In the
United States Court of Appeals
For the Seventh Circuit

NO. 18-1193

BROOKS GOPLIN,

Plaintiff-Appellee,

v.

WECONNECT, INCORPORATED,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 3:17-cv-00773-jdp – **James D. Peterson**, *Chief Judge*.

ARGUED MAY 24, 2018 – DECIDED JUNE 21, 2018

Before MANION and BARRETT, *Circuit Judges*, and GETTLEMAN, *District Judge*.*

BARRETT, *Circuit Judge*. WeConnect, Inc. asks us to reverse the district court for making a factual mistake. The district court found that WeConnect was not a party to the arbitration agreement it sought to enforce. WeConnect says that the district court misunderstood the nature of its relationship with the entity

* Of the Northern District of Illinois, sitting by designation.

named in the arbitration agreement. Because the district court did not clearly err, we affirm its ruling.

I.

Brooks Goplin worked for WeConnect, Inc. When he began his employment, he signed an arbitration agreement called the "AEI Alternative Entertainment Inc. Open Door Policy and Arbitration Program." The agreement referred to an entity named AEI throughout; it never mentioned We-Connect. This error became significant several months later, when Goplin sued We-Connect in federal court.

Goplin brought a collective action under the Fair Labor Standards Act and a class action asserting claims under Wisconsin law. Invoking the agreement Goplin had signed, We-Connect filed a motion to dismiss and compel arbitration. Fed. R. Civ. P. 12(b)(3). It attached an affidavit from its Director of Human Resources stating, among other things, that "I am employed by WeConnect, Inc.—formerly known as Alternative Entertainment, Inc. or AEI—as Director of Human Resources."

Goplin raised several arguments in opposition, but only one is relevant here: he claimed that WeConnect was not a party to the agreement and therefore could not enforce it.[1] He directed the district court to

[1] Goplin also argued, and the district court agreed, that the "collective action" waiver was invalid under our precedent in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) (holding that such waivers violate the Fair Labor Standards Act). The

language on WeConnect's website, which stated the following:

> WeConnect formed when two privately held companies, Alternative Entertainment, Inc. (AEI) and WeConnect Enterprise Solutions, combined in September 2016 . . . Working together, AEI and WeConnect Enterprises could be as nimble as the next great technological innovation required. Our founders . . . saw that we were stronger together. And we officially became one company, WeConnect.

Goplin contended that this language supported his position that AEI and WeConnect were two distinct legal entities. His arbitration agreement was with the now-defunct AEI, and WeConnect could not enforce an agreement that he had entered with another company. Under Wisconsin law, which applies here, "[t]he general rule is that only a party to a contract may enforce it." *Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc.*, 605 N.W.2d 620, 622–23 (Wis. Ct. App. 1999).

In its reply, WeConnect disputed Goplin's characterization of its relationship with AEI.[2] It asserted that WeConnect and AEI were not two different legal entities, but rather two names for the same legal entity—

Supreme Court has since reversed *Epic Systems*, so this argument is no longer relevant. *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).

[2] WeConnect's reply focused primarily on enforceability of the agreement under the National Labor Relations Act and whether the agreement is procedurally or substantively unconscionable. Unfortunately, it gave very little attention to the issue now on appeal.

AEI was the company's original name and WeConnect is its new one. It emphasized that the affidavit from the Director of Human Resources referred to WeConnect as a company "formerly known" as AEI. Thus, WeConnect argued, a contract with AEI *was* a contract with WeConnect. This was a name change, not a merger.

The district court held that WeConnect failed to meet its burden of demonstrating that it was a party to the arbitration agreement or otherwise entitled to enforce it. It discounted the affidavit from the Director of Human Resources as conclusory and noted that "WeConnect's own website indicates that AEI ceased to exist in September 2016, when it merged with WeConnect Enterprise Solutions to form We-Connect, Inc." Because the court found that "AEI isn't just another name for WeConnect," it denied WeConnect's motion to compel arbitration.

WeConnect filed a motion for reconsideration. This time, it attached more substantial evidence—including some corporate-form documents and affidavits from its lawyer and CEO—to support its claim that AEI had undergone a name change rather than a merger. But the district court pointed out that new evidence cannot be introduced in a motion for reconsideration unless the moving party shows "not only that [the] evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of the motion]." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264,

1269 (7th Cir. 1996) (citations omitted). WeConnect's evidence was neither newly discovered nor unknown; moreover, it could easily have produced these documents and affidavits the first time around. The district court thus denied the motion.

II.

On appeal, WeConnect challenges the district court's factual finding that WeConnect and AEI are distinct legal entities. This argument is an uphill battle, because we will only reverse a district court's finding of fact if it is clearly erroneous. And in making that determination, we will consider only the evidence that was properly in the record when the district court ruled. The district court correctly declined to revisit its decision based on the additional materials that WeConnect attached to its motion for reconsideration; thus, we will not consider that evidence in our review of the district court's finding.

