No. _____

In The
Supreme Court of the United States

D.A. OSGUTHORPE FAMILY PARTNERSHIP,

Petitioner,

v.

ASC UTAH, INC. and
WOLF MOUNTAIN RESORTS, L.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

DAVID W. SCOFIELD
Counsel of Record for Petitioner
PETERS | SCOFIELD
A PROFESSIONAL CORPORATION
7430 Creek Road, Suite 303
Sandy, Utah 84093
Telephone: (801) 322-2002
Facsimile: (801) 912-0320
Email: dws@psplawyers.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

"[Utah] public policy . . . favors arbitration agreements . . . only [when] they serve as 'speedy and inexpensive methods of adjudicating disputes,' . . . and [save] judicial resources[,]" so there "*is no public policy supporting arbitration when it would undermine these goals.*" Based on that state law, a procedural construction of the arbitration clause against petitioner's standing to invoke arbitration and the construction, without use of the federal presumption of arbitrability, that petitioner's dispute over default was not "a dispute under this Amended Agreement," petitioner's clear arbitration rights were denied.

The Questions Presented are:

1. Whether Utah's public policy on the enforcement of arbitration agreements, quoted above, is preempted by section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

2. Whether a particular party's standing to invoke arbitration, like other procedural questions prerequisite to arbitration, is presumptively for the arbitrator and not the court under federal substantive law.

3. Whether a judicially-construed limitation contrary to an arbitration clause's express language contravenes federal substantive law on the presumption of arbitrability.

PARTIES TO THE PROCEEDING BELOW

This case arises from the denial of petitioner D.A. Osguthorpe Family Partnership's motion to compel respondents ASC Utah, Inc. [hereinafter "ASC"] and Wolf Mountain Resorts, LC [hereinafter "Wolf"], to arbitrate disputes under an arbitration agreement to which they, petitioner, and thirty-three other signatories were parties.

Additional parties below, Stephen A. Osguthorpe, individually and in his capacity as Interim Personal Representative of the Estate of D.A. Osguthorpe, D.V.S. and also in his capacity as Successor Trustee of The Dr. D.A. Osguthorpe Trust; American Skiing Company; Leslie B. Otten; and Enoch Richard Smith, as Personal Representative of the Estate of Enoch Smith, Jr., are not parties to the arbitration agreement and so have had no involvement in this dispute either at the trial court or the Utah Supreme Court. Petitioner is submitting a letter to the Clerk of the Court in writing, pursuant to Rule 12.6, stating petitioner's belief that none of these parties have any interest in the outcome of this petition.

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The Utah Supreme Court's decision, 2013 UT 12, 729 Utah Adv. Rep. 23, 2013 Utah LEXIS 57 is reprinted in the Appendix at 1-12. The trial court's Ruling and Order (Arbitration Issues), dated November 20, 2010, is reprinted in the Appendix at 13-23. The Utah Supreme Court's ruling denying petitioner's emergency application for a stay pending appeal, dated January 20, 2011, is reprinted in the Appendix at 24. The trial court's Order Denying Plaintiff's Motion Pursuant to the Federal Arbitration Act for Order Compelling Arbitration and for Immediate Stay and Dismissing Claimed Arbitrable Issues Without Prejudice, entered April 12, 2011, is reprinted in the Appendix at 25-26.

JURISDICTION

The Utah Supreme Court filed its decision on March 5, 2013. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final judgments or decrees rendered by the highest court of a State, in which a decision could be had upon any right or privilege claimed under the statutes of the United States, on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may

petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the

> issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

ARBITRATION CLAUSE OF THE SPA AGREEMENT

The arbitration clause of the "SPA Agreement" says:

> 5.8.1 *Binding Arbitration.* In the event that the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator agreed upon by the parties, or if no single arbitrator can be agreed upon, an arbitrator or arbitrators shall be selected in accordance with the rules of the American Arbitration Association and such dispute, difference, or disagreement shall be resolved by the binding decision of the arbitrator, and judgment upon the award rendered by the arbitrator

> may be entered in any court having jurisdiction thereof. However, in no instance shall this arbitration provision prohibit the County from exercising enforcement of its police powers where Developers are in direct violation of the Code.

Appendix at 33. Because the Utah Supreme Court references the Default Mechanism of the SPA Agreement and its attorney fee provision as support for its decision, all portions of Sections 5.1 through 5.8 of the SPA Agreement are reprinted for context in Appendix 27-35.

RELATED PETITION FOR CERTIORARI, NO. 12-1247

On April 15, 2013, petitioner filed its petition for writ of certiorari asking permission to appeal the decision of the United States Court of Appeals for the Tenth Circuit, dated January 15, 2013, and reported at 705 F.3d 1223 (2013). That petition has been assigned No. 12-1247. That petition involves this same dispute, except that it represents petitioner's effort to have the federal court uphold its arbitration right, as described in the Statement below.

STATEMENT

I. Background on (1) the Binding Mandatory Arbitration Agreement; (2) the 2009 Summit County Default Notice; and (3) Petitioner's Motion to Compel Arbitration and Stay Litigation Over Arbitrable Disputes.

The petitioner is one party to a thirty-six (36) party agreement (named the "Amended and Restated Development Agreement For the Canyons Specially Planned Area – Snyderville Basin, Summit County, Utah" [hereinafter the "SPA Agreement"]), entered into November 15, 1999, for the development of hundreds of acres in Summit County, Utah ("Summit County") for golf courses, hotels, condominiums and other destination accommodations, resort support housing, commercial uses, and other facilities and amenities.

The SPA Agreement contains a mandatory and binding arbitration provision which states broadly, in pertinent part:

> *Binding Arbitration.* In the event that the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator agreed upon by the parties, or if no single arbitrator can be agreed upon, an arbitrator or arbitrators shall be selected in accordance with the rules of the American Arbitration Association and such dispute, difference, or

> disagreement shall be resolved by the binding decision of the arbitrator. . . .

ASC and Wolf are both also parties to the SPA Agreement. On June 14, 2006, ASC filed suit against Wolf concerning a ground lease between the two of them (which incorporated obligations under the SPA Agreement) and in its amended complaint dated July 28, 2006, ASC made clear that its ground lease claims encompassed breaches of the SPA Agreement. On December 18, 2006, Wolf filed a counterclaim under the SPA Agreement. On May 20, 2009, after litigating the SPA Agreement issues for almost three years, Wolf filed a motion to compel arbitration. The trial court ruled that Wolf's three-year active participation litigating SPA Agreement issues waived its right of arbitration. Wolf appealed to the Utah Supreme Court on July 8, 2009.

Just three weeks later, on July 29, 2009, Summit County, a party to the SPA Agreement, purported to act under the SPA Agreement default mechanism and issued a default notice to petitioner, ASC, Wolf and several other parties [hereinafter the "Default Notice"]. The Default Notice was grounded, in part, on the very delay dispute which ASC and Wolf had been litigating for more than three years. Appendix at 54-59.

The Default Notice threatened that petitioner would lose all of its valuable development rights if it did not cure, something it could not do in light of the very same delay over which ASC and Wolf were litigating. Petitioner thus has arbitrable claims against ASC and Wolf over that delay.

Petitioner had separately sued ASC and Wolf under agreements entirely separate from and unrelated to the SPA Agreement. That case had been consolidated, however, over petitioner's objection, with breach of ground lease claims between ASC and Wolf also unrelated to any SPA Agreement breach. When petitioner understood the court to order a supplemental pleading with all existing new claims to be filed, petitioner, fearing claim preclusion if it did not obey the court order, filed a supplemental pleading on July 19, 2010, raising its new SPA Agreement claims against ASC and Wolf, grounded in the Default Notice. On September 29, 2010, petitioner filed its motion to compel ASC and Wolf to arbitrate all the issues of delay under the SPA Agreement including those they had been litigating and which were subsumed within Summit County's Default Notice.

Petitioner's motion was grounded on the Utah Arbitration Act. However, in briefing on that motion, petitioner raised effect of the FAA, including preemption under section 2 of the FAA, of any conflicting state law. *See* Appendix at 38 n.2. Petitioner pointed to federal public policy chosen by Congress that relegated the avoidance of piecemeal litigation to the "overarching federal policy in favor of enforcing arbitration agreements." Appendix at 41. Petitioner raised the federal substantive law presumption that procedural questions under the agreement are for the arbitrator, not the court, stating:

> Whether conditions precedent have been met do not go to the sole questions before the Court of whether an agreement to arbitrate

> exists and whether the issues are within the scope of that agreement. Once those issues are answered affirmatively, this Court must send the dispute to arbitration, where it is for the arbitrators to determine questions about issues of procedural, as opposed to substantive, arbitrability, such as conditions precedent. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (holding that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide" (quoting the Revised Uniform Arbitration Act of 2000 (RUAA) § 6(c) cmt. 2).

Appendix at 42-43. And petitioner pointed to federal law requiring a stay of trial:

> FAA § 3 requires that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" the Court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." *Id.* It is clear that if any issue is referable to arbitration then a stay must be entered as to every issue related in any way to the arbitration. *AXA Equitable Life Insurance Co. v. Infinity Financial Group, LLC,* 608 F. Supp. 2d 1330,

> 1332 (S.D. Fla. 1999) ("For arbitrable issues, the language of [9 U.S.C. § 3] indicates that the stay is mandatory.") (*quoting Klay v. All Defendants,* 389 F.3d 1191, 1203-04 (11th Cir. 2004)).

Appendix at 42.

II. While Petitioner's Motion Was Pending, the Utah Supreme Court Announced Utah's Public Policy Against Enforcing Arbitration Agreements Where Speedy and Efficient Dispute Resolution and Conservation of Judicial Resources Would Not Result.

While petitioner's arbitration motion was pending, the Utah Supreme Court issued its November 19, 2010 decision in *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.,* 2010 UT 65, 245 P.3d 184 [hereinafter *ASC Utah, Inc.*]. The Utah Supreme Court decided that Wolf's three years of litigating arbitrable issues under the SPA Agreement had resulted in a waiver of Wolf's arbitration right, stating: "The legislature enacted the Act in accordance with a public policy that favors arbitration agreements as contractual agreements between parties not to litigate . . . only insofar as they serve as 'speedy and inexpensive methods of adjudicating disputes,' . . . and help reduce strain on judicial resources[.]" *Id.* at 191, ¶ 18. Utah public policy on arbitration became restrictive: "Utah public policy favors arbitration agreements only insofar as they provide a speedy and inexpensive means of adjudicating disputes, and reduce strain on judicial resources." *Id.* at 197, ¶ 40. Utah now will not enforce

arbitration agreements unless those prerequisites are met: "*There is no public policy supporting arbitration when it would undermine these goals.*" *Id.* at 191, ¶ 18 (emphasis added).[1]

III. Utah Public Policy Now Directly Conflicts With Congress' Paramount Policy of Enforcement of Arbitration Agreements.

Utah's public policy against arbitration unless it serves as a "'speedy and inexpensive method[ ] of adjudicating disputes' [citation omitted], and helps reduce strain on judicial resources," *id.,* directly called for the application of section 2 preemption, in light of Congress' overriding goal to promote the enforcement of private arbitration contracts. This Court's decision in *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) [hereinafter *Dean Witter*] settled that primacy of the conflict between the two policies almost thirty years ago:

> The legislative history of the Act establishes that the purpose behind its passage was

[1] Notably, the Utah Supreme Court recognized that none of the SPA Agreement parties besides ASC and Wolf, had been litigating the pre-2009 Default Notice issues recited by Summit County. *See id.* at 188, ¶ 3 ("In 1999, pursuant to the Ground Lease, ASC[ ], Wolf Mountain, Summit County, and *various other landowners not participating in this litigation* entered into an Amended and Restated Development Agreement for the Canyons Specially Planned Area (SPA Agreement). [Emphasis added.]"). So all SPA Agreement parties besides ASC[ ] and Wolf retained their contractual arbitration rights.

> to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements.

Id. at 220. And while the goals cited by the Utah Supreme Court are laudable (this Court also acknowledged in *Dean Witter* that Congress had recognized the desire for those often-attained salutary effects of arbitration) this Court firmly reinforced the primacy of Congress' goal for the FAA as requiring the enforcement of arbitration agreements:

> Nonetheless, *passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation*. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an

> arbitration agreement," *id.,* at 20. *See also id.,* at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Id. at 220-21 (footnotes omitted & emphasis added).

IV. The Trial Court Followed the Utah Supreme Court's Public Policy Instruction, Disregarded the Federal Substantive Law of Arbitration and Refused to Enforce the SPA Agreement's Arbitration Provision.

The very next day after *ASC Utah, Inc.* was handed down, the trial court expressly relied on Utah public policy to deny petitioner's arbitration motion, stating:

> [C]ommonly in this court's experience– about the salutary purposes and features of arbitration (the "just, speedy and inexpensive resolution of disputes") that require enforcement of such agreements. Those benefits may indeed be present when arbitration agreements are bargained for, and the parties promptly exercise their rights to arbitrate, but the Supreme Court has now squarely, faced the circumstances where arbitration clauses are used in a way that in fact defeats the positive features that may otherwise exist:
>
> > The legislature enacted the Act in accordance with a public policy that favors arbitration as contractual agreements

> between parties not to litigate, [citation omitted] only insofar as they serve as "speedy and inexpensive methods of adjudicating disputes, [citation omitted] and help reduce strain on judicial resources, [citation omitted].["] *There is no public policy supporting arbitration when it would undermine these goals.*
>
> [*ASC Utah, Inc.*] at ¶ 18 (emphasis added).

Trial Court's Ruling and Order (Arbitration Issues), Appendix at 17-18 (*quoting ASC Utah, Inc.* at 191, ¶ 18, emphasis in original).

The state trial court explained the direct effect of Utah public policy on its decision regarding petitioner's right of arbitration under the SPA Agreement:

> Osguthorpes' essential argument is that "this Court has no discretion and must compel arbitration of all claims and issues relating to the SPA [Agreement]." (Memorandum in Support at 6) *The argument is supported by case law, and had some force, until yesterday* [the day the Utah Supreme Court decided *ASC Utah, Inc.*] The discussion above shows how the landscape has changed. This court must DENY Osguthorpes' Motion to Compel Arbitration, but it does so fully recognizing that Osguthorpes have an option not available to Wolf Mountain.
>
> That is, Osguthorpes' Motion was prompted by the court's ruling re-opening the pleadings

> pursuant to Rule 15(d), URCP. Osguthorpes felt compelled to assert claims at that time, whether they wanted to or not, at the peril of losing any right to assert such claims in the future. During his last hearing in this case, on October 27, 2010, Judge Kelly apparently recognized that Osguthorpes' supplemental pleadings had created some unforeseen consequences, and on his own motion, he first bifurcated, then dismissed those pleadings, without prejudice to re-filing. No order to that effect has been entered and Judge Kelly left the door open for objections to his oral order.
>
> This court now vacates Judge Kelly's oral ruling regarding Osguthorpes' supplemental claims, and grants the Osguthorpe plaintiff [sic] leave, at their option, to continue with the claim in this case, or dismiss the claims (or any of them) without prejudice to re-filing within a reasonable time after this case is adjudicated through a final and appealable judgment, within any applicable statute of limitations, or no later than six months after final judgment, whichever occurs last.

