

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Raymond Melendez,

Plaintiff,

vs

Merritt Charles Horning III a.k.a. Chad Horning;
 Riggers Store Holdings, LLC; Riggers Store 1,
 LLC; Gregory Dalton Bradford a.k.a. Greg
 Bradford; Chase Merritt Management, Inc.; Chase
 Merritt, LP, a limited partnership; and Racers
 Store Management, LLC,

Defendants,

Merritt Charles Horning III a.k.a. Chad Horning;
 Riggers Store Holdings, LLC; Riggers Store 1,
 LLC; Chase Merritt Management, Inc.; Chase
 Merritt, LP, a limited partnership; and Racers
 Store Management, LLC,

Appellants,

Raymond Melendez and Gregory Dalton
 Bradford a.k.a. Greg Bradford,

Appellees.

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 CLERK OF SUPREME COURT
 October 26, 2017
 STATE OF NORTH DAKOTA

Williams Co. No.:

53-2016-CV-01662

Supreme Court No.:

20170183

APPELLANTS' REPLY BRIEF

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 Management, LLC

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	ii
Summary.....	¶ 1
Argument	¶ 3
Conclusion	¶ 14

TABLE OF AUTHORITIES

<u>North Dakota Cases:</u>	<u>Paragraph</u>
<u>Kostrzewski v. Frisinger</u> , 2004 ND 108, ¶ 8, 680 N.W.2d 271, 273	¶ 3
<u>Henry v. Securities Com'r</u> , 2003 ND 62, ¶ 9, 659 N.W.2d 869	¶ 3
 <u>North Dakota Statutes and Rules:</u>	
N.D.C.C. § 28-27-02	¶ 3
N.D.C.C. § 10-32.1-34	¶ 13
 <u>Delaware Statutes and Rules:</u>	
Del. Code Ann. tit. 6 §18-1002	¶ 13

Appellants make this reply to Appellee's arguments.

SUMMARY

[1] This case is simpler than portrayed by Melendez. Melendez could obtain standing on behalf of Riggers Holding, but he does not have derivative standing on behalf of Riggers Store 1. Melendez is displeased with CMM management of Riggers Store 1, but those differences with CMM are subject to arbitration as required by the Operating Agreement. Melendez, a non-member of Riggers Store 1 may not take actions on behalf of Riggers Store 1.

[2] Horning, Racers Management and Riggers Store 1, the parties who are non-signatories to the arbitration agreement, have effectively consented to arbitration by making the demand for arbitration; Melendez cannot hide behind those parties in resisting arbitration. (See Appellants' Br. at ¶ 15-18 for the argument that the court may require non-signatories to participate in arbitration).

ARGUMENT

[3] Raymond Melendez ("Melendez") attempts to misdirect the Court in two respects. First, Melendez spends a significant amount of time talking about the Motion to Dismiss Complaint for Lack of Jurisdiction [see trial court docket no. 66 and 67]. That is not an issue in this appeal and in any event, is an interlocutory order that is not appealable. Kostrzewski v. Frisinger, 2004 ND 108, ¶ 8, 680 N.W.2d 271, 273 ("[t]he denial of a motion to dismiss for lack of jurisdiction is a non-appealable interlocutory order[]", (citing Henry v. Securities Com'r, 2003 ND 62, ¶ 9, 659 N.W.2d 869 and N.D.C.C. § 28-27-02)). Appellants make no argument in their appeal regarding this issue.

[4] The second misdirection relates to Melendez's argument regarding the Motion to Dismiss for Failure to State a Claim. Similarly, this is not a primary issue on appeal. However, it is peripherally related only in the sense that Melendez does not directly have a claim against Merritt Charles Horning III, a.k.a. Chad Horning ("Horning"), Chase Merritt Management, Inc. ("CMM"), nor Racers Store Management, LLC ("Racer's Management"); Riggers Store 1, LLC ("Riggers Store 1") might have a direct claim against those parties and Riggers Store Holdings, LLC ("Riggers Holdings") may have a derivative claim on behalf of Riggers Store against those parties, but Melendez does not have a claim against these parties. That is important because those claims are largely the basis for claims the court found to not be subject to arbitration.

[5] Melendez's misdirection relates to his continuing confusing arguments as to the allegations of bad acts and which party has the entitlement to pursue those acts.

[6] The Horning Group (as described in Appellant's original statement of the case, all of the defendants to the underlining litigation less defendant Bradford) adamantly deny that there was any misappropriation nor that the accounting of the transactions between the various entities was materially inaccurate. However, assuming there were some factual basis for claims against any of the members of "the Horning Group", that would be a cause of action belonging to Riggers Store 1. Neither Melendez nor Bradford are members of Riggers Store 1; its sole member is Riggers Holdings which appointed CMM as manager for

Riggers Store 1. If such a claim existed, it would be the manager's (CMM) responsibility to pursue those misappropriations.