WeConnect's primary complaint is that the district court should not have taken its website into account in ruling on the Rule 12(b)(3) motion. According to WeConnect, the district court violated the rules of judicial notice by relying on information it found in the course of its own internet research. WeConnect emphasizes our warning that "it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011).

WeConnect suggests that without the website, the district court's factual finding lacks any basis.

WeConnect is incorrect. The website was not the determinative factor in the district court's decision. WeConnect bore the burden of establishing its right to enforce the arbitration agreement. It contended that it could enforce a contract entered by AEI, but the only evidence it introduced of its relationship to AEI was one sentence in an affidavit from its Director of Human Resources. The district court held that this affidavit was insufficient proof that WeConnect and AEI were different names for the same entity. To be sure, it viewed the website as confirmation that the entities were distinct. But the court's opinion makes clear that it would have reached the same result even without the website. It thought that WeConnect simply hadn't introduced enough evidence to show that it had an enforceable agreement with Goplin.

In any event, the district court did not violate the rules of judicial notice by reviewing WeConnect's website. Contrary to WeConnect's assertion, the district court did not engage in its own internet research to find the website; Goplin cited WeConnect's website in his briefing. WeConnect protests that it did not have the opportunity to put its website language in context for the court. But it could have done so in its reply brief; it simply failed to use that opportunity. We note too that the statements at issue are WeConnect's own assertions, not potentially unfamiliar information posted on third-party websites. *Cf. Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015) (taking notice of medical reference

websites); *Pickett*, 664 F.3d at 648 (addressing a court's taking notice of the Consumer Price Index and Laffey Matrix).

Had WeConnect introduced the strongest evidence of its relationship with AEI from the get-go, it may well have convinced the district court that the two names referred to the same entity. But WeConnect miscalculated and relied on a conclusory sentence in a human resources affidavit to establish the corporate relationship between WeConnect and AEI. Based on the evidence it had before it, the district court's finding was not clearly erroneous. The decision of the district court is AFFIRMED and the case is remanded for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BROOKS GOPLIN, Plaintiff, v. WECONNECT, INC., Defendant.	OPINION & ORDER 17-cv-773-jdp (Filed Mar. 14, 2018)

Plaintiff Brooks Goplin contends that defendant WeConnect, Inc., failed to pay him for some of the time he spent working and altered his time records to deprive him of regular and overtime wages, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19, and Wisconsin wage and hour laws. Dkt. 1. In a December 28, 2017 order, the court denied WeConnect's motion to dismiss the case in favor of arbitration or to stay the case pending the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*. Dkt. 20. WeConnect moves for reconsideration of that decision. Dkt. 25. It has also appealed the decision and moves the court to stay the proceedings pending appeal. Dkt. 36. Finally, Goplin moves to dismiss WeConnect's counterclaim. Dkt. 30. The court will deny WeConnect's motion for reconsideration and grant WeConnect's motion to stay. The court will deny Goplin's motion to dismiss, although it will do so without prejudice to his renewing the motion should the court of appeals affirm this court's decision.

MOTION FOR RECONSIDERATION

"Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 1269 (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)). WeConnect purports to move under the "manifest error" prong, which allows for reconsideration when "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

In its December 28 order, the court denied WeConnect's motion to dismiss or stay the case because (1) binding Seventh Circuit precedent renders the arbitration agreement at issue unenforceable and (2) WeConnect is neither a signatory to nor named in the arbitration agreement, which refers to only Goplin and Alternative Entertainment, Inc. (AEI). Dkt. 20, at 4. WeConnect challenges the second conclusion, contending that it is based on several factual errors.

At the heart of WeConnect's motion are several new exhibits. Together, these exhibits suggest, contrary to the court's conclusions in its December 28 order, that (1) in 2016, AEI didn't merge with WeConnect Enterprise Solutions, LLC, but rather it changed its name to WeConnect, Inc.; and (2) Goplin received several documents bearing the AEI name related to his employment when he signed the arbitration agreement. *See* Dkts. 27–29. New evidence may support a motion for reconsideration only when the movant shows "'that it could not with reasonable diligence have discovered and produced such evidence' during the pendency of the motion." *Caisse Nationale*, 90 F.3d at 1269 (quoting *Engelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (7th Cir. 1963)). The evidence WeConnect now offers could have been produced in support of WeConnect's original motion. WeConnect argues in its reply brief that it may introduce this evidence now because Goplin "scarcely mentioned and completely failed to develop the argument upon which the Court ultimately based its Decision and Order."[1] Dkt. 35-1, at 2. In other words, WeConnect contends that the court should consider this new evidence because the court based its December 28 ruling on adversarial issues not presented by the parties. But Goplin argued in his response to WeConnect's original motion that the arbitration agreement "does not anywhere identify WeConnect as a party to the agreement," Dkt. 14, at 8, so the issue was presented to the

[1] The court will grant WeConnect's motion for leave to file the reply brief. Dkt. 35.

court and sufficiently developed to put WeConnect on notice that it should respond. *See also, e.g.*, Dkt. 14, at 2 n.1 ("Defendant makes no effort . . . to explain how AEI became WeConnect [but] seeks to enforce an agreement between the Plaintiff and AEI, wherein WeConnect is not referenced."). Goplin wasn't referring to some obscure legal theory; he was pointing out a basic element of contract enforcement that WeConnect failed to fulfill. WeConnect could have and should have submitted this evidence in support of its original motion; its failure to do so provides no basis for reconsideration of the court's order.