Appendix at 21-22 (emphasis added). The state trial court held that no party to the SPA Agreement held any further arbitration right under Utah's public policy, despite the recent Default Notice, solely because two parties, ASC and Wolf, had litigated the dispute underlying the Default Notice for years: "the [Utah state law public] policies underlying arbitration have

been so violated in this case that *arbitration is not an option open to any party*." Appendix at 21 (emphasis added).

At a subsequent hearing before the trial court on December 9, 2010, the trial court expressly acknowledged that it did not and would not consider the federal law, would not issue a stay pending appeal of the arbitration decision and instead was going to proceed to trial unless a federal judge issued an injunction against him:

> THE COURT: . . . I don't think that I should spend much time on the issue of the federal because that's going to be decided in the federal court. . . . I think that's going to be decided in the federal court issue (inaudible) that area and that's up to you.
>
> I don't think there's anything I should do automatically or upon my own volition to stay the action pending the federal action and I think even if the federal court were to act, it would have to do more than stay, it would have to enjoin me which it could do perhaps but that's an argument for a (inaudible) I think.
>
> . . .
>
> I believe [what] the Supreme Court did in ASCU vs. Wolf Mountain was indeed make some new law which says at some point the policies are so violated, the e[ff]ica[c]ious objectives of arbitration are so unavailable that the Court's discretion is very broad to say no,

> we're not going to arbitrate. I don't think anything has changed here. I don't think the Court will change that view. I don't think they'll change it in this case particularly but, of course, I could be wrong. I recognize that. I have never felt – it's not just this case I've never felt I had an obligation to stay that is automatic. I certainly don't feel I'm divested of jurisdiction until the final judgment in the case. I have previously denied the stay and all I can tell you is the worst thing they did to me was (inaudible) Central Florida vs. Park West. I denied the stay and about a month or two later they came back and said it's stayed. But they didn't say you have no right to deny the stay. So I think it really is important for you to move on to see what they say. Do you have any objection to – my position is to deny the stay [pending appeal of the denial of the motion to compel arbitration].

Appendix at 44-46.

Following the trial court's denial of a stay pending appeal, petitioner filed with the Utah Supreme Court a Combined Petition for Emergency Relief, and Motion for Stay, on January 3, 2011 [hereinafter "Motion for Stay Pending Appeal"]. Appendix, at 48-66. In the Motion for Stay Pending Appeal, petitioner expressly raised with the Utah Supreme Court, for the first time, section 2 preemption of the Utah public policy on which the denial of its motion to compel arbitration had been grounded, stating:

> Had this Court intended [Utah public policy stated in *ASC Utah, Inc.*] to result in the

> trial court's [denial of the motion to compel arbitration], . . . that Utah law would be preempted by the Federal Arbitration Act. *See Buzas Baseball v. Salt Lake Trappers,* 925 P.2d 941, 952 (Utah 1996). The United States Supreme Court has held with respect to Congressional intent under that Act: " . . . The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute. [*quoting Dean Witter*, 470 U.S. at 221]."

Appendix at 61-63. Petitioner expressly raised with the Utah Supreme Court the federal substantive law cautioning against impairing the arbitrator's ability to decide arbitrable issues:

> *See Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp.,* 916 F.2d 402 (7th Cir. 1990) ("potential for impairment of the issues before the arbitrator due to the collateral estoppel effect of the [buyer-guarantor] litigation" required a stay), *abrogated on other grounds, IDS Life Ins. Co. v. SunAmerica, Inc.,* 103 F.3d 524, 530 (7th Cir. 1990); *accord Air Freight Services, Inc. v. Air Cargo Transport, Inc.,* 919 F. Supp. 321 (N.D. Ill. 1996) ("the court finds that it would be wise to allow the arbitrable issues in this case to be decided before the case proceeds any further, so as not to impair the arbitrator's

> ability to decide the arbitrable issues."); *cf. Olde Discount Corp. v. Tupman,* 1 F.3d 202, 208 (3d Cir. 1993) ("right to arbitration cannot be satisfied if an alternate administrative forum is determining at the same time whether a claim to the identical remedy is available").

Appendix at 64. Without addressing any of the federal preemption issues or federal substantive law issues, the Utah Supreme Court issued an Order denying the petition to stay trial court proceedings pending the resolution of petitioner's appeal. Appendix at 24.

V. Petitioner Then Sought and Was Denied FAA Relief in Federal Court.

Nineteen days later, on February 8, 2011, petitioner filed a complaint in the United States District Court for the District of Utah, Case No. 2:11-cv-00147-DS, *inter alia,* for a declaration that Utah public policy was preempted under section 2 of the FAA. Petitioner also asked the federal court for an order compelling ASC and Wolf to arbitrate all of the SPA Agreement disputes underlying the Summit County Default Notice, even though they had chosen to litigate those issues between themselves over the previous four-plus years and even preceding Summit County's issuance of the Default Notice.

At a hearing on February 23, 2011, without addressing the section 2 preemption claim, the federal district court ruled from the bench, asserting that it lacked subject matter jurisdiction under the

Rooker-Feldman doctrine and it denied petitioner's motion to compel arbitration and to stay the state court proceedings. On January 15, 2013, the United States Court of Appeals for the Tenth Circuit reversed the district court's ruling on the *Rooker-Feldman* doctrine that it lacked subject matter jurisdiction but affirmed the dismissal under *Colorado River* abstention. A petition for certiorari seeking leave to appeal that decision was filed with this Court on April 15, 2013, in *D.A. Osguthorpe Family Partnership v. ASC Utah, Inc., et al.*, and has been assigned No. 12-1247. Petitioner's federal complaint was dismissed by the federal court without any decision on its section 2 preemption claim.

VI. With its Request for Federal Vindication of its FAA Arbitration Rights Dismissed on *Rooker-Feldman* Grounds, Petitioner Again Moved the State Court to Compel Arbitration and for a Stay, this Time Expressly Under the FAA and Federal Substantive Law.

All this time, the state trial court, Wolf and ASC continued to move forward towards trial on arbitrable issues. Petitioner therefore brought in the state court yet another motion to compel arbitration, on March 2, 2011. This time, the motion was expressly grounded in the FAA and expressly asserted section 2 preemption of the state public policy espoused in *ASC Utah, Inc.,* as shown in its supporting memorandum, Appendix at 67-78. This motion expressly argued that "The FAA Pre-Empts All State Laws That Conflict

With the FAA," that "The FAA Requires This Court to Enter an Order Compelling Arbitration and Immediately Staying the Proceedings Before It," that federal substantive law of arbitration "withdrew the power of the states to require a judicial forum" that all doubts as to whether SPA Agreement disputes, differences and disagreements are arbitrable" must be resolved "in favor of arbitrability" and that "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide. Appendix at 68, 72-73, 76-77. The trial court asserted, again, that it was bound by the decision in *ASC Utah, Inc.* The written Order denying the motion was entered on April 12, 2011. *See* Appendix at 25-26.

VII. The Utah Supreme Court's Decision Which is the Subject of this Petition Completely Disregards the Federal Substantive Law of Arbitration.

Petitioner appealed the denial of its second motion to compel arbitration and to stay, this time brought exclusively under the FAA and asserting section 2 preemption of the Utah public policy announced in *ASC Utah, Inc.* That second arbitration appeal was consolidated with the first appeal and the decision on both was issued in *D.A. Osguthorpe Family Partnership v. Wolf Mountain Resorts, L.C.,* 2013 UT 12, 729 Utah Adv. Rep. 23, 2013 Utah LEXIS 57 [hereinafter *D.A. Osguthorpe Family Partnership*],

which is the Utah Supreme Court decision from which petitioner hereby seeks permission to appeal to this Court. Although the FAA issues were thus directly and timely before the Utah trial court and the Utah Supreme Court, the decision in *D.A. Osguthorpe Family Partnership* makes no mention of them whatsoever (much like the Tenth Circuit decision from which leave to appeal is requested by the petition for certiorari in No. 12-1247).

A. The Application of Preempted Utah Public Policy Was Affirmed.

The decision in *D.A. Osguthorpe Family Partnership* emphatically upholds the denial of petitioner's arbitration right under the Utah public policy, stating: "Here, the district court indeed found that the arbitration issue in this case ha[d] been . . . authoritatively decided" by our opinion in [*ASC Utah, Inc.*]. *We agree.*" Appendix at 11 (emphasis added). The decision in *D.A. Osguthorpe Family Partnership* therefore reinforces to Utah's inferior courts that Utah public policy prohibits enforcement of valid arbitration clauses when speed, efficiency and economy are not served, even though that public policy direct conflicts with this Court's conclusion in *Dean Witter* that the paramount concern of the Congress was to enforce arbitration agreements. The decision in *D.A. Osguthorpe Family Partnership* simply disregards this Court's precedent on the topic and this Court's precedent on section 2 preemption under the FAA.

B. The Federal Substantive Law of Arbitration Concerning the Construction of Arbitration Agreements Was Disregarded by the Utah Supreme Court.

The *D.A. Osguthorpe Family Partnership* decision then, using procedural constructions of the SPA Agreement, held that "the SPA [Agreement] disputes between ASC[ ] and Wolf . . . are not within the scope of the arbitration provision and . . . even if they were, [petitioner] would not have a right to compel arbitration of claims between two other parties." Appendix at 6.

1. The Utah Supreme Court disregarded the presumption that procedural questions are for the arbitrator, not the court.

As its grounds to conclude that the disputes between ASC and Wolf were not "within the scope of the arbitration provision" the Utah Supreme Court stated that "the SPA claims for which [petitioner] is attempting to compel arbitration are not 'continuing dispute[s]' with [Summit] County that the default mechanism has failed to resolve. [Summit] County is not a party to this appeal or to any of the litigation leading to this appeal, and the default mechanism has not been (and cannot be) invoked as to these claims." Appendix at 9 (footnote omitted). Those underpinnings are procedural, however, and not interpretations that the dispute was not one "under this Amended Agreement" as the plain language of the

arbitration clause provides: "In the event that *the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement*, then *every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator* agreed upon by the parties . . . [emphasis added]." The *D.A. Osguthorpe Family Partnership* overlooks the fact that the ASC and Wolf golf course delay "dispute" which the court says "cannot be the subject of the invocation of the default mechanism" is in fact at the heart of the Default Notice issued by Summit County. *See* Appendix at 54-59 (*quoting* Default Notice).

The federal substantive law of arbitration in that regard, not mentioned by the Utah Supreme Court, but well-settled by this Court's precedent, makes the resolution much easier. This Court has established that "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) [hereinafter *Howsam*] (*quoting John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964)).

> Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act]," states that an "arbitrator shall decide whether a condition

> precedent to arbitrability has been fulfilled." RUAA § 6(c) and comment 2, 7 U. L. A. 12-13 (Supp. 2002). And the comments add that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.,* § 6, comment 2, 7 U. L. A., at 13 (emphasis added).

Howsam, 537 U.S. at 84-85 (changes in original). The Utah Supreme Court failed to follow that presumption and made no effort to overcome the presumption – it simply disregarded it and, in doing so, violates the federal substantive law of arbitrability.

The next question raised by the *D.A. Osguthorpe Family Partnership* decision, is that, "even if these claims were arbitrable, [petitioner], as a non-party to the disputes, would have no right under the SPA Agreement to compel their arbitration." Appendix at 10. The correct inquiry is whether one is a party to the arbitration agreement, not the "dispute." To the extent that the court defined the "dispute" to mean the litigation which has proceeded between ASC and Wolf, nothing in the arbitration agreement or the entire SPA Agreement lends itself to any construction that a dispute litigated between two parties may be the same dispute between multiple other parties and those two parties.

The question of whether petitioner has standing to demand arbitration of "the dispute" under the SPA Agreement over the delay issues litigated between ASC and Wolf which led to petitioner's receiving the Default Notice is a procedural question for the arbitrator to decide, not the court. *See, e.g., Envtl. Barrier Co., LLC v. Slurry Sys.,* 540 F.3d 598 (7th Cir. 2008) ("courts have not hesitated to hold that standing is a matter for the arbitrator to resolve, even though (as we note in a moment) arbitrability is usually an issue for the court."); *Investors Equity Life Ins. Co. of Haw. v. ADM Investor Servs.,* 1 Fed. Appx. 709, 711, 2001 U.S. App. LEXIS 622, **5 (9th Cir. 2001) (unpublished decision) ("the issue of whether a particular person or entity is a proper party to the arbitration proceeding is a procedural issue to be determined by the arbitrators"); *Aluminum, Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.,* 991 F.2d 1545, 1550 (11th Cir. 1993) (standing a procedural issue for the arbitrator); *Oil, Chemical & Atomic Workers Int'l Union, Local 7-1 v. Amoco Oil Co.,* 883 F.2d 581 (7th Cir. 1989) ("procedural issues such as standing . . . 'are for the arbitrator, so long as the subject matter of the dispute is within the arbitration clause.'"); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.,* 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including the standing of a party to the arbitration . . . are for the arbitrator, so long as the subject matter of the dispute is within the arbitration clause"); *American Postal Workers Union v. United States Postal Service,* 861 F.2d 211, 216 (9th Cir. 1988) (standing is procedural issue for

arbitrator); *Bealmer v. Texaco, Inc.,* 427 F.2d 885, 886-87 (9th Cir.), *cert. denied,* 400 U.S. 926, 91 S. Ct. 187, 27 L. Ed. 2d 185 (1970) (standing is a procedural issue for the arbitrator).

The resolution of that procedural issue by the Utah Supreme Court violates the federal substantive law of arbitration with respect to the presumption that all such procedural issues are to be decided by the arbitrator, not the court.

2. The Utah Supreme Court disregarded the presumption of arbitrability and the rule that all doubts are resolved in favor of arbitration and proceeded to rewrite the parties' agreement.

The *D.A. Osguthorpe Family Partnership* in like fashion ignores the federal substantive law of arbitration concerning the construction of arbitration agreements. First, there is no question that

> [w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, *Volt*[*Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*], 489 U.S. [468,] at 476[, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) [hereinafter *Volt*]], we do not override the clear intent of the parties, or reach a result *inconsistent with the plain text of the contract*, simply because the policy favoring arbitration is implicated.

EEOC v. Waffle House, Inc., 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (emphasis added).

The "plain text of the contract" here is silent as to the standing requirements for any party to the agreement to invoke arbitration. What the arbitration clause does say is: "In the event that the default mechanism contained herein *shall not sufficiently resolve a dispute under this Amended Agreement, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator*. . . ." Appendix at 7. The question of arbitrability is answered by whether there is a dispute under the SPA Agreement. The dispute must be one not sufficiently resolved by the procedural default mechanism of the SPA Agreement. At that point, "every" such continuing dispute, difference and disagreement shall be referred to an arbitrator. ASC and Wolf's dispute over the performance of the SPA Agreement plainly falls within that language as does petitioner's dispute with them for the delay they caused resulting in the Default Notice.