[7] To the extent Melendez contends that CMM is not performing its duties as manager of Riggers Holdings, Melendez's claim as to CMM is subject to the Operating Agreement which mandates arbitration of disputes between members and/or the manager.

[8] Somewhat telling in the shotgun approach of Melendez is the fact that he sues Riggers Store 1, the alleged victim of the misappropriation. Melendez also sues Horning and Racers Management under the vague allegation that they misappropriated goods or misapplied credits in the accounting for Riggers Store 1. Such a claim would belong to Riggers Store 1 and should be pursued by it or its manager CMM.

[9] It also needs to be pointed out that Melendez and Bradford had, or should have had, knowledge as to the relationships (rights and obligations) created in the organization of Riggers Store 1. Melendez and Bradford executed the Operating Agreement and obviously knew that it mandates arbitration. With this knowledge, they agreed to arbitration.

[10] Melendez's only argument that arbitration cannot be compelled is that Horning, Riggers Store 1, and Racers Management are not parties to the Operating Agreement imposing the arbitration. (Melendez Br. ¶¶ 41, 48-51.

[11] As pointed out, Riggers Store 1 is really a non-party. As to Horning and Racers Management, they were among the moving parties to compel arbitration,

which would include the claims against them. They can hardly argue that they will not be a party to the arbitration.

[12] Also overlooked by Melendez is the true nature of Melendez's claim. Melendez is merely a member of Riggers Holdings. He might make a derivative claim on behalf of Riggers Holdings, but he fails to meet the requirements for allegation of a derivative claim. (Appellants' Br. at ¶ 28).

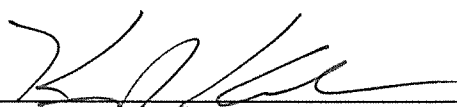
[13] Melendez individually has no claim against any other party. Melendez claims he has derivative standing to sue Horning, CMM¹ and Racers Management, for their alleged misappropriation of Riggers Store 1 assets. It is obvious Melendez has no standing when you consider what a derivative claim is. A derivative claim is a claim made by a stockholder/member of the entity that has the direct claim. Del. Code Ann. tit. 6 §18-1002 ("plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action . . ."); see also, N.D.C.C. § 10-32.1-34 ("A member may maintain a derivative action to enforce a right of a limited liability company if . . ." implying membership of the LLC is necessary.) The "claims" asserted by Melendez are losses incurred by Riggers Store 1. The sole member of Riggers Store 1 (Riggers Holdings) might be entitled to make a derivative claim on behalf of Riggers Store 1 if it meets all of the "pre-suit" conditions, but Melendez is not a member of Riggers Store 1 and has no standing to make a claim on behalf of Riggers Store 1.

¹ Any claim against CMM requires arbitration as it is a signor of the Operating Agreement, containing the arbitration clause.

CONCLUSION

[14] The Horning Group (Appellants) respectfully request that the Court vacate the trial court order and direct that the issues in dispute be arbitrated as required by the Operating Agreement of Riggers Store Holdings, LLC.

Dated this 26th day of October, 2017.



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AFFIDAVIT OF ELECTRONIC SERVICE

I, Charity Grueneich, being first duly sworn and under oath, depose and say: I am of legal age, a citizen of the United States and not a party to the action herein; that on the 26th day of October, 2017, I served the following documents:

APPELLANTS' REPLY BRIEF

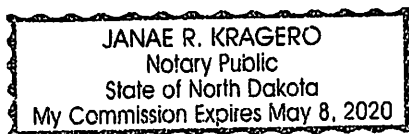
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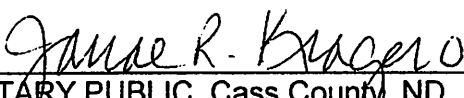
Michael L. Gust – mlgfilings@andersonbottrell.com

Charles L. Neff – cneff@nefflawnd.com


Charity Grueneich

Subscribed and sworn to before me this 26th day of October, 2017.




NOTARY PUBLIC, Cass County, ND

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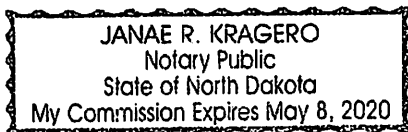
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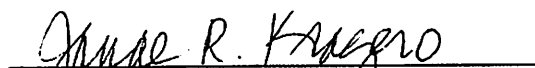
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Charles L. Neff – cneff@nefflawnd.com


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