Regardless, the new evidence concerning the name change would not change the court's ultimate conclusion because the timeline remains the same: by the time Goplin signed the AEI arbitration agreement in March 2017, his employer's name was WeConnect, not AEI. WeConnect cites *McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, for the proposition that "[a] mere change in the name of a corporation generally does not destroy the identity of the corporation, nor in any way affect its rights and liabilities." 2004 WI App 221, ¶ 17, 277 Wis. 2d 801, 692 N.W.2d 247 (quoting 6 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 2456 (perm. ed., rev. vol. 1996)). But *McNally* would only help WeConnect if it entered into the arbitration agreement with Goplin *before* changing its name; that's not what happened.

The other employment-related materials bearing the AEI name might have been helpful to WeConnect if they had been adduced on the first go-around.

WeConnect might have been able to argue that it was doing business as AEI at the time Goplin signed the arbitration agreement. In many jurisdictions, a corporation may enforce a contract it entered under an assumed name, at least when the assumed name is used in good faith. *See Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 744 n.14 (N.D. Iowa 2005) (collecting cases). Wisconsin has not adopted this rule, but regardless, WeConnect did not advance this argument in its original motion, nor has it advanced it in its motion for reconsideration. In fact, WeConnect's filings indicate that it has *not* assumed AEI as a fictitious name. *See* Dkt. 29, ¶ 2 (describing WeConnect as "formerly known as Alternative Entertainment, Inc. or 'AEI'").[2]

Finally, WeConnect argues that the court "erred by assigning the burden on the issue of Mr. Goplin's 'understanding' to [WeConnect because] '[t]he party resisting arbitration bears the burden of establishing that the arbitration clause is unconscionable.'" Dkt. 26, at 9 (quoting *Felland v. Clifton*, No. 10-cv-664, 2013 WL 3778967, at *7 (W.D. Wis. July 18, 2013)). This argument is inaccurate, and ultimately unpersuasive, for several reasons. First, the court did not conclude that the arbitration clause was unconscionable; rather, it concluded that WeConnect could not enforce the arbitration agreement. Second, Goplin's understanding of

[2] *See also Corporate Records*, Wisconsin Department of Financial Institutions, https://www.wdfi.org/apps/CorpSearch/Results.aspx?type=Name&q=alternative+entertainment%2c+inc. (displaying no records for Alternative Entertainment, Inc., in a search for name availability).

the arbitration agreement was not central to the court's decision. The dispositive issue was whether WeConnect was a party to the agreement or otherwise able to enforce it. Finally, the court applied the correct standard of review, following the command in *Faulkenberg v. CB Tax Franchise Systems, LP,* to "construe all facts and draw[] all reasonable inferences in favor of the plaintiff[]" when reviewing a motion to dismiss in favor of arbitration. 637 F.3d 801, 806 (7th Cir. 2011); *see Jackson v. Payday Fin., LLC*, 764 F.3d 765, 773 & n.19 (7th Cir. 2014) (confirming that *Faulkenberg* annunciated the correct standard of review for this type of motion). WeConnect, as the party seeking to compel arbitration, bore the burden of establishing the threshold issue of whether the parties agreed to arbitrate. *Druco Restaurants, Inc. v. Steak N Shake Enters., Inc.*, 765 F.3d 776, 781–82 (7th Cir. 2014). "[T]he FAA's policy in favor of arbitration" would only have kicked in if WeConnect met its burden. *Id.* at 781 (denying a motion to compel arbitration because the party seeking to compel arbitration "failed to demonstrate" an enforceable arbitration agreement).

In sum, the court will not reconsider its denial of WeConnect's motion to dismiss or stay the case in favor of arbitration.

MOTION TO STAY

The parties agree that in the Seventh Circuit, a district court must stay proceedings pending the appeal of a denial of a motion to compel arbitration

unless the appeal is frivolous. *See Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). Goplin's sole argument against a stay is that WeConnect's appeal is frivolous because it filed a "contradictory" motion for reconsideration after filing its notice of appeal. Dkt. 39, at 6.

WeConnect's appeal isn't frivolous. This court has jurisdiction to rule on WeConnect's motion for reconsideration, regardless whether the timing of WeConnect's motion and notice were procedurally proper. *See Square D. Co. v. Fastrak Softworks, Inc.*, 107 F.3d 448, 450 (7th Cir. 1997). So the court will grant WeConnect's motion for a stay. It will deny Goplin's motion to dismiss WeConnect's counterclaim without prejudice to his renewing the motion should the court of appeals affirm this court's decision.