To get to its ultimate conclusion, the Utah Supreme Court was constrained to re-write the plain terms of the arbitration agreement: "We conclude that the SPA claims between ASCU and Wolf Mountain are not arbitrable because they are not 'continuing dispute[s]' *with* [*Summit*] *County that the default mechanism has failed to resolve.*" *Id.* at ¶ 16 (emphasis added). Appendix at 10. The Utah Supreme Court's insertion of the phrase "with the County" after "continuing dispute[s]" simply rewrites the arbitration clause contrary to its express text. This violated multiple clear edicts from this

Court concerning the construction of arbitration agreements. It is well-settled that under the FAA, all doubts as to arbitrability must be resolved in favor of arbitrability. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24-25 (1983) [hereinafter *Moses H. Cone*]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

This Court instructed state courts that "in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt,* 489 U.S. at 475-76 (emphasis added). When there is silence or ambiguity about whether a particular merits-based dispute is arbitrable because it is within the scope of a valid arbitration agreement, there is a presumption in favor of arbitration. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) [hereinafter *First Options*]. *See also Granite Rock Co. v. Int'l Bhd. of Teamsters,* ___ U.S. ___, 130 S. Ct. 2847, 2857 (2010) (presumption of arbitrability where parties "have agreed to arbitrate some matters pursuant to the arbitration clause[,]" the underlying agreement is valid and the arbitration clause is valid).

Thus, "[f]inally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense

that '[*an*] *order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.*'" *AT&T Techs. v. Communs. Workers of Am.,* 475 U.S. 643, 656, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) [hereinafter *AT&T Techs.*] (*quoting United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) [hereinafter *Warrior & Gulf*]) (emphasis added). Having failed to even mention that general presumption of arbitrability, the *D.A. Osguthorpe Family Partnership* made no effort to and did not rebut the presumption.

The plain language of the arbitration provision does not limit itself to "claims" but includes "every such dispute, difference, and disagreements. . . ." "Thus, the text of the arbitration clause itself surely does not support – indeed, it contradicts – the conclusion that the parties agreed to foreclose claims" of litigating parties that bear directly on the arbitrable claims of other parties from the consequences of the arbitration agreement. *See Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52, 61, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

The federal substantive law of arbitration in the general construction of the contract as to the presumption of arbitrability, like the presumption that the arbitrator decides procedural matters, like, as well, the preemption of Utah public policy, is simply

disregarded in the *D.A. Osguthorpe Family Partnership* decision.

REASONS FOR GRANTING THE PETITION

Less than six months ago, in this very Term, this Court forcefully rebuked the Supreme Court of Oklahoma for exhibiting judicial hostility to arbitration. *See Nitro-Lift Techs., L.L.C. v. Howard,* ___ U.S. ___, 133 S. Ct. 500, 503 (2012) ("Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.' ") [hereinafter *Nitro-Lift*]. "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq., including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Id.* at 501.

Yet fewer than four months after that decision, the Utah Supreme Court has also failed to adhere to the federal substantive law of arbitration. Apparently not only is "eternal vigilance [ ] the price we pay for liberty[,]" Thomas Jefferson, *4th July, 1817, 42d Year*, VERMONT GAZETTE, July 8, 1817, at 2, it must also be the price we pay for adherence to the FAA's national policy favoring arbitration and this Court's precedent.

Utah's public policy against arbitration (coincidentally announced only one week before the decision

in *Nitro-Lift* was handed down) is too dangerous a precedent challenging Congress' intent under the FAA to let it stand unanswered. One day after that policy was announced by the court the trial court in this case applied it to petitioner. Petitioner did not bargain to serve Utah's sensibilities regarding dispute resolution and judicial resources. It bargained for the right to mandatory and binding arbitration and the FAA, despite Utah public policy, demands that bargain to be enforced. Indeed, Utah's precedent now leaves unclear when an arbitration agreement *would* be deemed enforceable. The Utah trial judge certainly interpreted himself as having newfound freedom to disregard arbitration agreements as shown by his statement that he believed the Utah Supreme Court "ma[d]e some new law which says at some point the policies are so violated, the [efficacious] objectives of arbitration are so unavailable that *the Court's discretion is very broad to say no, we're not going to arbitrate.*" Appendix at 45 (emphasis added).

Congress' intent to make courts enforce arbitration agreements cannot withstand some ill-defined, "very broad" "discretion" "to say no, we're not going to arbitrate." Yet that is now the law in Utah, followed by its trial courts, and perhaps to be relied on by other states as a sound basis for their own public policies against arbitration. This Court plainly instructed in *Dean Witter* that "the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which

an arbitration agreement has been signed[,]" 470 U.S. at 218. This case presents an excellent opportunity to again cause judicial hostility to yield to Congress' mandate.

Especially where complex, multi-party agreements with arbitration clauses are ubiquitous in commerce, any court's disregard but especially a state court's disregard under the guise of state law granting "discretion" to disregard even the presumption that procedural questions are for the arbitrator and not the court is potentially momentous. Any number of procedural issues may be raised in complex, multi-party agreements to defeat an arbitration clause. For courts to invite a relentless series of procedural challenges to arbitration can lead only to costly court battles and appeals over matters that neither the parties to the agreement nor Congress ever intended courts to answer. All that the Utah Supreme Court did was "assume[ ] the arbitrator's role by" deciding procedural questions. *Nitro-Lift,* 133 S. Ct. at 503. And because the court's construction of the SPA Agreement was limited to state law only to decide arbitrability under a contract governed by the FAA, there "is all the more reason for this Court to assert jurisdiction." *Nitro-Lift Techs.,* 133 S. Ct. at 503.

I. This Court Should Reject Utah Public Policy Against Enforcing Arbitration Agreements Unless Enforcement Results in Speedy and Efficient Dispute Resolution, as Preempted by Section 2 of the FAA.

Utah's public policy cannot survive *Dean Witter*'s express rejection of salutary benefits in favor of the *paramount* policy of the FAA, i.e., "ensur[ing] judicial enforcement of privately made agreements to arbitrate." 470 U.S. at 220. While quite certainly acknowledging that Congress was aware of the salutary benefits of expeditious dispute resolution and saving of judicial resources that arbitration will often provide, *Dean Witter* expressly rejected Utah's public policy argument against arbitration where those goals are not served: "We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." *Id.* The fact that the Utah trial court felt that Utah's public policy gave it broad discretion to *not* enforce arbitration agreements, *see* Appendix at 45, shows an especial need for this Court to remedy that erroneous belief as to FAA-governed agreements.

Therefore, this Court should reject Utah's application of its public policy to FAA-governed agreements by holding that section 2 of the FAA preempts Utah public policy against the enforcement of arbitration agreements where speedy dispute resolution and conservation of judicial resources are not served. *See Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201, 1203-04 (2012) (state public

policy against arbitration of personal injury claims preempted by section 2); *Perry v. Thomas,* 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (holding that section 2 of the FAA preempted conflicting limitations of state law).

II. This Court Should Enforce its Precedent on the Presumption That the Arbitrator Decides Procedural Questions, Including Standing.

In *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) [hereinafter *John Wiley*], this Court stated: "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557. In *Howsam,* this Court clarified that "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" are substantive "questions of arbitrability" for the court to decide. *See* 537 U.S. at 84 (*citing First Options,* 514 U.S. at 943-46 & *AT&T Techs.,* 475 U.S. at 651-52).

"At the same time the Court has found the phrase 'question of arbitrability' not applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus '"procedural"' questions

which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." *Id.* (*quoting John Wiley,* 376 U.S. 543, at 557). The Court's opinion in *Howsam* also discussed the Revised Uniform Arbitration Act of 2000 (RUAA) and quoted the RUAA's rule that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam,* 537 U.S. at 84-85 (*quoting RUAA,* § 6, comment 2, 7 U. L. A., at 13).

The resolution of whether the court or the arbitrator is presumed to be the arbiter on gateway questions of arbitrability is addressed further in this Court's decision in *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) [hereinafter *Green Tree*]. There, it was succinctly explained that:

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clear and unmistakable" evidence to the contrary). *AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean*

> *Witter Reynolds, Inc.,* 537 U.S. 79, 83, 154 L. Ed. 2d 491, 123 S. Ct. 588 (2002). They include certain gateway matters, such as *whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. See generally Howsam, supra. See also John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-547, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964) (whether an arbitration agreement survives a corporate merger); *AT&T, supra,* at 651-652, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (whether a labor-management layoff controversy falls within the scope of an arbitration clause).

Id. at 452 (emphasis added). Here, as in *Green Tree,* all parties are concededly signatories to a valid and binding mandatory arbitration clause. The plain language of the arbitration provision defines the disputes subject to coverage as "a dispute under this [SPA] Agreement. . . ." Disputes concerning delays in construction of the golf course, which led to Summit County's Default Notice under the SPA Agreement's default mechanism, squarely fall under the terms and conditions of the SPA Agreement. Thus, as in *Green Tree,* the gateway issue "concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." 539 U.S. at 452.

With respect to parties or standing, the federal circuit courts of appeals that have addressed the issues seem to conclude that standing issues are

procedural matters for the arbitrator and not a court. *See, e.g., Envtl. Barrier Co., LLC v. Slurry Sys.,* 540 F.3d 598, 605 (7th Cir. 2008) ("courts have not hesitated to hold that standing is a matter for the arbitrator to resolve, even though (as we note in a moment) arbitrability is usually an issue for the court."); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.,* 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including the standing of a party to the arbitration, . . . are for the arbitrator, so long as the subject matter of the dispute is within the arbitration clause."); *United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc.,* 652 F.2d 1356, 1360 (9th Cir. 1981) ("Whether the Steelworkers had standing as a party to the arbitration to proceed with that arbitration, which had been properly commenced, was a procedural matter for the determination of the arbitrator."), *cert. denied,* 455 U.S. 1021, 102 S. Ct. 1718, 72 L. Ed. 2d 139 (1982); *Bealmer v. Texaco, Inc.,* 427 F.2d 885 (9th Cir. 1970) (standing to invoke arbitration a procedural question for the arbitrator).

III. This Court Should Enforce its Precedent on the Presumption of Arbitrability and That Doubt Should Be Resolved in Favor of Arbitration.

When the Utah Supreme Court engaged in its contract construction exercise under state law, it disregarded additional precedent from this Court: "[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration

agreement within the scope of the Act, [citation omitted] due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt,* 489 U.S. at 475-76. "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone,* 460 U.S. at 25.

"[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Techs.,* 475 U.S. at 656 (*quoting Warrior & Gulf,* 363 U.S. at 582-83).

> Such a presumption is particularly applicable where the clause is [so] broad as [to] provide[ ] for arbitration of "*any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder*. . . ." In such cases, "[in] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

Id. at 657 (emphasis added) (*quoting Warrior & Gulf,* at 584-85). The emphasized language is not far from the SPA Agreement's mandate that if the default process failed to sufficiently resolve "a dispute under this Amended Agreement, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator. . . ."

The contract language, "a dispute under this Amended Agreement" broadly describes the subject matter of a dispute. The Utah Supreme Court parsed other provisions of the SPA Agreement to conclude that "a dispute" does not mean "a dispute under this Amended Agreement" but rather "a dispute with [Summit County] under this Amended Agreement" it did not honor the required federal substantive law of arbitration. The Utah Supreme Court instead tried to create doubt where the plain language offers none and, once it thought it had done so, it resolved the doubt against arbitration rather than in favor of it. One may have thought that this type of issue was put to rest once and for all by this Court's decision in *Nitro-Lift,* where it stated in no uncertain terms that "[o]ur cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" 133 S. Ct. at 503.

CONCLUSION

Petitioner respectfully requests that its petition be granted.

Respectfully submitted,

DAVID W. SCOFIELD
Counsel of Record
for Petitioner
PETERS | SCOFIELD
A PROFESSIONAL CORPORATION
7430 Creek Road, Suite 303
Sandy, Utah 84093
Telephone: (801) 322-2002
Facsimile: (801) 912-0320
Email: dws@psplawyers.com

STEPHEN A. OSGUTHORPE and D.A. OSGUTHORPE FAMILY PARTNERSHIP, Plaintiffs and Appellants, v. WOLF MOUNTAIN RESORTS, L.C., Defendant, Appellee, and Cross-Appellant, v. ASC UTAH, INC., dba THE CANYONS; AMERICAN SKIING COMPANY; LESLIE B. OTTEN; and John Does I-XX, Defendants and Appellees.

Nos. 20100928

SUPREME COURT OF UTAH

2013 UT 12; 729 Utah Adv. Rep. 23; 2013 Utah LEXIS 11

March 5, 2013, Filed

COUNSEL: David W. Scofield, Sandy, for appellants.

Joseph E. Wrona, Todd D. Wakefield, Park City, for appellee and cross-appellant.

John R. Lund, Kara L. Pettit, John P. Ashton, Clark K. Taylor, Salt Lake City, for appellees.

JUDGES: JUSTICE DURHAM authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE PARRISH, and JUSTICE LEE joined.

OPINION BY: DURHAM

OPINION

JUSTICE DURHAM, opinion of the Court:

INTRODUCTION

The D.A. Osguthorpe Family Partnership (Osguthorpe) appeals the district court's denial of its motion to compel arbitration of claims between ASC Utah, Inc., (ASCU) and Wolf Mountain Resorts, L.C. (Wolf Mountain). Osguthorpe also asserts that its due process rights were violated by the district court. We affirm.

BACKGROUND[1]

The claims for which Osguthorpe seeks to compel arbitration arise from two agreements: the 1997 Ground Lease Agreement between ASCU and Wolf Mountain (Ground Lease) and the 1999 Amended and Restated Development Agreement for the Canyons Specially Planned Area (SPA Agreement). The SPA Agreement has thirty-six signatories, including ASCU, Wolf Mountain, Osguthorpe, and Summit County (County). In the SPA Agreement, the parties agreed to take specified steps to develop the Canyons Resort in exchange for the County's approval of the projects, assistance in obtaining permits from other governmental agencies, and other support.

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[1] For a more detailed account of this case's factual and procedural background, *see ASC Utah, Inc. v. Wolf Mountain Resorts, L.C. (Wolf Mountain II)*, 2010 UT 65, ¶¶ 2-9, 245 P.3d 184 and *Osguthorpe v. Wolf Mountain Resorts, L. C. (Wolf Mountain I)*, 2010 UT 29, ¶¶ 1-3, 232 P. 3d 999.

In 2006, ASCU and Wolf Mountain began litigating claims involving both the Ground Lease and the SPA Agreement. *See ASC Utah, Inc. v. Wolf Mountain Resorts, L. C. (Wolf Mountain II)*, 2010 UT 65, ¶ 4, 245 P.3d 184. Shortly thereafter, in 2006 and 2007, Osguthorpe sued ASCU and Wolf Mountain separately, alleging that each party had breached a land-lease agreement distinct from the Ground Lease or the SPA Agreement. In late 2007, ASCU moved to consolidate Osguthorpe's separate actions into ASCU's litigation with Wolf Mountain. The district court granted ASCU's motion over Osguthorpe's opposition.

