No. 22-

IN THE

Supreme Court of the United States

GINGER ATHERTON,

Petitioner,

v.

KEY BANK, N.A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When there is a valid and enforceable agreement to arbitrate, and the dispute is within the scope of the arbitration agreement, does the FAA preempt state courts from construing their statutes to allow courts, not arbitrators, primary jurisdiction to decide whether conditions precedent that were not as to arbitrability have occurred?

2. When there is a valid and enforceable agreement to arbitrate, and the dispute is within the scope of the arbitration agreement, does the FAA prohibit state courts from looking through a motion to compel arbitration to decide whether an unfulfilled condition precedent has excused a party's failure to perform its obligations under the agreement?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Ginger Atherton. The Respondent is Key Bank, N.A. Defendants are Henry Dean, as trustee for the Sharon Graham Bingham 2007 Trust; the Estate of Scott Bingham; Kelly Bingham; Umpqua Bank; Opus Bank, as successor-in-interest to Cascade Bank; Washington Federal, N.A., itself and as successor-in-interest to Horizon Bank; Washington Federal, N.A.; Washington Trust Bank; First Citizens Bank and Trust Co., as successor-in-interest to Venture Bank; State of Washington Dept. of Revenue; Centrum Financial Services, Inc., MUFG; Union Bank, N.A., itself and as successor-in-interest to Frontier Bank; Pearlmark Real Estate Partners; Pearlmark Mezzanine Realty Partners II, LLC; LVB-Ogden Marketing, Inc., LLC.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

1. The 2016 foreclosure action.

    - King County, Washington, Superior Court

    - No. 16-2-06689-5 SEA, *Key Bank, N.A., v. Henry Dean, as trustee for the Sharon Graham Bingham 2007 Trust; the Estate of Scott Bingham; Kelly Bingham; Umpqua Bank; Opus Bank, as successor-in-interest to Cascade Bank; Washington Federal, N.A., itself and as successor-in-interest to Horizon Bank; Washington Federal, N.A.; Washington Trust Bank; First Citizens Bank and Trust Co., as successor-in-interest to Venture Bank; State of Washington Dept. of Revenue; Centrum Financial Services, Inc., MUFG; Union Bank, N.A., itself and as successor-in-interest to Frontier Bank; Pearlmark Real Estate Partners; Pearlmark Mezzanine Realty Partners II, LLC; LVB-Ogden Marketing, Inc., LLC.*

    - December 2, 2021, Amended Order for Judgment and Decree of Foreclosure and Sale.

2. The August, 2021 motion to compel arbitration.

    - King County, Washington, Superior Court

    - No. 16-2-06689-5 SEA, *Key Bank, N.A., v. Henry Dean, as trustee for the Sharon Graham Bingham 2007 Trust; the Estate of Scott Bingham; Kelly Bingham; Umpqua Bank; Opus Bank, as successor-in-interest to Cascade Bank; Washington Federal, N.A., itself and as successor-in-interest to Horizon Bank; Washington Federal, N.A.; Washington Trust Bank; First Citizens Bank and Trust Co., as successor-in-interest to Venture Bank; State of Washington Dept. of Revenue; Centrum Financial Services, Inc., MUFG; Union Bank, N.A., itself and as successor-in-interest to Frontier Bank; Pearlmark Real Estate Partners; Pearlmark Mezzanine Realty Partners II, LLC; LVB-Ogden Marketing, Inc., LLC.*

    - Final orders entered August 10, 2021.

3. The 2021-2022 appeal.

    - Court of Appeals of the State of Washington, Division 1.

    - No. 831046-I, *Key Bank, N.A., v. Ginger Atherton.*

- Unpublished Opinion July 25, 2022.

4. The 2022 Petition for Review.

    - Supreme Court of the State of Washington.

    - No. 101301-9, *Ginger Atherton v. Key Bank, N.A.*

    - Order Terminating Review entered January 4, 2023.

5. The 2023 appeal on order confirming sale and allowing distribution of supersedeas.

    - Court of Appeals of the State of Washington, Division 1.

    - No. 850971-I, *Key Bank, N.A., v. Henry Dean*.

    - Pending.

6. The 2023 motion to compel arbitration.

    - King County, Washington, Superior Court.

    - No. 16-2-06689-5 SEA, *Key Bank, N.A., v. Henry Dean, as trustee for the Sharon Graham Bingham 2007 Trust; the Estate of Scott Bingham; Kelly*

Bingham; Umpqua Bank; Opus Bank, as successor-in-interest to Cascade Bank; Washington Federal, N.A., itself and as successor-in-interest to Horizon Bank; Washington Federal, N.A.; Washington Trust Bank; First Citizens Bank and Trust Co., as successor-in-interest to Venture Bank; State of Washington Dept. of Revenue; Centrum Financial Services, Inc., MUFG; Union Bank, N.A., itself and as successor-in-interest to Frontier Bank; Pearlmark Real Estate Partners; Pearlmark Mezzanine Realty Partners II, LLC; LVB-Ogden Marketing, Inc., LLC.