Finally, Goplin asks in a footnote that in the event of a stay, the court "provide for equitable tolling as to the FLSA claims of the putative class members." Dkt. 39, at 7 n.1. The court will not rule on that issue unless and until it is properly before the court post-appeal. *Accord Lewis v. Epic Sys. Corp.*, No. 15-cv-82, Dkt. 66, at 4 (W.D. Wis. Nov. 25, 2015).

ORDER

IT IS ORDERED that:

1. Defendant WeConnect, Inc.'s motion leave to file a reply brief in support of its motion for reconsideration, Dkt. 35, is GRANTED.

2. Defendant's motion for reconsideration, Dkt. 25, is DENIED.

3. Defendant's motion to stay pending appeal, Dkt. 36, is GRANTED.

4. Defendant's motion for leave to file a reply brief in support of its motion to stay, Dkt. 41, is DENIED as moot.

5. Plaintiff Brooks Goplin's motion to dismiss, Dkt. 30, is DENIED without prejudice.

Entered March 14, 2018.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BROOKS GOPLIN, Plaintiff, v. WECONNECT, INC., Defendant.	OPINION & ORDER 17-cv-773-jdp (Filed Dec. 28, 2017)

Plaintiff Brooks Goplin was a satellite/cable technician for defendant WeConnect, Inc. In this proposed class action, Goplin contends that WeConnect failed to pay him for some of the time he spent working and altered his time records to deprive him of regular and overtime wages, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–19, and Wisconsin wage and hour laws. Dkt. 1. WeConnect moves to dismiss the case in favor of arbitration pursuant to an arbitration agreement or to stay the case pending the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*. Dkt. 7. Because WeConnect has not shown that it can enforce the agreement and because the concerted action waiver in the agreement is unenforceable, rendering this action exempt from arbitration under the terms of the agreement, the court will deny WeConnect's motion to dismiss or stay the case.

BACKGROUND

When deciding a motion to dismiss under Rule 12(b)(3), the court may consider the allegations of complaint and information submitted by affidavits. *See Continental Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005). The court will accept as true the allegations in the complaint unless they are contradicted by affidavits. *See Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 806 (7th Cir. 2011). The court resolves all factual disputes and draws all reasonable inferences in the plaintiff's favor. *Id.* Here, the relevant facts are undisputed.

WeConnect is a business that "connect[s] next-generation technology."[1] It formed in September 2016 "when two privately held companies, Alternative Entertainment Inc. (AEI) and WeConnect Enterprise Solutions, combined. "[2]

In February 2017, WeConnect hired Goplin as a satellite/cable technician. A week later, Goplin signed a document titled "AEI Alternative Entertainment, Inc. Open Door Policy and Arbitration Program." Dkt. 9-1. The document contained the following arbitration provision:

> [B]y agreeing to this policy, you agree that in consideration for your employment and in exchange for promises made by AEI, Inc. ("AEI" or the "Company"), both you and AEI understand and agree that either one may elect to

[1] WeConnect, http://weconnectllc.com/.

[2] WeConnect, *About Us*, http://weconnectllc.com/about-us/.

> resolve the following types of disputes exclusively through binding arbitration:
>
> . . . . Disputes between you and AEI (or any of its affiliates, officers, directors, managers or employees) relating to your employment with the Company (including but not limited to: (1) claims of discrimination under federal, state or local laws, (2) claims regarding compensation, including overtime; (3) claims regarding promotion, demotion, disciplinary action, and/or termination; and (4) claims regarding the application or interpretation of any of the terms of this agreement).

Id. at 1. It also contained what is sometimes called a concerted action waiver:

> By signing this policy, you and AEI also agree that a claim may not be arbitrated as a class action, also called 'representative' or 'collective' actions, and that a claims may not otherwise be consolidated or joined with the claims of others.

Id. The document provided that the concerted action waiver was central to the arbitration agreement:

> This agreement represents the intent of both you and the Company to arbitrate disputes that may arise in accordance with this Agreement. If any clause, provision or section of this Agreement is ruled invalid or unenforceable by any court of competent jurisdiction, the invalidity or unenforceability of such clause, provision or section shall not affect any remaining clause, provision or section hereof.

> However, to the extent this class/collective action wavier is found to be unlawful and/or unenforceable, from that point forward the collective claim will not be covered by this agreement and may be pursued in a court of law unless and until the claim ceases to be party of a class-action, representative-action or consolidated case.

Id.

Goplin signed the agreement on February 2, 2017. The signature line for AEI remains blank.