On July 30, 2009, the County issued a notice of default against Osguthorpe, ASCU, Wolf Mountain, and several other parties to the SPA Agreement. Nearly a year later, on June 28, 2010, the district court issued an order granting leave to the parties to file supplemental pleadings related to the Ground Lease under rule 15(d) of the Utah Rules of Civil Procedure. Osguthorpe filed a supplemental pleading alleging four new causes of action, including one related to liability for the default declared by the County under the SPA Agreement. The district court refused to allow Osguthorpe's claims because they were entirely new claims, not supplemental claims invited by the court pursuant to rule 15(d). Shortly thereafter, Wolf Mountain moved to disqualify the district judge, and the judge voluntarily recused himself. The judge to whom the case was reassigned vacated the previous judge's order and allowed

Osguthorpe to bring the new claims into the litigation.

In September 2010, Osguthorpe moved to compel arbitration of all the claims related to the SPA Agreement (SPA claims), including the claims between ASCU and Wolf Mountain, to which Osguthorpe was not a party. The district court scheduled a hearing on the motion for November 24, 2010. On November 19, this court issued *Wolf Mountain II*, in which we held that Wolf Mountain had "waived any potential contractual right to arbitrate" its SPA claims. 2010 UT 65, ¶ 39, 245 P.3d 184. Based on that opinion, the district court canceled the hearing on Osguthorpe's motion and held that the SPA claims between ASCU and Wolf Mountain were not arbitrable. As to Osguthorpe's own SPA claims, the district court held that Osguthorpe could continue to litigate them in the present case or pursue separate resolution through arbitration.

Osguthorpe appealed the district court's denial of its motion to compel arbitration.[2] Several weeks later, on the eve of trial, Osguthorpe withdrew its SPA claims from the case. Thus, the appeal before us involves only Osguthorpe's motion to compel arbitration of the SPA claims between ASCU and Wolf Mountain, to which Osguthorpe is not a party. We

[2] Osguthorpe also petitioned this court to stay the litigation and to disqualify the district judge. We denied these petitions.

have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j).

STANDARD OF REVIEW

We review the interpretation of a contract for correctness. *Meadow Valley Contractors, Inc. v. State Dept. of Transp*., 2011 UT 35, ¶ 24, 266 P.3d 671. Although the denial of a motion to compel arbitration presents a mixed question of fact and law, "when a district court denies a motion to compel arbitration based on documentary evidence alone," we afford no deference to the district court's decision. *Wolf Mountain II*, 2010 UT 65, ¶ 11, 245 P.3d 184. Finally, "[c]onstitutional issues, including questions regarding due process, are questions of law that we review for correctness." *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177.

ANALYSIS

Osguthorpe argues that, as a party to the SPA Agreement, it is entitled to compel arbitration of the SPA claims between ASCU and Wolf Mountain. Osguthorpe also contends that the district court violated its right to due process by ruling on the motion to compel arbitration without giving Osguthorpe an opportunity to be heard on what effect, if any, our decision in *Wolf Mountain II* should have on the motion's disposition. We disagree with Osguthorpe on both issues.

I. THE SPA AGREEMENT DOES NOT PERMIT OSGUTHORPE TO COMPEL ARBITRATION OF CLAIMS BETWEEN ASCU AND WOLF MOUNTAIN

Upon close examination of the default and arbitration provisions of the SPA Agreement, we conclude that the SPA disputes between ASCU and Wolf Mountain are not within the scope of the arbitration provision and that even if they were, Osguthorpe would not have a right to compel arbitration of claims between two other parties.

"The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract." *WebBank v. Am. Gen. Annuity Serv. Corp*., 2002 UT 88, ¶ 17, 54 P.3d 1139. To ascertain the parties' intentions, we look to the plain meaning of the contractual language, *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235, and "we consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none," *Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 23, 266 P.3d 691 (alteration in original) (internal quotation marks omitted).

The SPA Agreement contains detailed default provisions, which on their face apply only to obligations running to the County. Subsection 5.1.2 provides:

> Within ten (10) days after the occurrence of a default . . . the County shall give the Defaulting Party . . . written notice specifying the nature of the alleged default and, when appropriate, the manner in which the default must be satisfactorily cured. The Defaulting Party shall have sixty (60) days after receipt of written notice to cure the default.

Subsection 5.1.3 provides that in the event of an uncured default, the County may sue the defaulting party for specific performance or, if the default is a "major default," terminate the SPA Agreement. Under the plain language of the default provisions, the County is the only party that can declare a default and the only party that can sue for specific performance or terminate the agreement.

Subsection 5.8.1 of the SPA Agreement contains the following arbitration provision:

> *In the event that the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement*, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator agreed upon by the parties . . . and such dispute, difference, or disagreement shall be resolved by the binding decision of the arbitrator.

(Emphasis added.) The arbitration provision limits its scope to disputes that "the default mechanism" referenced above has failed to resolve. The phrase "every such continuing dispute" thus indicates that only

disputes to which the default mechanism has actually (whether successfully or not) been applied fall within the scope of the arbitration provision. Because the default mechanism can only be exercised by the County, the County will necessarily be a party to "every such continuing dispute." Thus, Osguthorpe is incorrect when it asserts that the arbitration provision applies to all disputes between any parties to the SPA Agreement.

A comparison of the arbitration provision with the attorney fee provision in subsection 5.8.6 of the SPA Agreement reinforces our interpretation. The attorney fee provision states:

> Should any party hereto employ an attorney . . . *for any reasons or in any legal proceeding whatsoever*, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, including appeals or rehearings . . . the prevailing party shall be entitled to receive from the other party thereto reimbursement for all attorney's fees and all costs and expenses.

(Emphasis added.) This provision bolsters our analysis in two ways. First, it suggests that not all disputes between parties to the SPA Agreement are governed by the arbitration provision. Second, its expansive language stands in contrast to the limiting language of the arbitration provision. The attorney fee provision applies to "any legal proceeding" involving "any party" to the SPA Agreement. In contrast, the arbitration provision applies only "[i]n the event that the

default mechanism . . . shall not sufficiently resolve a dispute" and applies only to "such continuing dispute[s]" with the County.

Here, the SPA claims for which Osguthorpe is attempting to compel arbitration are not "continuing dispute[s]" with the County that the default mechanism has failed to resolve. The County is not a party to this appeal or to any of the litigation leading to this appeal, and the default mechanism has not been (and cannot be) invoked as to these claims. Although the claims involve liability for the default declared by the County, they are distinct from the parties' disputes with the County. Thus, these SPA claims do not fall within the scope of the arbitration provision.

Even if the SPA claims were arbitrable, Osguthorpe would not have a right to invoke the arbitration provision because it is not a party to the claims between ASCU and Wolf Mountain. The arbitration provision directs that arbitrable disputes "be referred to a single arbitrator agreed upon by the parties." The word "parties" refers not to all thirty-six parties to the contract but rather to the parties to the particular dispute. To interpret the contract otherwise would lead to the absurd result of requiring all thirty-six signatories to agree on an arbitrator to hear a dispute in which most of the signatories have no interest. Nothing in the arbitration provision entitles signatories to the SPA Agreement that are not party to a dispute to compel that dispute into arbitration.

We conclude that the SPA claims between ASCU and Wolf Mountain are not arbitrable because they are not "continuing dispute[s]" with the County that the default mechanism has failed to resolve.[3] And even if these claims were arbitrable, Osguthorpe, as a non-party to the disputes, would have no right under the SPA Agreement to compel their arbitration.

II. OSGUTHORPE'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Osguthorpe also argues that the district court violated its right to due process by denying its motion to compel arbitration before it could be heard on what effect, if any, our opinion in *Wolf Mountain II* had on the motion. We disagree.

After we issued *Wolf Mountain II*, the district court cancelled the hearing it had scheduled on Osguthorpe's motion to compel arbitration, and denied the motion. In its written order, the court

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[3] Our analysis in *Wolf Mountain II* was premised on the unexamined assumption that the SPA Agreement gave Wolf Mountain a right to arbitrate its disputes with ASCU. In that appeal, the applicability of the arbitration provision was not disputed and therefore not briefed or argued to us. Accordingly, we did not analyze or interpret subsection 5.8.1, as acknowledged in the cautious phrasing of our holding: "Wolf Mountain waived *any potential* contractual right to arbitrate. . . ." *Wolf Mountain II*, 2010 UT 65, ¶ 39, 245 P.3d 184 (emphasis added). Although *Wolf Mountain II* could have been resolved on contract interpretation grounds rather than on waiver grounds, the opinion remains sound.

correctly explained that under rule 7(e) of the Utah Rules of Civil Procedure a court can deny hearings on dispositive motions if "the court finds that . . . the issue has been authoritatively decided." Here, the district court indeed found "that the arbitration issue in this case ha[d] been . . . authoritatively decided" by our opinion in *Wolf Mountain II*. We agree.

We have held that "due process requires that those with an interest in a proceeding be given notice and an opportunity to be heard in a meaningful manner before their interests are adjudicated by a court." *Salt Lake Legal Defender Ass'n v. Atherton*, 2011 UT 58, ¶ 2, 267 P.3d 227. Here, Osguthorpe fully briefed the matter to the district court, and the court noted in its written order that it "read all of the briefing." The district court complied with rule 7(e) in ruling on the motion without a hearing, *see supra* ¶ 18, and Osguthorpe has not argued that rule 7(e) is constitutionally inadequate. Nor has Osguthorpe provided any authority or argument for the notion that if new controlling precedent is handed down after a matter is briefed but before it is ruled on, the district court is required to order supplemental briefing. Therefore, we hold that Osguthorpe's due process rights were not violated.

CONCLUSION

The disputes for which Osguthorpe seeks to compel arbitration are not subject to the SPA Agreement's arbitration provision. Furthermore, as a non-party to

the disputes, Osguthorpe has no contractual right to compel their arbitration. We hold that the district court was correct in denying Osguthorpe's motion to compel arbitration, and that the district court did not violate Osguthorpe's due process rights. Affirmed.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SUMMIT COUNTY, STATE OF UTAH SILVER SUMMIT DEPARTMENT

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ASC UTAH, INC., a Maine corporation, dba THE CANYONS, Plaintiff, vs. WOLF MOUNTAIN RESORTS, L.C., a Utah limited liability company, Defendant.	RULING AND ORDER (ARBITRATION ISSUES) Consolidated Case No. 060500297 Judge Robert K. Hilder
WOLF MOUNTAIN RESORTS, L.C. Plaintiff, vs. ASC UTAH., etc., *et al*., Defendants.	Case No. 060500404
STEPHEN A. OSGUSTHORPE, etc., *et al*., Plaintiff, vs. WOLF MOUNTAIN RESORTS, L.C., Defendant.	Case No. 070500018 (Transferred from Salt Lake Dept., # 060913348)

ENOCH RICHARD SMITH, as Personal representative of the Estate of ENOCH SMITH, JR.,

Intervenor.

STEPHEN A. OSGUTHORPE, etc., *et al.*,

Plaintiff,

vs.

ASC UTAH, INC.; AMERICAN SKIING COMPANY; and LESLIE B. OTTENS,

Defendants.

Case No. 070500520

Wolf Mountain ("Wolf") filed its third Motion to Compel Arbitration in August, 2010. The Osguthorpes, plaintiffs in Case No. 070500520, filed their first Motion to Compel Arbitration in September, 2010. Both Motions are premised on the arbitration provision contained in the 1999 SPA Agreement. The Motions have been fully briefed and ready for decision for some time, but for reasons that need not be recited, scheduled hearings were continued, and on November 3, 2010, Judge Kelly entered his recusal Order in response to Wolf's Rule 63(b), URCP, Motion to Disqualify. I assumed responsibility for the case on November 10, 2010.

On November 16, 2010 the court met with counsel to plan the future course of this case. On that day the court scheduled oral argument on both Motions to Compel Arbitration on Wednesday November 23, 2010. Since November 16; however, two things have occurred that eliminate the need for a hearing on the arbitration motions: The court has read all of the briefing related to both motions, and on November 19, 2010, the Utah Supreme Court issued its full decision affirming Judge Lubeck's (a predecessor judge on this case) decision denying Wolf's earlier motion to compel arbitration. The Supreme Court had issued a summary affirmance on July 22, 2010, but until yesterday, the bases for that affirmance had not been stated.

As the court and counsel discussed on November 16, there are many motions awaiting decision in this case, some of which have been pending for many months, and not all of those motions necessarily require argument. Certainly, Rule 7, URCP, which governs motion practice, does not require argument for these non-dispositive arbitration motions. Rule 7(e). Even in the case of dispositive motions, the court may refuse argument if it finds that "the motion or opposition to the motion is frivolous or the issue has been authoritatively decided." *Id*.

When the court scheduled argument, it had not read the filings, and of course it had not seen the Supreme Court decision. Now having had the opportunity to do both, the court finds that the arbitration issue in this case has been as authoritatively decided

as one could imagine, and both Motions must therefore be DENIED, albeit for some different reasons. Accordingly, the scheduled hearing on arbitration motions is hereby STRICKEN, but counsel are advised that the hearing on the Motion to Change Venue will proceed as scheduled. The court addresses each Motion in turn:

WOLF MOUNTAIN MOTION TO COMPEL ARBITRATION

The bases for Wolf's Motion can be summarized as follows:

1. An agreement to arbitrate is contained in the SPA Agreement.

2. Arbitration is mandatory if an enforceable agreement exists.

3. Arbitration is favored as the public policy of this state, and by compelling arbitration judicial resources will be conserved.

Addressing each in order, the court certainly agrees, as did Judge Lubeck, that the SPA Agreement contains an arbitration provision – and it has done so since 1999. That is, it is not recent news to any party to these actions, notwithstanding that Wolf has argued that it was not aware of its right to arbitrate until Judge Lubeck issued his April 29, 2009, order. The Supreme Court has now specifically considered, and rejected, that argument. *ASC Utah, Inc. V. Wolf*

Mountain resorts, L.C., 2010 UT 65, ¶¶ 26-28 (November 19, 2010).

Second, a waiver exception to the mandatory character of arbitration agreements has existed since at least *Chandler v. Blue Cross Blue Shield of Utah*, 833 P.2d 356, 360 (Utah 1992), and now in *ASC Utah* the Supreme Court has removed any doubt whether the arbitration statute prevents courts from refusing to enforce arbitration agreements: The arbitration statute that controls this case, Utah Code Ann. § 78-31a-4, is neither mandatory nor jurisdictional. 2010 UT 65 at ¶¶ 13-21.

Much is written in memoranda supporting motions to compel arbitration – not just in this case, but commonly in this court's experience – about the salutary purposes and features of arbitration (the "just, speedy and inexpensive resolution of disputes") that require enforcement of such agreements. Those benefits may indeed be present when arbitration agreements are bargained for, and the parties promptly exercise their rights to arbitrate, but the Supreme Court has now squarely faced the circumstances where arbitration clauses are used in a way that, in fact, defeats the positive features that may otherwise exist:

> The legislature enacted the Act in accordance with a public policy that favors arbitration as contractual agreements between parties not to litigate, [citation omitted] only insofar as they serve as "speedy and inexpensive methods of adjudicating disputes, [citation omitted]

> and help reduce strain on judicial resources, [citation omitted]. *There is no public policy supporting arbitration when it would undermine these goals.*

Id. at ¶ 18 (emphasis added).

