonsignatories to the financing document. The Salmons and RMC, not J.C. Rubiola (or any other Relator), are the sole signatories to the financing document - J.C. Rubiola signed it clearly in a representative capacity on behalf of a disclosed principal, RMC. Relators are not third party beneficiaries of the financing document; in addition, the arbitration provision in the financing document is ambiguous

²⁵ The *Trammell* court noted: “...it applies when the signatory to a written agreement containing an arbitration clause **must** rely on the terms of the written agreement in asserting its claims against the nonsignatory”. Id. at 821

and the Salmons do not complain about RMC, or any Relator's acts/omissions when they were acting on behalf of RMC and have disavowed such claims. Neither incorporation by reference or direct benefits estoppel are applicable; thus Relators, as nonsignatories, are not entitled to enforce the arbitration provision in the financing document.

CONCLUSION AND PRAYER

The trial court did not abuse its discretion. The Salmons pray that this Court deny all relief requested by Relators, affirm the orders of the trial court and award the Salmons any other relief to which they may be entitled and for general relief.

Respectfully submitted,

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By: _____
BRYAN A. WOODS
21952600
ATTORNEY FOR THE SALMONS,
REAL PARTIES IN INTEREST

CERTIFICATE OF SERVICE

I, BRYAN A. WOODS, hereby certify that a true and correct copy of the foregoing has been sent to Ben Shub, 111 West Olmos Drive, San Antonio, Texas 78212, Elizabeth Conry Davidson, 1802 Blanco Road, San Antonio, Texas 78212 and the Honorable John D. Gabriel, Judge, 131st Judicial District Court, Bexar County Courthouse, 100 Dolorosa, San Antonio, Texas 78205 on this the _____ day of September, 2009.

BRYAN A. WOODS

VERIFICATION OF APPENDIX, RECORDS AND FACTS

STATE OF TEXAS {

COUNTY OF BEXAR {

BEFORE ME, the undersigned authority, on this day personally appeared Bryan A. Woods, the person whose name is subscribed below and who, upon his oath, and based upon personal knowledge, stated that (1) he is attorney of record for Real Parties in Interest Brian and Cristina Salmon in this original proceeding and in the underlying case; (2) the items contained in the Appendix and documents in the Record (save and except for the documents to which the Salmons have objected) are true and correct copies of the original documents; and (3) all facts stated in this Response are true and correct.

Bryan A. Woods

SWORN TO AND SUBSCRIBED on this the _____ day of September, 2009.

NOTARY PUBLIC, State of TEXAS

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