On October 10, 2017, Goplin filed this proposed class action against WeConnect alleging violations of the FLSA and Wisconsin wage and hour law. The court has federal question jurisdiction over the FLSA claim under 28 U.S.C. § 1331, and it has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

ANALYSIS

WeConnect moves under Federal Rule of Civil Procedure 12(b)(3) to dismiss Goplin's claims in favor of arbitration. *See Faulkenberg*, 637 F.3d at 808 (explaining that "a district court cannot compel arbitration outside the confines of its district" and so should dismiss the case for improper venue under Rule 12(b)(3) when arbitration is required). Under binding Seventh Circuit precedent, the concerted action waiver of the arbitration agreement violates the National Labor Relations Act, so it is unenforceable. *See Lewis v. Epic*

Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *see also NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 408 (6th Cir. 2017) (determining that the concerted action waiver of the arbitration agreement at issue in this case rendered it unenforceable). So under the terms of the agreement, Goplin's collective claims are not subject to arbitration.

WeConnect argues that Goplin "waived his right" to argue that the concerted action waiver violates the NLRA by failing to assert that argument in a charge filed with the National Labor Relations Board within the six-month limitations period established by the act. Dkt. 17, at 3. WeConnect's argument is underdeveloped and difficult to understand. The NLRB may have "primary jurisdiction" over affirmative claims brought under the NLRA, but federal courts have "a duty to determine whether a contract violates federal law before enforcing it," so federal court is a proper forum for Goplin's argument. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). In *Kaiser Steel*, the Supreme Court held that § 8(e) of the NLRA renders certain contract clauses "at all times unenforceable by federal courts" and that "a court must entertain [a] defense" brought under § 8(e), *id.* at 84, 86, a strong indication that no limitations period attaches to challenges under that provision. There is no indication that § 7, the NLRA provision that Goplin relies upon, should be treated any differently. *Cf. Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779, 2012 WL 1242318, at *3 (W.D. Wis. Mar. 16, 2012) (concluding that under *Kaiser Steel*, a § 7 challenge to a concerted action waiver

was properly before the court). So Goplin did not waive his argument.

Lewis is currently before the U. S. Supreme Court, so if the concerted action waiver were the only roadblock to arbitration, it might be appropriate to stay this case pending the Supreme Court's ruling. But a larger issue looms in this case: Goplin brings his claims against WeConnect, which is neither a signatory to nor named in the arbitration agreement.

"[A] litigant who was not a party to the relevant arbitration agreement may [compel arbitration] if the relevant state contract law allows him to enforce the agreement." *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017) (quoting *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 632 (2009)). Under Wisconsin law (which the parties agree applies here), "[t]he general rule is that only a party to a contract may enforce it. However, there is an exception when the contract was made specifically for the benefit of a third party." *Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc.*, 231 Wis. 2d 404, 605 N.W.2d 620, 622–23 (Ct. App. 1999) (citation omitted).

Here, there is no indication that WeConnect is a party to the arbitration agreement. "WeConnect" does not appear anywhere in the arbitration agreement; rather, the agreement purports to bind Goplin and AEI. WeConnect argues that "'WeConnect' and 'AEI' are two names for the same entity." Dkt. 17, at 7. In support, it adduces only a conclusory statement in the declaration of Kevin LeCloux: "I am employed by

WeConnect, Inc.—formerly known as Alternative Entertainment, Inc. or AEI—as Director of Human Resources." Dkt. 9, ¶ 3. There's no reason to think that Goplin knew that AEI was another name for WeConnect (as WeConnect suggests) at the time he signed the agreement. And in fact, AEI isn't just another name for WeConnect. As Goplin notes, WeConnect's own website indicates that AEI ceased to exist in September 2016, when it merged with WeConnect Enterprise Solutions to form WeConnect, Inc. Goplin didn't sign the arbitration agreement until March 2017, half a year later. WeConnect cites no authority for the proposition that WeConnect can continue to enter into valid, enforceable contracts under AEI's name post-merger, after AEI ceased to exist.

Perhaps WeConnect intends to argue that AEI assigned its rights and obligations under the arbitration agreement to WeConnect upon merger. But because the agreement postdates the merger, this theory falls flat. And even if the agreement predated the merger, WeConnect has not shown that it survived, and the agreement does not expressly bind successors or assigns. *Cf. Campbell v. Millennium Ventures, LLC*, 55 P.3d 429, 433 (N.M. Ct. App. 2002) ("[Some] jurisdictions have held that an employee consents to assignment of an employment agreement if the agreement expressly binds and benefits successors or assigns.").

WeConnect also argues that it "drafted the Agreement and presented it to Goplin for signature." Dkt. 17, at 7. But the drafter of a contract is not automatically a party to it—for example, lawyers often draft

contracts to which they are not party. Besides, WeConnect adduces no evidence about the agreement's drafting.