This court could take time and pages explaining why this case may be a prime example of misuse of the existence of an arbitration provision, but in fact the Supreme Court engages in that exercise, specifically addressing this case, and repetition avails little.

Third, this court touches on the conservation of judicial resources issue, because Wolf has chosen to include this possibility as a basis for enforcing arbitration, albeit in a one line declaration, without explanation or factual support: "The arbitration will conserve judicial resources and be less expensive for the parties." (Wolf memorandum in support at 3).

How? As this court has recently commented to counsel, this case (or more correctly, these cases) have proven to be one of the greatest consumers of the resources of the Third District Court in many years. The litigation has consumed years of intensive court involvement, voluminous motion practice, extensive discovery, and even substantial physical resources as basic as paper, copy toner, and storage space. This consolidated case comprises more file volumes than any presently pending case in this District that serves more than one million citizens of this state. It is also now on its third judge and fourth or fifth law clerk. It is maybe five or six weeks from a five week

trial – it is certainly very close to a long trial, whenever it may actually commence – but the point is that court resources have already been consumed almost to exhaustion. This court cannot see how the jettisoning of much or all of that work and expense (Wolf says that: "The arbitration herein will likely resolve all of the disputes presently found in this case") will somehow conserve resources. What such a course will do, at best, is waste resources, burden parties with further enormous costs, and delay resolution – all counter to the policies underlying the arbitration model.

The conclusive point is that the Supreme Court has found (1) arbitration is not mandatory, and (2) this case presents a clear case of waiver on the part of Wolf. That is now the law of this case, and the mandate from the appellate court. This court could not decide otherwise if it wished, but certainly no reason has been advanced why there should be any other outcome.

Again, this court cannot state the bases for finding waiver by Wolf, and prejudice to ASCU, better than the Supreme Court has already done. See, 2010 UT 65 at ¶¶ 29-36.

Wolf may argue that the court has not considered its position that it now seeks arbitration of new claims, as asserted by ASCU by leave of court, pursuant to Rule 15(d), URCP. The court, however, agrees with ASCU that the claims not new, but supplements, addressing new alleged actions since the original

pleadings were closed. Even if that is not so, the door to arbitration in this case has been slammed shut because of the conduct of the parties, through their intensive engagement in the litigation process, and the resulting irreparable harm to any objective at this date, sincere or not, to engage in arbitration to reap the benefits that may have been available through that process years ago when all started down this litigation path.

This court sums up with words from Chief Justice Durham's conclusion:

> Utah public policy favors arbitration agreements only insofar as they provide a speedy and inexpensive means of adjudicating disputes, and reduce strain on judicial resources. In this case, enforcing the arbitration agreement would undercut both policy rationales: arbitration at this point would be neither a speedy and inexpensive way to adjudicate this dispute, nor a means of reducing strain on judicial resources.

2010 UT 65 at ¶ 40.

For all of the reasons stated herein, and even more to the point, stated in the Utah Supreme Court's decision issued yesterday, Wolf Mountain's third Motion to Compel Arbitration is hereby DENIED.

OSGUTHORPES' MOTION TO COMPEL ARBITRATION

The Osguthorpe plaintiff are situated differently from Wolf for several reasons, but not so differently that they can compel arbitration of any claims or defenses *in this consolidated action*. Even if Osguthorpes have newly asserted claims or defenses for which they may not be fairly said to have waived any right to arbitrate, a point this court does not decide in the context of the present motion, the policies underlying arbitration have been so violated in this case that arbitration is not an option open to any party. The Supreme Court has so decided, and even if this court did not agree (which, of course, it adamantly does), the mandate rule leaves no room for a different result. *IHC Health Services, Inc. v. D & K Management, Inc*., 196 P.3d 588(Utah 2008).

Osguthorpes' essential argument is that "this Court has no discretion and must compel arbitration of all claims and issues relating to the SPA." (Memorandum in support at 6). The argument is supported by case law, and had some force, until yesterday. The discussion above shows how the landscape has changed. This court must DENY Osguthorpes' Motion to Compel Arbitration, but it does so fully recognizing that Osguthorpes have an option not available to Wolf Mountain.

That is, Osguthorpes' Motion was prompted by the court's ruling re-opening the pleadings pursuant to Rule 15(d), URCP. Osguthorpes' felt compelled to

assert claims at that time, whether they wanted to or not, at the peril of losing any right to assert such claims in the future. During his last hearing in this case, on October 27, 2010, Judge Kelly apparently recognized that Osguthorpes' supplemental pleadings had created some unforeseen consequences, and on his own motion, he first bifurcated, then dismissed those pleadings, without prejudice to re-filing. No order to that effect has been entered, and Judge Kelly left the door open for objections to his oral order,

This court now vacates Judge Kelly's oral ruling regarding Osguthorpes' supplemental claims, and grants the Osguthorpe plaintiff leave, at their option, to continue with the claims in this case, or dismiss the claims (or any of them) without prejudice to re-filing within a reasonable time after this case is adjudicated through a final and appealable judgment, within any applicable statute of limitations, or no later than six months after final judgment, whichever occurs last. This ruling does not preclude any statute of limitations defense available to any party if the statute has run before the claims were filed in this case. Osguthorpes are granted twenty days from today to make their election as provided herein.

The foregoing ruling does not include a determination that Osguthorpes' will have an arbitration option in any future filing.[1] That issue is reserved for

[1] This court does reject Osguthorpes' insistence that their right to arbitrate any SPA Agreement claims was determined by

(Continued on following page)

future determination by the assigned court. What this court states without question is that any claims the Osguthorpes maintain in these consolidated cases will be litigated, not arbitrated, for all of the reasons set forth herein and in the Utah Supreme Court decision at 2010 UT 65.

As to the matters decided herein, this Ruling is the Order of the court and no further Order is required.

DATED this 20th day of November, 2010.

By the Court:

/s/
Robert K. Hilder
District Court Judge

Judge Lubeck and presumably affirmed by the Supreme Court. First, all Judge Lubeck's language did was agree that the SPA Agreement includes an arbitration provision, which it does. He then went on to find that provision was waived byWolf Mountain, which ruling has been affirmed by the court of last resort. Second, in a later order, Judge Lubeck stated that: "This court did not rule . . . that Wolf [Mountain] MUST or COULD or SHOULD arbitrate. . . ." This language is taken as quoted in the Supreme Court decision at ¶ 9. Accordingly, the mandate rule has no application on this point.

IN THE SUPREME COURT
OF THE STATE OF UTAH

Stephen A. Osguthorpe, et al.,,

Appellants,

v. Case No. 20100928-SC

ASC Utah, Inc., American Skiing Company, Leslie B. Otten, and Wolf Mountain Resorts, LC,

Appellees.

ORDER

This matter is before the Court on Appellants' "combined petition for emergency relief and motion for stay" of trial court proceedings. The petition and motion are denied.

FOR THE COURT:

[January 20, 2011] /s/ Jill N. Parrish
Date Jill N. Parrish
Justice

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

STEPHEN A. OSGUTHORPE, individually and in his capacity as Interim Personal Representative of the Estate of D.A. Osguthorpe, D.V.S. and also in his capacity as Successor Trustee of The Dr. D.A. Osguthorpe Trust; and **D. A. OSGUTHORPE FAMILY PARTNERSHIP**, Plaintiffs, -vs- **ASC UTAH, INC.; AMERICAN SKIING COMPANY; LESLIE B. OTTEN; WOLF MOUNTAIN RESORTS, L.C.; AND JOHN DOES I THROUGH XX**, Defendants.	**ORDER DENYING PLAINTIFF'S MOTION PURSUANT TO THE FEDERAL ARBITRATION ACT FOR ORDER COMPELLING ARBITRATION AND FOR IMMEDIATE STAY AND DISMISSING CLAIMED ARBITRABLE ISSUES WITHOUT PREJUDICE** (Filed Apr. 12, 2011) Consolidated Case No. 060500297 (Original Case No. 070500520 CN) Honorable Robert K. Hilder

The Court, having fully considered Plaintiff D. A. Osguthorpe Family Partnership's Motion Pursuant to the Federal Arbitration Act for Order Compelling Arbitration and for Immediate Stay, being now fully advised in the premises, and good cause appearing for all the reasons stated on the record during the

hearing on Monday, March 6, 2011, by and through its undersigned counsel,

IT IS ORDERED, that Plaintiff D.A. Osguthorpe Family Partnership's Motion Pursuant to the Federal Arbitration Act for Order Compelling Arbitration and for Immediate Stay be, and the same hereby is, **DENIED**. Furthermore, for the reasons stated on the record during the hearing, any claim of the Osguthorpes that in any way relates to an alleged breach of the SPA Agreement is hereby **DISMISSED WITHOUT PREJUDICE**.

DATED this 12th day of April, 2011.

BY THE COURT:

/s/ Robert K. Hilder [SEAL]
Honorable Robert K. Hilder
Third District Court Judge

AMENDED AND RESTATED DEVELOPMENT AGREEMENT FOR THE CANYONS SPECIALLY PLANNED AREA

SNYDERVILLE BASIN, SUMMIT COUNTY, UTAH

. . .

ARTICLE 5
GENERAL PROVISIONS

Section 5.1 *Default.*

5.1.1 *Occurrence of Default.* Default under this Amended Agreement occurs upon the happening of one or more of the following events or conditions:

(a) A warranty or representation made or furnished to the County by a Developer, the RVMA, or The Colony Master Association in this Amended Agreement, including any attachments hereto, which is materially false or proves to have been false in any material respect when it was made.

(b) A finding and determination made by the County following a Benchmark or Annual Review that upon the basis of substantial evidence, the Master Developer, Developers. The Colony Master Association, or RVMA have not complied in good faith with one or more of the material terms or conditions of this Amended Agreement, including a failure to satisfy Benchmarks under Section 3.3.

(c) Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement.

5.1.2 *Procedure Upon Default.* Within ten (10) days after the occurrence of a default hereunder, the County shall give the Defaulting Party (where "Defaulting Party" means the party or parties alleged by the County under Section 5.1.1 as being in default) and the Canyons Resort Village Management Association and/or The Colony Master Association written notice specifying the nature of the alleged default and, when appropriate, the manner in which the default must be satisfactorily cured. The Defaulting Party shall have sixty (60) days after receipt of written notice to cure the default. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default. Notwithstanding the sixty-day cure period provided above, in the event more than sixty days is reasonably required to cure a default and the Defaulting Party or some other party, within the sixty day cure period, commence actions reasonably designed to cure the default, then the cure period shall be extended for such additional period during which the Defaulting Party or such other party is prosecuting those actions diligently to completion.

5.1.3 *Remedies Upon Default.*

(a) Equitable Remedies: In the event a default remains uncured after proper notice and the expiration of the applicable cure

period without cure, the County shall have the option of suing the Defaulting Party for specific performance or pursuing such other remedies against the Defaulting Parties as are available in equity. It is stipulated between the parties for purposes of any judicial proceeding that the County need only establish the occurrence of default under Section 5.1.1 of this Amended Agreement to obtain equitable relief.

(b) Major Default: A "major default" means a default which, taking this Amended Agreement as a whole, has the effect of denying the County the essential benefits of this Amended Agreement or placing upon the County significant negative fiscal impacts not contemplated by this Amended Agreement. In the event of a major default, the County shall have the option of terminating this Amended Agreement in its entirety after proper notice and expiration of the applicable cure periods without cure, and after exhaustion of all equitable remedies, if applicable.

Section 5.2 *Enforcement.* The parties to this Amended Agreement recognize that the County has the right to enforce its rules, policies, regulations, and ordinances, subject to the terms of this Amended Agreement, and may, at its option, seek an injunction to compel such compliance. In the event that Developers or any user of the subject property violate the rules, policies, regulations or ordinances of the County or violate the terms of this Amended Agreement, the County may, without electing to seek an injunction

and after sixty (60) days written notice to correct the violation (or such longer period as may be established in the discretion of the Board of County Commissioners or a court of competent jurisdiction if Developers have used their reasonable best efforts to cure such violation within such sixty (60) days and are continuing to use their reasonable best efforts to cure such violation), take such actions as shall be deemed appropriate under law until such conditions have been honored by the Developers. The County shall be free from any liability arising out of the exercise of its rights under this Section; provided, however, that any party may be liable to the other for the exercise of any rights in violation of Rule 11 of the Utah Rules of Civil Procedure, Rule 11 of the Federal Rules of Civil Procedure and/or Utah Code Annotated Section 78-27-56, as each may be amended.

Section 5.3 *Reserved Legislative Powers, Future Changes of Laws and Plans, Compelling Countervailing Public Interest.* Nothing in this Amended Agreement shall limit the future exercise of the police power of the County in enacting zoning, subdivision, development, growth management, platting, environmental, open space, transportation and other land use plans, policies, ordinances and regulations after the date of this Amended Agreement. Notwithstanding the retained power of the County to enact such legislation under the police power, such legislation shall only be applied to modify the vested rights described in this Amended Agreement based upon policies, facts and circumstances meeting the

compelling, countervailing public interest exception to the vested rights doctrine in the State of Utah. (*Western Land Equities, Inc. v. City of Logan,* 617 P.2d 388 (Utah 1980) or successor case and statutory law). Any such proposed change affecting the vested rights of the Developers and other rights under this Amended Agreement shall be of general application to all development activity in the Snyderville Basin; and unless the County declares an emergency, the Developers shall be entitled to prior written notice and an opportunity to be heard with respect to the proposed change and its applicability to The Canyons SPA Plan under the compelling, countervailing public policy exception to the vested rights doctrine. In the event that the County does not give prior written notice, Developers shall retain the right to be heard before an open meeting of the Board of County Commissioners in the event Developers allege that their rights under this Amended Agreement have been adversely affected.

Section 5.4 *Reversion to Regulations.* Should the County terminate this Amended Agreement under the provisions hereof, Developers' Property will thereafter comply with and be governed by the applicable County Development Code and General Plan then in existence, as well as with all other provisions of Utah State Law.

Section 5.5 *Force Majeure*.

5.5.1 Any default or inability to cure a default caused by strikes, lockouts, labor disputes, acts of

God, inability to obtain labor or materials or reasonable substitutes therefor, enemy or hostile governmental action, civil commotion, fire or other casualty, and other similar causes beyond the reasonable control of the party obligated to perform, shall excuse the performance by such party for a period equal to the period during which any such event prevented, delayed or stopped any required performance or effort to cure a default.