Finally, WeConnect argues that the agreement "repeatedly refers to the obligations and the rights of the employer." *Id.* That's true—it's clear that the agreement concerns an employment relationship, but the only reasonable inference to draw from the agreement is that the employer is AEI. Perhaps WeConnect intends to contend that it is a third-party beneficiary of the agreement. But WeConnect, as the party "claiming third-party beneficiary status[,] must show that the contracting parties entered into the agreement for the direct and primary benefit of the third party." *Sussex Tool & Supply*, 605 N.W.2d at 623. WeConnect has not met this burden. There's no reason to think that Goplin believed he was agreeing to arbitrate his claims against WeConnect—as opposed to AEI—when he signed the agreement. So even if *Lewis* were reversed, it would be inappropriate to dismiss this case in favor of arbitration.

ORDER

IT IS ORDERED that defendant WeConnect, Inc.'s motion to dismiss or stay proceedings, Dkt. 7, is DENIED.

Entered December 28, 2017.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 18, 2018

Before

DANIEL A. MANION, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

ROBERT W. GETTLEMAN, *District Judge**

No. 18-1193

BROOKS GOPLIN *Plaintiff-Appellee,* *v.* WECONNECT, INCORPORATED *Defendant-Appellant.*	Appeal from the United States District Court for the Western District of Wisconsin No. 3:17-CV-00773-JDP James D. Peterson, *Judge.*

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed on July 3, 2018, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

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* Of the Northern District of Illinois, sitting by designation.

Fed. R. Evid. 201
Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the

jury that it may or may not accept the noticed fact as conclusive.

Fed. R. Evid. 901
Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only – not a complete list – of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Fed. R. Evid. 902
Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The

proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BROOKS GOPLIN,
Individually and on behalf
Of all others similarly situated,

Plaintiff,

Case No. 17-cv-773

v.

WECONNECT, INC.,

Defendant.

DECLARATION OF BRICK N. MURPHY

Pursuant to 28 U.S.C. §1746, I, Brick N. Murphy declare as follows:

1. I am an adult resident of the state of Wisconsin, fully competent to make this Declaration, and I have personal knowledge of the facts set forth in this Declaration.

2. I am a partner in the Green Bay, Wisconsin Law firm of Conway, Olejniczak & Jerry, S.C. ("LCOJ"), Since long before 2012 to the present day, LCOJ has represented the corporation formerly known as Alternative Entertainment, Inc. ("AEI") and now known as WeConnect, Inc. LCOJ has also represented WeConnect Enterprise Solutions, LLC since its inception in 2012.

3. In August of 2016, I drafted a "Unanimous Consent of the Board of Directors and Shareholders of Alternative Entertainment, Inc." (A true and correct copy of that Unanimous Consent is attached hereto as Exhibit A.) On August 11, 2016, two shareholders and members of the Board of Directors of AEI executed the Unanimous Consent, (Exh. A.) In relevant part, the Unanimous Consent provides that "the Corporation shall change its name from 'ALTERNATIVE ENTERTAINMENT, INC.' to 'WECONNECT, INC.' effective at the time of filing of the Articles of Amendment with the Wisconsin Department of Financial Institutions." (Exh. A.)

4. On August 18, 2016, I filed the Articles of Amendment for Alternative Entertainment, Inc. with the Wisconsin Department of Financial Institutions. (A true and correct copy of that Amendment is attached hereto as Exhibit B.) The Amendment provides that the name of the corporation is changed from Alternative Entertainment, Inc. to WeConnect, Inc.

5. I recently consulted public records on the Wisconsin Department of Financial Institutions website. On that website is a public record headed as "WECONNECT, INC." which indicates, in relevant part, that the "Old Name" of the corporation was "Alternative Entertainment, Inc." and that, on August 15, 2016, the "Current" name of the corporation became "WeConnect, Inc." The report also indicates that, on August 18, 2016, an "amendment" was "filed" and that the "Old Name = Alternative Entertainment, Inc." (A true and

correct copy of that report is attached hereto as Exhibit C.)

6. The corporation formerly known as Alternative Entertainment, Inc. continues to exist as a Wisconsin corporation, now known as WeConnect, Inc.

7. Since WeConnect Enterprise Solutions, LLC came into existence in 2012, it has never merged with Alternative Entertainment, Inc. a/k/a WeConnect, Inc. WeConnect Enterprise Solutions, LLC had no role in the August 2016 change of AEI's name to WeConnect, Inc., and WeConnect Enterprise Solutions, LLC remains a separate and distinct entity.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 30th day of January, 2018.

/s/ Brick N. Murphy
Brick N. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BROOKS GOPLIN,
Individually and on behalf
Of all others similarly situated,

Plaintiff,

Case No. 17-cv-773

v.

WECONNECT, INC.,

Defendant.

DECLARATION OF KEVIN LECLOUX

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1. I, Kevin LeCloux, pursuant to 28 U.S.C. § 1746, state as follows:

2. I am an adult resident of the State of Wisconsin, fully competent to make this Declaration and I have personal knowledge of the facts set forth in this Declaration.