5.5.2 In the event the real estate sales figures published by the Park City Board of Realtors show a 20% or greater decline for real estate sales in the Park City area for the comparable six-month period in the preceding year or if the number of beds rented published by the Park City Chamber of Commerce/Convention and Visitors Bureau for the Park City area shows a 10% or greater decline in the number of beds rented for the comparable six-month period of the preceding year, then the RVMA and/or The Colony Master Association may notify the Community Development Director of such downturn in the economy and request a six-month extension of all the time limits set forth herein. Upon the verification of such published figures, but in no event later than twenty (20) days after such request, the Director shall grant a six-month extension on all relevant dates of performance as set forth herein. The Director shall thereafter immediately provide notice of such extension to the Planning Commission and BCC. In the event such downturn continues, the Director may grant additional six month extensions for the duration of the downturn. The RVMA may request and receive up to a maximum of twenty-four (24) months of

such extensions during the first fifteen (15) years of the term of this Amended Agreement.

Section 5.6 *Continuing Obligations.* Adoption of law or other governmental activity making performance by the Developers unprofitable, more difficult, or more expensive does not excuse the performance of the obligations by the Developers.

Section 5.7 *Other Remedies.* All other remedies at law or in equity, which are consistent with the provisions of this Amended Agreement, are available to the parties to pursue in the event there is a breach.

Section 5.8 *Dispute Resolution.*

5.8.1 *Binding Arbitration.* In the event that the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement, then every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator agreed upon by the parties, or if no single arbitrator can be agreed upon, an arbitrator or arbitrators shall be selected in accordance with the rules of the American Arbitration Association and such dispute, difference, or disagreement shall be resolved by the binding decision of the arbitrator, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. However, in no instance shall this arbitration provision prohibit the County from exercising enforcement of its police powers where Developers are in direct violation of the Code.

5.8.2 *Institution of Legal Action.* Enforcement of any such arbitration decision shall be instituted in the Third Judicial District Court of the County of Summit, State of Utah, or in the United States District Court for Utah.

5.8.3 *Rights of Third Parties.* This Amended Agreement is not intended to affect or create any additional rights or obligations on the part of third parties.

5.8.4 *Third Party Legal Challenges.* In those, instances where, in this Amended Agreement, Developers have agreed to waive a position with respect to the applicability of current County policies and requirements, or where Developers have agreed to comply with current County policies and requirements. Developers further agree not to participate either directly or indirectly in any legal challenges to such County policies and requirements by third parties, including but not limited to appearing as a witness, amicus, making a financial contribution thereto, or otherwise assisting in the prosecution of the action.

5.8.5 *Enforced Delay, Extension of Times of Performance.* In addition to specific provisions of this Amended Agreement, performance by the County, the Master Developer, or a Participating Landowner hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, or acts of God. An extension of time for such cause shall be granted in writing by County for the period of the

enforced delay or longer, as may be mutually agreed upon.

5.8.6 *Attorney's Fees*. Should any party hereto employ an attorney for the purpose of enforcing this Amended Agreement, or any judgment based on this Amended Agreement, or for any reasons or in any legal proceeding whatsoever, including insolvency, bankruptcy, arbitration, declaratory relief or other litigation, including appeals or rehearings, and whether or not an action has actually commenced, the prevailing party shall be entitled to receive from the other party thereto reimbursement for all attorney's fees and all costs and expenses. Should any judgment or final order be issued in that proceeding, said reimbursement shall be specified therein.

5.8.7 *Venue*. Venue for all legal proceedings related to this Amended Agreement shall be in the District Court for the County of Summit, in Coalville, Utah.

5.8.8 *Damages upon Termination*. Except with respect to just compensation and attorneys' fees under this Amended Agreement, Developers shall not be entitled to any damages against the County upon the unlawful termination of this Amended Agreement.

DAVID W. SCOFIELD – 4140
CRAIG D. FLINDERS – 12510
PETERS | SCOFIELD
A Professional Corporation
Suite 115 Parleys Corporate Center
2455 East Parleys Way
Salt Lake City, Utah 84109
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

Attorneys for Plaintiffs

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

STEPHEN A. OSGUTHORPE, individually and in his capacity as Interim Personal Representative of the Estate of D.A. Osguthorpe, D.V.S. and also in his capacity as Successor Trustee of The Dr. D.A. Osguthorpe Trust; and **D. A. OSGUTHORPE FAMILY PARTNERSHIP**, Plaintiffs, -vs- **ASC UTAH, INC.; AMERICAN SKIING COMPANY; LESLIE B. OTTEN; WOLF MOUNTAIN RESORTS, L.C.; AND JOHN DOES I THROUGH XX**, Defendants.	**THE OSGUTHORPE PLAINTIFFS' OMNIBUS (1) MEMORANDUM IN OPPOSITION TO THE ASC PARTIES' MOTION TO DISMISS, STRIKE OR BIFURCATE -AND- (2) REPLY MEMORANDUM IN FURTHER SUPPORT OF OSGUTHORPE PLAINTIFFS' MOTION TO COMPEL ARBITRATION AND TO STAY ALL CLAIMS IN THIS ACTION BEARING ON OR RELATING IN ANY WAY TO ANY**

-and- ENOCH RICHARD SMITH, as Personal Representative of the Estate of Enoch Smith, Jr., Intervenor.	**ALLEGED DEFAULT UNDER THE SPA AGREEMENT** Consolidated Case No. 060500297 (Original Case No. 070500520 CN) Honorable Keith A. Kelly

. . .

But now it is the D.A. Osguthorpe Family Partnership (the "Partnership") which has invoked its never-waived contractual right to force the ASC Parties to arbitration. The Partnership is supported in its demand by both the Federal Arbitration Act, 9 U.S.C. §§ 1-16 [hereinafter "FAA"] and the Utah Uniform Arbitration Act, UTAH CODE ANN. §§ 78B-11-101 to -131 [hereinafter "UUAA"].

. . .

ARGUMENT

I. DISMISSAL, STRIKING PLEADINGS AND BIFURCATION ARE ALL STRAWMAN ISSUES; CONGRESS AND THE UTAH LEGISLATURE REQUIRE THIS COURT TO COMPEL ARBITRATION AND STAY ITS PROCEEDINGS BY STATUTE SIMPLY BECAUSE AN ARBITRABLE DISPUTE EXISTS.

Congress[2] and the Utah Legislature have afforded the Partnership the absolute right to ***compel arbitration*** of and to stay all claims in ***this*** action bearing on or relating in any way to any alleged default under the SPA Agreement ***regardless of whether the Partnership is even a party to this***

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[2] The FAA is applicable to every arbitration clause in every "contract evidencing a transaction involving commerce. . . ." 9 U.S.C. § 2; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983). Indeed, "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Id.* The Utah Supreme Court has recognized that state law governing arbitration is pre-empted "to the extent it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Buzas Baseball v. Salt Lake Trappers,* 925 P.2d 941, 952 (Utah 1996) (quoting *Volt Information Sciences v. Stanford University,* 489 U.S. 468, 477, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). Contracts relating to the operation of a ski resort unquestionably involve commerce, *Heath v. Aspen Skiing Corp.,* 325 F. Supp. 223, 231 (D. Colo. 1971), and so the FAA plainly applies to the SPA Agreement's arbitration clause.

action. FAA § 4 (non-party may petition "***any*** United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action . . . [Emphasis added.]"); UUAA § 78B-11-106 ("(1) Except as otherwise provided in Section 78B-11-129 [inapplicable here], ***an application for judicial relief under this chapter shall be made by motion to the court*** and heard in the manner provided by law or rule of court for making and hearing motions. (2) [If no action is pending then] notice of an initial ***motion to the court*** under this chapter shall be served in the manner provided by law for the service of a summons in a civil action. ***Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving motions in pending cases.*** [Emphasis added.]

So whether the Court dismisses any claims, whether it strikes any pleadings and whether it bifurcates any portion of this consolidated proceeding is utterly immaterial. Neither the ASC Parties nor the Court may avoid the statutory requirement that the right of the Partnership to move to compel arbitration and to stay all litigation of all SPA-related issues ***in this action***, may be exercised in this action at the discretion of the Partnership. All matters in this action, no matter how tangentially related to the SPA Agreement, so long as they relate in any way to the SPA Agreement, must be decided in arbitration and this Court has the statutory and mandatory duty to order that relief, regardless of any dismissal, striking or bifurcation.

Such arguments are so rare that the Partnership has located only a single case where a party attempted to avoid the effect of an arbitration agreement by moving to dismiss arbitrable claims. In *Stroklund v. Nabors Drilling USA, LP,* Case No. 4-10-cv-005, 2010 U.S. Dist. LEXIS 101048 (D.N.D. September 10, 2010) (unpublished decision), copy attached as Exhibit A hereto, the plaintiff moved to dismiss without prejudice following entry of the Court's order compelling arbitration and staying the action. *Id.* at *1. The Court denied the motion, stating: "Allowing Stroklund to voluntarily dismiss without prejudice would prejudice Nabors Drilling and may result in a waste of judicial time and effort if Stroklund files another action without first arbitrating." *Id.* at *3-4. That is all that the ASC Parties' motion to dismiss, strike and bifurcate represents here – an effort to avoid the contractual right of the Partnership to demand arbitration. Granting such motions would be prejudicial and a waste of time, because this Court is duty-bound to the mandates of Congress and the Utah Legislature to send all SPA Agreement issues, whether they affect the Ground Lease or not, to arbitration.

Parties have tried other procedural stunts, however, to bootstarp around their contractual duty to arbitrate. In *Global Client Solutions, LLC v. Fluid Trade, Inc.,* No. 10-CV-0123-CVE-TLW, 2010 U.S. Dist. LEXIS 65839 (N.D. Okla. July 1, 2010) (unpublished decision), copy attached as Exhibit B hereto, the defendant moved to "dismiss" plaintiff's

petition to compel arbitration or, in the alternative, to implement the procedural device of *Colorado River* abstention to stay the federal action pending the outcome of a parallel case filed in Massachusetts state court. *Id.* at *1. The Court recognized that "[o]rdinarily, a federal court is not required to abstain under *Colorado River* when a party files a petition to compel arbitration of claims asserted in a prior state court case [and that t]he FAA expressly authorizes federal courts to hear a petition to compel arbitration of claims pending before another court, and the general need to avoid piecemeal litigation does not override the overarching federal policy in favor of enforcing arbitration agreements." *Id.* at *18. The Court therefore denied *Colorado River* abstention. *Id.*

Addressing the request to dismiss the petition to compel arbitration as requesting that issues beyond the scope of the agreement were sought to be compelled to arbitration, the Court denied the motion and compelled even a variety of tort claims not directly arising out of the contract to arbitration. *Id.* at *27-34. As justification for those rulings compelling arbitration, the Court stated that "[t]he parties executed a broad arbitration provision requiring them to litigate [sic] any disputes arising under or relating to the Agreement or conduct pursuant to the Agreement, and this may include collateral matters implicating the parties' rights and obligations under the Agreement."

The ASC Parties' arguments that dismissal, striking or bifurcation should "moot" the Partnership's

motion to compel arbitration is equally unavailing here in light of the express right of the Partnership to file the motion in this proceeding under FAA § 2, UUAA § 78B-11-106 and the overriding public policy of recognized in Cogress' adoption of the FAA and the Utah Legislature's adoption of the UUAA.

. . .

III. ALL SPA AGREEMENT-RELATED ISSUES ARE SUBJECT TO AN ARBITRATION AGREEMENT.

FAA § 3 requires that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" the Court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." *Id.* It is clear that if ***any*** issue is referable to arbitration then a stay must be entered as to ***every*** issue related in any way to the arbitration. *AXA Equitable Life Insurance Co. v. Infinity Financial Group, LLC,* 608 F. Supp. 2d 1330, 1332 (S.D. Fla. 1999) ("For arbitrable issues, the language of [9 U.S.C. § 3] indicates that the stay is mandatory.") (quoting *Klay v. All Defendants,* 389 F.3d 1191, 1203-04 (11th Cir. 2004)).

The ASC Parties argue that certain conditions precedent to the right to initiate arbitration have not yet occurred and so the motion to compel arbitration must be denied. They are flatly wrong. Whether conditions precedent have been met do not go to the sole questions before the Court of whether an

agreement to arbitrate exists and whether the issues are within the scope of that agreement. Once those issues are answered affirmatively, this Court must send the dispute to arbitration, where it is for the arbitrators to determine questions about issues of procedural, as opposed to substantive, arbitrability, such as conditions precedent. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (holding that "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide" (quoting the Revised Uniform Arbitration Act of 2000 (RUAA) § 6(c) cmt. 2) (emphasis added & in original)).

. . .

RESPECTFULLY SUBMITTED this 23rd day of October, 2010.

PETERS | SCOFIELD
A Professional Corporation

/s/ David W. Scofield
DAVID W. SCOFIELD
Attorneys for Plaintiffs

THIRD JUDICIAL DISTRICT COURT,
SILVER SUMMIT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

ASC UTAH, INC., et al., Plaintiff, v WOLF MOUNTAIN RESORTS, LC., Defendants.	:	Case No. 060500297 With Keyword Index

SCHEDULING CONFERENCE AND
MOTION HEARING DECEMBER 9, 2010

BEFORE

JUDGE ROBERT K. HILDER

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

. . .

[3] THE COURT: I understand your position.

And Mr. Wahlquist, Mr. Andreason, I don't think that I should spend much time on the issue of the federal because that's going to be decided in the federal court.

There was an interesting article, Forum Shopping for Arbitration Decisions; Federal Courts Use of Anti-Trust Injunctions against State Courts. It is from University of Pennsylvania Law Review, 147 UPA Law Review 91 from 1998. It gets into a lot of the issues of what a court should, federal [4] court should consider the order in which the actions were filed, how long it's been going on, whole bunch of federal doctrines that should be considered that this author is concerned that sometimes are not considered. Brooker Feldman which hasn't been addressed that clearly but anyway, I think that's going to be decided in the federal court issue (inaudible) that area and that's up to you.

I don't think there's anything I should do automatically or upon my own volition to stay the action pending the federal action and I think even if the federal court were to act, it would have to do more than stay, it would have to enjoin me which it could do perhaps but that's an argument for a (inaudible) I think.

. . .

[5] . . . but what I believe the Supreme Court did in ASCU vs. Wolf Mountain was indeed make some new law which says at some point the policies are so violated, the epicatious objectives of arbitration are so unavailable that the Court's discretion is very broad to say no, we're not going to arbitrate. I don't think anything has changed here. I don't think the Court will change that view. I don't think they'll change it in

this case particularly but, of course, I could be wrong. I recognize that. I have never felt – it's not just this case – I've never felt I had an obligation to stay that is automatic. I certainly don't feel I'm divested of jurisdiction until the final judgment in the case.

I have previously denied the stay and all I can tell you is the worst thing they did to me was (inaudible) Central Florida vs. Park West. I denied the stay and about a month or two later they came back and said it's stayed. But they didn't say you have no right to deny the stay. So I think it really is important for you to move on to see what they say. Do you have any objection to – my position is to [6] deny the stay.

I do understand that you wanted to try to find a way to segregate it out. I don't think anything has changed. I think that would be a very unmanageable case but I also don't think in this case, the court is going to overrule my decision. So that's where I am.

. . .