3. I am employed by WeConnect, Inc.—formerly known as Alternative Entertainment, Inc. or AEI—as Director of Human Resources. I have been employed by WeConnect since December 28, 2015.

4. Brooks Goplin was an employee of WeConnect from February 27, 2017 until he informed his location manager that he was resigning as of August 29, 2017. Goplin's last day of actual work at WeConnect was August 27, 2017.

5. On March 2, 2017, Goplin agreed to and signed WeConnect's Open Door Policy and Arbitration Program agreement ("Arbitration Agreement") and did not revoke it. Attached hereto and marked as "**Exhibit 1**" is a true and correct copy of Goplin's Arbitration Agreement.

6. Under the Arbitration Agreement, Goplin agreed that either he or WeConnect may exclusively elect to submit, among other things, wage and hour disputes to binding arbitration before the American Arbitration Association ("AAA"). The Arbitration Agreement also provided that, Goplin waived his right to pursue such claims in Court if either Goplin or WeConnect elected to arbitrate those claims. The Arbitration Agreement states in relevant part:

> ***What is Arbitration?***
> Arbitration is a method of resolving disputes by using a neutral third party, called an arbitrator, to hear and decide an issue. If certain disputes or claims cannot be solved through AEI's open door policy or other informal measures, either you or AEI may elect to exclusively settle the dispute through binding arbitration. If either party elects to pursue arbitration, the arbitrator's decision is final and the matter will not be brought or heard in a court of law or tried before a jury.
>
> ***What types of Disputes Are Subject to Arbitration?***
> Specifically, by agreeing to this policy, you agree that in consideration for your employment and in exchange for promises made by

> AEI, Inc. ("AEI" or the "Company"), both you and AEI understand and agree that either one may elect to resolve the following types of disputes exclusively through binding arbitration: 1. Disputes between you and AEI (or any of its affiliates, officers, directors, managers or employees) relating to your employment with the Company (including but not limited to: (1) claims of discrimination under federal, state or local laws, (2) claims regarding compensation, including overtime; (3) claims regarding promotion, demotion, disciplinary action, and/or termination; and (4) claims regarding the application or interpretation of any of the terms of this agreement).

7. The Arbitration Agreement also expressly provides that all claims shall be brought on an individual basis:

> ***What Am I agreeing To by Signing This Policy?***
> By signing this agreement, among the other provisions in this document, you and AEI agree that if either party to a dispute chooses to arbitrate a claim involving the types of disputes described above, then the other party may not file or maintain a lawsuit in a court. The only claims not subject to this agreement are those which the law declares "nonarbitrable," or not subject to arbitration. Claims with administrative agencies, such as workers' compensation claims would not be subject to this agreement.

> By signing this policy, you and AEI also agree that a claim may not be arbitrated as a class action, also called "representative" or "collective" actions, and that a claim may not otherwise be consolidated or joined with the claims of others.

8. The Arbitration Agreement requires that the arbitration of any such claims take place in Green Bay, Wisconsin.

9. WeConnect has elected to arbitrate the claims asserted by Goplin in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 3rd day of November, 2017.

s/Kevin LeCloux
Kevin LeCloux

AEI_ALTERNATIVE ENTERTAINMENT, INC. OPEN DOOR POLICY AND ARBITRATION PROGRAM

What is the Open Door Policy?

Alternative Entertainment, Inc. ("AEI") advocates an open door and communication policy and encourages employees to exchange suggestions and constructive comments with management. If an issue arises, you should always try to go through your normal lines of supervision first, but if you feel your comments, questions or complaints are not being heard or adequately addressed, you can request a meeting with any member of management to directly discuss any matter. It is AEI's policy to provide employees with the opportunity to express their complaints or concerns formally or informally and, if need be, to involve higher levels of management in solving the problem. AEI cannot solve a problem if it does not know about it.

What is Arbitration?

Arbitration is a method of resolving disputes by using a neutral third party, called an arbitrator, to hear and decide an issue. If certain disputes or claims cannot be solved through AEI's open door policy or other informal measures, either you or AEI may elect to exclusively settle the dispute through binding arbitration. If either party elects to pursue arbitration, the arbitrator's decision is final and the matter will not be brought or heard in a court of law or tried before a jury.

What Types of Disputes Are Subject to Arbitration?

Specifically, by agreeing to this policy, you agree that in consideration for your employment and in exchange for promises made by AEI, Inc. ("AEI" or the "Company"), both you and AEI understand and agree that either one may elect to resolve the following types of disputes exclusively through binding arbitration:

1. Disputes between you and AEI (or any of its affiliates, officers, directors, managers or employees) relating to your employment with the Company (including but not limited to: (1) claims of discrimination under federal, state or local laws, (2) claims regarding compensation, including overtime; (3) claims regarding promotion, demotion, disciplinary action, and/or termination; and (4) claims regarding the application or interpretation of any of the terms of this agreement).