[8] MR. SCOFIELD: Your Honor, in light of Your Honor's ruling –

THE COURT: You haven't filed a stay yet but are you going to?

MR. SCOFIELD: I haven't, Your Honor. My position has been Your Honor is divested of jurisdiction and that both of the statutes require the stay to be in place and remain in place until the final decision which my view is until the Appellate Court rules it's not. However, in light of Your Honor's ruling, I

may as well make a motion for a stay with respect to my client's motion to compel arbitration, to stay all the issues governed with my client's motion acknowledging that I'm going to receive a verbal objection and a ruling.

THE COURT: I agree with that. I think it's good to get it on the record. So again, Mr. des Rosiers, you do in fact oppose the verbal motion?

[9] MR. DES ROSIERS: We would object to the Osguthorpe motion as well for the same reason.

THE COURT: And for the same reasons, I deny it but to add I didn't treat it quite the same although maybe in a sense it is, in the sense of a supplemental claim issue you raised, Mr. Wahlquist, but I think just because of the procedural issue of the last few weeks, Mr. Scofield, I still feel that you have the option which you can elect not to take, to carve these out (inaudible) as I stated I think fairly clearly giving you the chance to come back later and maybe even arbitrate. I think you're differently situated. This was your first motion. That's an election I think you could still make. The time has probably about run. Do you want me to allow you another 10 days or so or do you just want to go ahead with me denying the stay?

MR. SCOFIELD: Yeah, my position on that, Your Honor, is I'm not going to make any election to proceed in litigation. My client's election is to proceed in arbitration.

DAVID W. SCOFIELD – 4140
PETERS | SCOFIELD
A Professional Corporation
Suite 115 Parleys Corporate Center
2455 East Parleys Way
Salt Lake City, Utah 84109
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

Attorneys for Plaintiffs/Appellants

IN THE SUPREME COURT OF UTAH

STEPHEN A. OSGUTHORPE, individually and in his capacity as Interim Personal Representative of the **ESTATE OF D.A. OSGUTHORPE, D.V.S.** and also in his capacity as Successor Trustee of **THE DR. D.A. OSGUTHORPE TRUST**; and **D. A. OSGUTHORPE FAMILY PARTNERSHIP,** Plaintiffs/Appellants, -vs-	**COMBINED PETITION FOR EMERGENCY RELIEF, AND MOTION FOR STAY** Subject to Assignment to the Court of Appeals Case No. 20100928-SC (On Appeal from Consolidated Case No. 060500297) (Original Case No. 070500520 CN Third District Court, Summit County) Honorable Robert K. Hilder

ASC UTAH, INC.; AMERICAN SKIING COMPANY; LESLIE B. OTTEN and WOLF MOUNTAIN RESORTS, LC., Defendants/Appellees, -and- **ENOCH RICHARD SMITH,** Intervenor.	

. . .

Pursuant to Utah Rules of Appellate Procedure 8 and 8A, the Osguthorpe Plaintiffs/Appellants respectfully Petition the Utah Supreme Court for Emergency Relief and Move this Court for a Stay[1] of the Ruling and Order of the Third District Court, Summit County, State of Utah, executed by the Honorable Robert K. Hilder on November 20, 2010, and entered on November 22, 2010 [hereinafter the "Arbitration Order]," copy attached as Exhibit A, and entry of an emergency stay of all of the proceedings in this action which relate in any way to "every such continuing dispute, difference, and disagreement" under that certain Amended and Restated Development Agreement for the Canyons Specially Planned Area, dated

[1] "[A] rule 8A petition may be combined with a motion for a stay under rule 8 of the Rules of Appellate Procedure, provided the requirements of both provisions are met by the same pleading." *Snow, Christensen & Martineau v. Lindberg,* 2009 UT 72, ¶ 7 n.4, 222 P.3d 1141.

November 15, 1999 ("SPA Agreement"), all of which are subject to Osguthorpe Plaintiff/Appellant D.A. Osguthorpe Family Partnership's (the "Partnership") contractual right to mandatory and binding arbitration.

After the trial court ruled that it was not divested of jurisdiction by the Osguthorpe Plaintiffs' appeal, the Osguthorpe Plaintiffs made an oral motion for stay of the proceeding which was denied (the Osguthorpe Plaintiffs had requested a stay of proceedings as part of their initial motion to compel arbitration, which stay was implicitly denied by the Arbitration Order), *see* portion of XChange Docket, 12/9/2010 Minute Entry of Hearing ("Mr. Schofield makes a motion to stay. ASC Utah objects to both motions to stay. Court denies Mr. Schofield's motion to stay."), attached hereto as Exhibit B.

PRELIMINARY STATEMENT

The SPA Agreement contains and arbitration clause which provides in pertinent part:

> 5,8.1 Binding Arbitration. In the event that the default mechanism contained herein shall not sufficiently resolve a dispute under this Amended Agreement, then ***every such continuing dispute, difference, and disagreement shall be referred to a single arbitrator*** agreed upon by the parties, or if no single arbitrator can be agreed upon, an arbitrator or arbitrators shall be selected in accordance with the rules of the American

> Arbitration Association and such dispute, difference, or disagreement shall be resolved by the binding decision of the arbitrator, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. However, in no instance shall this arbitration provision prohibit the County from exercising enforcement of its police powers where Developers are in direct violation of the Code.

SPA Agreement, ¶ 5.8.1 [hereinafter the "Arbitration Agreement"], genuine copy attached hereto as Exhibit C (emphasis added).

On or about July 30, 2009, Summit County issued Findings of Fact and Conclusions of Law Regarding the Enforcement and Status of the Amended and Restated Development Agreement for The Canyons Specifically Planned Area, Snyderville Basin, Summit County, Utah cited provisions of which are attached hereto as Exhibit D [hereinafter "Default Notice"].[2] The 2009 Default Notice was and remains entirely derivative of and dependent upon the status of the declared defaults of ASC Utah and Wolf Mountain which includes the breaches alleged by ASC Utah and Wolf Mountain in their action which was consolidated with the Partnership's case

[2] Although denominated by Summit County as Findings and Conclusion, the Osguthorpe Plaintiffs dispute both the accuracy and legal effect of the Default Notice although it does give rise to the Partnership's arbitrable claims.

against ASC Utah and Wolf Mountain under Rule 42 of the Utah Rules of Civil Procedure.

When the Osguthorpe Plaintiffs exercised their contractual right and moved to compel arbitration of all arbitrable issues, the trial court denied the Osguthorpe Plaintiffs' motion. *See* Arbitration Order.[3] The Arbitration Order did not find that there was no arbitration agreement. The Arbitration did not find that the issues which the Osguthorpe Plaintiffs sought to compel to arbitration were not arbitrable under the Arbitration Agreement. The Arbitration Order did not find any waiver of the Partnership's right to insist on arbitration. Instead, the Arbitration Order held that because another party to the arbitration agreement had waived its right to arbitration, namely, Wolf Mountain, that the Osguthorpes were likewise prohibited, on public policy grounds, from enforcing the Partnership's own, separate right of arbitration, by virtue of this Court's decision against *Wolf Mountain in ASC Utah, Inc. v. Wolf Mountain Resorts,* L.C., 2010 UT 65.

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[3] A denial of the Osguthorpe Plaintiffs' motion to recuse Judge Hilder for a conflict of interest in this case is pending before this Court on Petition for Extraordinary Relief, Case No. 20100986-SC. Judge Hilder was notified that the Osguthorpe Plaintiffs expected to receive information that would assist them in determining whether a motion to recuse was called for (which was the expert opinion they received) on the Friday before Judge Hilder made his Saturday ruling on the motion to compel arbitration and struck the hearing on the same that he had previously scheduled to occur on the following Wednesday.

The Arbitration Order is not only contrary to this Court's precedent on the enforcement of arbitration agreements, including the ASC Utah, Inc. case, it is contrary to controlling federal law under the Federal Arbitration Act which mandates a stay and that the arbitrable issues be sent to arbitration. The Federal Arbitration Act pre-empts any Utah law to the contrary. *See Buzas Baseball v. Salt Lake Trappers,* 925 P.2d 941, 952 (Utah 1996). Therefore, regardless of ASSC Utah's interpretation of the *ASC Utah, Inc.,* decision, federal law command this Court to enter a stay to prevent action from proceeding on any and all arbitrable issues.

Now the Osguthorpe Plaintiffs are confronted with an impending trial date of January 18, 2011 (with jury selection to begin on January 11, 2010. An emergency stay is required to prevent the commencement of the trial of any and all arbitrable issues, consistent with the Partnership's right to compel both Wolf Mountain And ASC Utah to arbitrate all such issues. The failure to grant such a stay would cause irreparable harm to the Partnership in undermining its right to a stay under the Utah Arbitration Act and the Federal Arbitration Act, and may result in actions taken by the trial court that would impair the arbitrator's ability to do his or her job effectively and in accordance with those Acts.

FACTS

1. On July 30, 2009, the Default Notice was issued by Summit County, alleging defaults against Wolf Mountain identical to those asserted by ASC Utah, as follows:

   a. Wolf is in violation of §§ 3.2.6, 3.5.1.5, 5.1.1 and 5.12.1 of the DA (the Amended and Restated **D**evelopment **A**greement for the Canyons Specially Planned Area, Snyderville Basin, Summit County, Utah, dated November 15, 1999). The County hereby declares Wolf to be in default of the DA."

   b. The specific grounds for Wolf's default are as follows:

      i. The Lis Pendens, which Wolf placed on all golf lands within the Canyons SPA, has directly interfered with the intent and objective of the DA by preventing golf financing. Hence, Wolf is directly responsible for any delay in Golf Course construction since the date of the Lis Pendens. This directly violates § 3.2.6 ("The Developers shall permit the Golf Course developer to construct the amenity without obstruction or interference") and 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement.").

      ii. The failure of Wolf to sign the 2006 Lower Village Subdivision Plat, the 2006 West Willow Draw Subdivision Plat, and

place deeds for golf lands into the 2006 Escrow directly contributed to the delay in Golf Course construction. This directly violates § 3.2.6 ("The parties to this Amended Agreement whose property includes land for the proposed Golf Course acknowledge and agree that completion of the course is one for the highest priority public amenities in the SPA. To this end, all affected property owners hereby agree to establish an agreement within 90 days of the Effective Date of this Amended Agreement for the purpose of setting such lands aside at no cost to the County, RVMA, or other entity for the construction of the Golf Course. The Developers shall permit the Golf Course developer to construct the amenity without obstruction or interference") and 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement.").

iii. The failure of Wolf to complete the transfer of WWD-6 to Krofcheck ("Wolf/Krofcheck Transfer"), which was contemplated by the 2006 Subdivision Plats and 2006 Golf. Course Design Plan, directly contributed to the delay in Golf Course construction. This directly violates § 3.2.6 ("The Developers shall permit the Golf Course developer to construct the amenity without obstruction or interference"), 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes

with the intent and objective of this Amended Agreement."), and 3.5.1.5 ("Each Developer shall cooperate in establishing . . . easements . . . reasonably required for the convenient and mutually beneficial use and operation of the Project." Project is defined in Article 1 as "all of the master planned development contemplated under this Amended Agreement.")."

Default Notice, at 37, ¶ 17.

2. As against the Partnership, the Default Notice asserted:

a. The specific grounds for DA Osguthorpe Family Partnership's default are as follows:

i. Failure to sign the 2007 Lower Village Subdivision Plat, as amended, and issue appropriate deeds, which are essential to the construction of the Golf Course. This directly violates § 3.2.6 ("The parties to this Amended Agreement whose property includes land for the proposed Golf Course acknowledge and agree that completion of the course is one for the highest priority public amenities in the SPA. To this end, all affected property owners hereby agree to establish an agreement within 90 days of the Effective Date of this Amended Agreement for the purpose of setting such lands aside at no cost to the County, RVMA, or other entity for the construction of the Golf Course, The Developers

shall permit the Golf Course developer to construct the amenity without obstruction or interference") and 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement.").

ii. Failure to provide the required golf land easements and deeds necessary to facilitate ownership changes consistent with the. plats and Golf Course construction. This directly violates § 3.2.6 ("The Developers shall permit the Golf Course developer to construct the amenity without obstruction or interference"), 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement."), and 3.5.1.5 ("Each Developer shall cooperate in establishing . . . easements . . . reasonably required for the convenient and mutually beneficial use and operation of the Project." Project is defined in Article 1 as "all of the master planned development contemplated under this Amended Agreement.")."

Default Notice, at 45-46, ¶¶ 19(a)-(b).

3. As against ASC Utah, the Default Notice asserted:

a. The specific grounds for ASCU's default are as follows:

i. Failure to construct the Golf Course in a timely manner as required by the DA and the Standstill and Forbearance Agreements. This directly violates § 3.2.6 ("RVMA and the Master Developer will ensure that the course is completed within 36 months of the effective date of this Amended Agreement, starting as early as possible in the Spring of 2000.") and 5.1.1(c) ("Any other act or omission by the Developer(s) that materially interferes with the intent and objective of this Amended Agreement.").

Default Notice, at 50, ¶ 24(a).

4. On July 19, 2010, ASC Utah filed its Rule 15(d) Supplement to its First Amended Complaint [hereinafter "ASC Utah Pleading"], attached hereto as Exhibit E, in which ASC Utah alleged both identical and substantially-related arbitrable issues, as follows:

a. Wolf Mountain breached the SPA Agreement by obstructing and delaying the golf course development project (ASC Utah Pleading, ¶ 1);

b. Wolf Mountain impeded the golf course development project by conveying land to Hydra Global Investments, Inc. (Id. at ¶ 3);

c. Wolf Mountain failed to convey required portion of land for the golf course development project requiring ASC Utah to redesign the course. ASC Utah also states it may seek specific performance from Wolf Mountain by

> demanding that Wolf Mountain execute certain conveyances or documents related to the golf course (Id. at ¶ 5).

ARGUMENT

I. PURSUANT TO RULE 8A, THIS COURT SHOULD GRANT AN EMERGENCY PROVISIONAL STAY OF THE RULING AND ORDER, WHICH STAY IS REQUIRED BY BOTH THE UTAH AND FEDERAL ARBITRATION ACTS.

The trial denied the motion to compel arbitration. This appeal was filed which divested the trial court of jurisdiction over all arbitrable issues. The grounds for denial were that this Court, in *ASC Utah, Inc. v. Wolf Mountain Resorts, LC.,* 2010 UT 65, had overruled years of precedent governing a party to a mandatory arbitration agreement's right to demand that all arbitrable issues be arbitrated. Specifically, the district court ruled that the Utah Arbitration Act (in its 1999 form) "is neither mandatory nor jurisdictional." Arbitration Order, at 6.

The trial court thereafter stated:

> Osguthorpes' essential argument is that "this Court has no discretion and must compel arbitration of all claims and issues relating to the SPA." (Memorandum in support at 6). The argument is supported by case law, and had some force, until yesterday [the date of the ASC Utah, Inc. Opinion]. ***The discussion above shows how the landscape has changed.*** This court must DENY

> Osguthorpes' Motion to Compel Arbitration . . . ."