2. Disputes between you and another employee of the Company relating to that employee's employment with the Company, including but not limited to: (1) claims of discrimination under federal, state or local laws, (2) claims regarding compensation, including overtime; (3) claims regarding promotion, demotion, disciplinary action, and/or termination; and (4) claims regarding the application or interpretation of any of the terms of this agreement).

What Am I Agreeing To by Signing This Policy?

By signing this agreement, among the other provisions in this document, you and AEI agree that if either party to a dispute chooses to arbitrate a claim involving the types of disputes described above, then the other party may not file or maintain a lawsuit in a court. The only claims not subject to this agreement are those which the law declares "nonarbitrable," or not subject to arbitration. Claims with administrative agencies, such as workers' compensation claims would not be subject to this agreement.

By signing this policy, you and AEI also agree that a claim may not be arbitrated as a class action, also called "representative" or "collective" actions, and that a claim may not otherwise be consolidated or joined with the claims of others.

This agreement represents the intent of both you and the Company to arbitrate disputes that may arise in accordance with this Agreement. If any clause, provision or section of this Agreement is ruled invalid or unenforceable by any court of competent jurisdiction, the invalidity or unenforceability of such clause, provision or section shall not affect any remaining clause, provision or section hereof. However, to the extent this class/collective action waiver is found to be unlawful and/or unenforceable, from that point forward the collective claim will not be covered by this agreement and may be pursued in a court of law unless and until the claim ceases to be part of a class-action, representative-action or consolidated case. That is, if a claim is

removed from a class-action, representative-action or is no longer part of a consolidated case, the claim will once again be covered by this agreement, and the party defending such claim may choose to have the dispute resolved through binding arbitration.

Who Pays for Arbitration?

If you choose to file a claim, the Company will, within 60 days after the claim has been accepted by the AAA for filing, reimburse you for the administrative costs associated with filing the claim for arbitration. The Company will otherwise pay or share arbitration costs and fees, as determined by the arbitrator. You will be responsible for paying your own legal fees associated with the arbitration as they are incurred throughout the process should you decide to hire an attorney.

Where Would the Arbitration Take Place, and What Rules Would Apply?

Arbitrations under this agreement will take place in Green Bay, Wisconsin. The Employment Arbitration Rules and Mediation Procedures (formerly the National Employment Dispute Resolution Rules) of the American Arbitration Association ("AAA") will apply. As recognized in the employment dispute resolution rules of the AAA, the dispute will be heard and resolved by *one* neutral arbitrator. These rules permit adequate discovery, empower the arbitrator to award all remedies otherwise available in a court of competent

jurisdiction and require the arbitrator to enter a written decision that may be judicially reviewed. Any court of competent jurisdiction may enforce the arbitrator's award.

What Rights Do I and AEI Waive Under This Agreement?

By signing this agreement, you and the Company give up the same important rights, such as filing or maintaining a lawsuit in a court, joining or participating in a class action or a representative action, acting as a representative of others, having a jury decide a claim, and exercising in an arbitration proceeding the same procedural, pre-trial discovery, and appellate rights that you or the Company would enjoy in a court or judicial proceeding. You and the Company agree to relinquish these rights because you and the Company believe that arbitration represents a fair, fast, and mutually-beneficial process for resolving workplace disputes. However, nothing in this Agreement is intended to limit your ability to recover any remedies that may be available by statute.

When Must I Demand Arbitration?

By signing this agreement, you and the Company also agree **that any claim or dispute relating to your employment with the Company that is not resolved first through the open door policy or other informal measures must be filed in**

accordance with this agreement no more than *six (6) months* after the date of the employment action that is the subject of the claim or dispute. This paragraph is not intended to limit any substantive rights you may have under any applicable statute.

Notices and Acknowledgements

It is important that you read carefully and understand this agreement before signing it. If you do choose to sign the Agreement, the date on which you sign the Agreement will be the "execution date." You and the Company also agree that this Agreement will not become effective until seven (7) calendar days after the time you sign this agreement, and that you may revoke your acceptance by written notice to the Company within seven (7) calendar days. If written notice of revocation is not received by the Company by the eighth (8th) day after the execution date, the agreement will become effective and enforceable.

This agreement is not an employment contract and does not change your status as an at-will employee of the Company.

This agreement is the sole and entire agreement between the Company and you on the subject of arbitration of disputes and supersedes any prior or contemporaneous written or oral agreements and/or understandings on this subject.

I ACKNOWLEDGE THAT I HAVE READ THE FOREGOING CAREFULLY, HAD THE OPPORTUNITY TO ASK ANY QUESTIONS OR CONSULT WITH AN ATTORNEY BEFORE SIGNING, AND AM VOLUNTARILY ENTERING INTO THIS AGREEMENT. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO A JURY OR COURT.

Date: 3/2/2017 /s/ Brooks Goplin
Employee Name:
Brooks Goplin

Alternative Entertainment, Inc.

Date: _____ By: _____
Its: _____