Arbitration Order, at 8 (emphasis added).

In *ASC Utah, Inc.,* this Court had in fact ruled that the waiver of Wolf Mountain, L.C.'s right to arbitrate prevented it from exercising its contractual right to compel all arbitrable issues to arbitration, *Id.,* ¶ 40. The language quoted by the district court that the Utah Arbitration Act "is neither mandatory not jurisdictional" is taken out of the context of the *ASC Utah, Inc.* decision. In fact, Wolf Mountain had apparently argued that the district court was without jurisdiction to consider the issue of waiver. *Id.*, ¶ 13 ("Wolf Mountain argues that section 78-31a-4 of the Utah Arbitration Act creates a mandatory statutory right that cannot be waived, and therefore the district court did not have jurisdiction to find that Wolf Mountain had waived any potential contractual right of arbitration.")

The "mandatory and jurisdictional" issue was never discussed outside of whether a court had the power to determine waiver (as opposed to the arbitrator), in the context of the proposition asserted by Wolf Mountain, L.C. But the trial court, in deciding the Osguthorpe Plaintiffs' motion, incorrectly conflated the power of the Court to determine waiver (as opposed to the arbitrator) with the power of the Court, when confronted with a valid and enforceable mandatory arbitration agreement and ***no waiver***, to avoid

ordering arbitration, a power the Court does not have:

> The conclusive point is that the Supreme Court has found (1) arbitration is not mandatory, ***and*** (2) this case presents a clear case of waiver on the part of Wolf. ***That is now the law of this case,*** and the mandate from the appellate court.

Ruling, at 6 (emphasis added). The trial court's statement that arbitration is not mandatory is flat contrary to Utah precedent, out of the context of the case and flat wrong. The Partnership has waived no right of arbitration and the Arbitration Order did not find any such waiver.

Had this Court intended Utah law to result in the trial court's Arbitration Order against the Partnership, a result contrary to so much Utah precedent, then that Utah law would be pre-empted by the Federal Arbitration Act. *See Buzas Baseball v. Salt Lake Trappers,* 925 P.2d 941, 952 (Utah 1996). The United States Supreme Court has held with respect to Congressional intent under that Act:

> We conclude, however, on consideration of Congress' intent in passing the statute, that a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made. ***The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore***

reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. . . . This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it, the House Report expressly observed:

> "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." *Id.,* at 2.

Nonetheless, ***passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.*** Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law requires piecemeal resolution when

> necessary to give effect to an arbitration agreement," *id.,* at 20. *See also id., at* 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").
>
> We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act – enforcement of private agreements and encouragement of efficient and speedy dispute resolution – must be resolved in favor of the latter in order to realize the intent of the drafters. ***The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation,*** at least absent a countervailing policy manifested in another federal statute. [Citation omitted.] ***By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.***

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21, 105 S. Ct. 1238, 1242-43, 84 L. Ed. 2d 158, 164-65 (1985) (emphasis added). *For* ***arbitrable issues,*** the language of [9 U.S.C. § 3] indicates that ***the stay is mandatory.*** *" Klay v. Pacific Health Systems, Inc.*, 389 F.3d 1191, 1204 (11th Cir. 2004) (emphasis added).

II. No Action Should Be Allowed to Proceed in the Trial Court Because It May Impair The Arbitrator's Ability to Conduct the Arbitration.

The issues raised by the Default Notice, as to which the Partnership is entitled to mandatory arbitration, all are interdependent with the allegations between Wolf Mountain and ASC Utah concerning defaults of the SPA Agreement and delay of construction of a golf course. In these circumstances, a refusal to stay is an abuse of discretion under the applicable federal law. See *Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp.,* 916 F.2d 402 (7th Cir. 1990) ("potential for impairment of the issues before the arbitrator due to the collateral estoppel effect of the [buyer-guarantor] litigation" required a stay), abrogated on other grounds, *IDS Life Ins.* Co. *v. SunAmerica, Inc.,* 103 F.3d 524, 530 (7th Cir. 1990); *accord Air Freight Services, Inc. v. Air Cargo Transport, Inc.,* 919 F. Supp. 321, (N.D. Ill. 1996) ("the court finds that it would be wise to allow the arbitrable issues in this case to be decided before the case proceeds any further, so as not to impair the arbitrator's ability to decide the arbitrable issues."); *cf. Olde Discount Corp. v. Tupman,* 1 F.3d 202, 208 (3d Cir. 1993) ("right to arbitration cannot be satisfied if an alternate administrative forum is determining at the same time whether a claim to the identical remedy is available").

III. An Immediate Stay Is Required Because the Trial Court Lacks Jurisdiction Yet Proceeds to Move Forward On Arbitrable Issues.

"This court has long followed the general rule that the trial court is divested of jurisdiction over a case while it is under advisement on appeal." *White v. State,* 795 P.2d 648, 650 (Utah 1990). But the trial court in this case continues to proceed forward on all arbitrable issues as it prepares for trial and has denied a motion to stay twice, first on the Osguthorpe Plaintiffs motion to compel arbitration and to stay and a second time on their motion to stay pending appeal. In *McCauley v. Halliburton Energy Services,* 413 F.3d 1158, 1160 (10th Cir. 2005), the United States Court of Appeals for the Tenth Circuit, treated an appeal of a denial of a motion to compel arbitration as interlocutory, observed that: "When an interlocutory appeal is taken, the district court only retains jurisdiction to proceed with matters not involved in that appeal." *Id.* at 1161 (quoting *Stewart v. Donges,* 915 F.2d 572, 576 (10th Cir. 1990)). The Court then held that "the [trial] court is divested of jurisdiction while a non-frivolous appeal from the [denial of a motion to compel arbitration] is pending." Id. at 1162. That rule is consistent with the precedent of this Court concerning divestiture of jurisdiction by the filing of a notice of appeal and so should be applied here.

CONCLUSION

For the foregoing reasons, this Court should immediately stay all proceedings below that relate in any way to arbitrable issues.

RESPECTFULLY SUBMITTED this 3d day of January, 2011.

PETERS | SCOFIELD
A Professional Corporation

/s/ David W. Scofield
DAVID W. SCOFIELD
Attorneys for
Plaintiff/Petitioners

DAVID W. SCOFIELD – 4140
THOMAS W. PETERS – 8856
PETERS | SCOFIELD
A Professional Corporation
Suite 115 Parleys Corporate Center
2455 East Parleys Way
Salt Lake City, Utah 84109
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

Attorneys for Plaintiffs

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

STEPHEN A. OSGUTHORPE, individually and in his capacity as Interim Personal Representative of the Estate of D.A. Osguthorpe, D.V.S. and also in his capacity as Successor Trustee of The Dr. D.A. Osguthorpe Trust; and **D. A. OSGUTHORPE FAMILY PARTNERSHIP**, Plaintiffs, -vs-	**MEMORANDUM IN SUPPORT OF MOTION PURSUANT TO THE FEDERAL ARBITRATION ACT FOR ORDER COMPELLING ARBITRATION AND FOR IMMEDIATE STAY**

ASC UTAH, INC.; AMERICAN SKIING COMPANY; LESLIE B. OTTEN; WOLF MOUNTAIN RESORTS, L.C.; AND JOHN DOES I THROUGH XX, Defendants. -and- **ENOCH RICHARD SMITH**, as Personal Representative of the Estate of Enoch Smith, Jr., Intervenor.	Consolidated Case No. 060500297 (Original Case No. 070500520 CN) Honorable Robert K Hilder

. . .

ARGUMENT

I. THE FAA PRE-EMPTS ALL STATE LAWS THAT CONFLICT WITH THE FAA.

The United States Supreme Court has closed the door on the question of whether any state law in conflict with the FAA can survive – the answer is a resounding no – all such state law is pre-empted by 9 U.S.C. § 2. *See Southland Corp. v. Keating,* 465 U.S. 1,10-17, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (explaining pre-emption of conflicting state law by the FAA). The Court rejected the contention that state public policy could form any basis for not enforcing arbitration agreements. *Id.* at 16.

The public policy of Utah has been declared in *ASC Utah, Inc.*:

> [Utah's] legislature enacted the [Utah Arbitration] Act ***in accordance with a public policy that favors arbitration agreements*** as contractual agreements between parties not to litigate, *Cent. Fla. Invs., Inc. v. Parkwest Assocs.,* 2002 UT 3, ¶ 16, 40 P.3d 599, ***only insofar as they serve as "speedy and inexpensive methods of adjudicating disputes,"*** *Allred v. Educators Mut. Ins. Ass'n of Utah,* 909 P.2d 1263, 1265 (Utah 1996), ***and help reduce strain on judicial resources,*** *See Chandler,* 833 P.2d at 358. There is no public policy supporting arbitration when it would undermine these goals. "The policies favoring arbitration are largely defeated when the right of arbitration is not raised until an opposing party has undertaken much of the expense necessary to prepare a case for trial." *Id.* at 361.

ASC Utah, Inc., at 7, ¶ 18 (emphasis added). That state public policy is in direct conflict with federal law. The United States Supreme Court was presented with the identical issue, of whether the public policy behind the FAA was primarily to promote the expeditious resolution of claims and the Court resoundingly rejected that notion, finding instead that arbitration must be ordered regardless of waste, inefficiency and cost:

> We conclude, however, on consideration of Congress' intent in passing the statute, that a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made. ***The legislative history***

of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. . . . This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it, the House Report expressly observed:

> "It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." *Id.,* at 2.

Nonetheless, ***passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation***. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement,

> even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement," *id.,* at 20. *See also id.,* at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").
>
> We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act – enforcement of private agreements and encouragement of efficient and speedy dispute resolution – must be resolved in favor of the latter in order to realize the intent of the drafters. ***The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation,*** at least absent a countervailing policy manifested in another federal statute. [Citation omitted.] ***By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.***

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21, 105 S. Ct. 1238, 1242-43, 84 L. Ed. 2d 158, 164-65 (1985) (emphasis added).

Indeed, contrary to any discretion to refuse to require arbitration that Utah law may allow (if any), "Congress has . . . ***mandated*** the enforcement of arbitration agreements." *Southland Corp.,* 465 U.S. at 10 (emphasis added). The Court explicitly announced the only two limitations on that Congressional mandate:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

Id. at 10-11. This court is therefore bound by the Supremacy Clause of the United States Constitution to hold that the Utah public policy set forth in *ASC Utah, Inc.* is preempted by the FAA for the reasons stated in *Dean Witter Reynolds Inc.*

II. THE FAA REQUIRES THIS COURT TO ENTER AN ORDER COMPELLING ARBITRATION AND IMMEDIATELY STAYING THE PROCEEDINGS BEFORE IT.

Section 3 of the Federal Arbitration Act requires that:

> "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall*** on application of one of the parties ***stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement***, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Since the FAA expressly references the staying of "the trial" it is clear that Congress mandated that this court stay, immediately, on application of The Partnership, "the trial" for which it has been preparing.

III. FEDERAL POLICY UNDERLYING THE FAA.

The United States Supreme Court explained that "the [Federal Arbitration Act] ***not only*** 'declared a national policy favoring arbitration' but actually '***withdrew the power of the states to require a judicial forum*** for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Southland Corp. v. Keating,* 465 U.S. 1,10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (emphasis added). The Court further held that the FAA "created a body of federal substantive law," which was "applicable in state ***and*** federal courts." *Id.* (emphasis added).

Further, the Federal Arbitration Act applies to proceedings in the state courts and "[u]nder the FAA, ***state courts*** as well as federal courts ***are obliged to honor and enforce agreements to arbitrate.***" *Vaden v. Discover Bank,* 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (citing *Southland,* at 12) (emphasis added).

The Court was clear in explaining Congress' intent in reaching that determination. Parties who enter into arbitration agreements are free to negotiate the terms of the agreements, and enter such agreements voluntarily. The Court stated:

> But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the ***FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit***. Just as they may limit by contract the issues which they will arbitrate, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), so too may they specify by contract the rules under which that arbitration will be conducted.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

All of the parties to the SPA Agreement, including both The Canyons and Wolf Mountain, agreed to resolve "***every such continuing dispute, difference, and disagreement***" arising under the SPA Agreement through arbitration. SPA Agreement, at 60, ¶ 5.8.1.

The Canyons and Wolf Mountain each had ample time and ability to review and revise, or reject altogether, the proposed terms requiring mandatory and binding arbitration. But they each chose to agree to the language in the Arbitration Agreement. The Canyons and Wolf Mountain are therefore bound equally as are the other parties to resolve "***every such continuing dispute, difference, and disagreement***" arising under the SPA Agreement through arbitration. SPA Agreement, at 60, ¶ 5.8.1. While this court found it had discretion to refuse to compel arbitration under Utah law, in light of ASC Utah, Inc., it has absolutely no discretion under the Federal Arbitration Act to compel arbitration and to stay. This court, as *Southland* stated, lacks the power, i.e. the jurisdiction, to resolve "***every such continuing dispute, difference, and disagreement***" arising under the SPA Agreement through arbitration. SPA Agreement, at 60, ¶ 5.8.1.

IV. THE UNITED STATES SUPREME COURT HAS ALSO INSTRUCTED THIS COURT, UNDER THE FAA, TO RESOLVE ALL DOUBTS AS TO WHETHER SPA AGREEMENT DISPUTES, DIFFERENCES AND DISAGREEMENTS ARE ARBITRABLE, IN FAVOR OF ARBITRABILITY.

It is well-settled that under the FAA, all doubts as to arbitrability must be resolved in favor of arbitrability. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24-25 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). The United States Supreme Court explained the significant distinction between the question of *who* should arbitrate arbitrability and the question of *whether* the dispute is within the scope of a valid arbitration agreement in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The Court explained:

> This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT&T Technologies, supra, at* 649; see *Warrior & Gulf, supra, at 583, n.* 7. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it

> treats silence or ambiguity about the question "***whether a particular merits-related dispute is arbitrable*** because it is within the scope of a valid arbitration agreement" – ***for in respect to this latter question the law reverses the presumption***.

Id. at 944-45 (emphasis added). In the case at hand, "who" should decide arbitrability is not in issue – the court. The question of whether an issue falls within the scope of the arbitration clause falls squarely into the presumption of arbitrability.

And as to that presumption, it is also clear that "procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964)). In this circumstance, those "procedural" questions include all questions pertaining to the validity or invalidity of Summit County's issuance its Default Notice, which questions are answered in part by the determination of the exact issues this court is about to try to a jury.

CONCLUSION

For the foregoing reasons, The Partnership respectfully submits that this Court has no discretion and must follow the mandate of Congress under the FAA to immediately stay "***every such continuing***

dispute, difference, and disagreement" arising under the SPA Agreement and to enter an order compelling The Canyons and Wolf Mountain to resolve "***every such continuing dispute, difference, and disagreement***" arising under the SPA Agreement in arbitration, just like they agreed to do.

DATED this 2d day of March, 2011.

PETERS | SCOFIELD
A Professional Corporation

/s/ David W. Scofield
DAVID W. SCOFIELD
Attorneys for Plaintiff D.A Osguthorpe Family Partnership