- Final Order/motion for rehearing pending.

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Petitioner Ginger Atherton respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

Key Bank v. Atherton, 200 Wash.2d 1024, 522 P.3d 48 (2023). App. 1a.

Key Bank, N.A. v. Atherton, 22 Wash. App. 2d 1059, 2022 WL 2915540 (UNPUBLISHED) (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023). App. 7a-19a.

The August 22, 2022 Order of Court of Appeals re attorney fees and costs (App. 2a-6a), the August 31, 2021 Order of the Superior Court of Washington denying reconsideration (App. 20a), the August 10, 2021 Order of the Superior Court of Washington for Judgement and Decree of Foreclosure and of Sale (App. 21a-27a), and the August 10, 2021 Order of the Superior Court of Washington denying stay and arbitration (App. 28a-29a) are unreported.

JURISDICTION

Ginger Atherton's Petition for Review by the Washington Supreme Court was denied on January 4, 2023. The Washington Court of Appeals entered a Commissioner's Ruling Awarding Attorney Fees and Costs on August 22, 2022. Ms. Atherton invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), having timely filed this petition for a writ of certiorari within ninety days of the Washington Supreme Court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. I, § 8, cl. 3 provides: "The Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States…"

U.S. Const., art. VI, § 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Wash. Const., art. IV, § 6 provides: "Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which

jurisdiction shall not have been by law vested exclusively in some other court..."

9 U.S.C. § 1 provides: " 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

9 U.S.C. § 2 provides: "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 or as otherwise provided in chapter 4."

STATEMENT OF THE CASE

This case arose out of a 2016 judicial foreclosure action regarding two deeds of trust against real property at 721 250th Ln. NE in Sammamish, Washington (the "Property"). *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059, 2022 WL 2915540 at *1 (UNPUBLISHED) (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023) at 2. Petitioner Ginger Atherton has lived on, and made significant improvements to, the Property for a period of more than 9 years. *Id.* at *1.

On October 18, 2019, after the case went to mandatory arbitration, the parties to the foreclosure action, Key Bank (the "Bank") and the Sharon Graham Bingham 2007 Trust (the "Trust"), reached a settlement in lieu of arbitration and executed two agreements: a "Settlement Agreement" and a "Redemption Agreement." *Id.* at *1. The Settlement Agreement included a broad, enforceable agreement to arbitrate, which stated: "Any disputes related to or arising under this Agreement will be arbitrated before Stew Cogan, or if he is unwilling or unavailable to serve, then selected according to the procedure described in the Prior Settlement," which was expressly incorporated into the Redemption Agreement.

Pursuant to the Settlement Agreement, the Bank was to have signed and delivered these two agreements on or prior to October 18, 2019. Key Bank did not comply with this obligation because it signed the two agreements two months after the deadline. In exchange for its promise, the Bank received stipulations that entitled it to foreclose the deeds of trust on the Property. Pursuant to these stipulations, the Bank was able to obtain an Order Authorizing the Sale of the Property.

The Redemption Agreement gave Atherton a "Redemption," defined as the right to purchase the Property from the Bank for $1.6 million. *Id.* at *1. The Redemption was expressly stated to be "among the consideration" for the promises in the Settlement Agreement. The Redemption Agreement, while stating that the Bank was entitled to foreclose its security interest in the Property, also obligated the Bank to credit bid the full amount of the debt, accrued interest, attorney fees, and costs at any foreclosure sale (at least $4.2 million). *Id.* at *1. If the Bank was the successful bidder at the foreclosure sale and acquired title to the Property, then Ginger Atherton could exercise the Redemption. *Id.* at *1. If the Bank did not acquire title, then the Bank was obligated to pay Atherton the amount bid less $3 million. *Id.* at *1. The Settlement Agreement required at ¶ 11 that any disputes related to or arising under the Settlement Agreement had to be arbitrated. *Id.* at *3. The Redemption expired in accordance with its terms on June 1, 2020. *Id.* at *3. Every party's heirs and assigns were to be bound by the Settlement Agreement.

In 2020, the Trust assigned its "right, title and interest" in the Agreements to Ginger Atherton. *Id.* at *1.

On June 29, 2021, the Bank finally filed a Motion for Judgment and Decree of Foreclosure and Order of Sale. *Id.* at *1. But this was after real estate values rapidly increased. KeyBank provided no notice to Ginger Atherton.

Ginger Atherton filed an emergency motion to compel arbitration, *id.* at *1, on July 13, 2021. She argued that the parties should be compelled to arbitrate the validity

of the trust's stipulation that KeyBank obtained from the settlement agreement and whether KeyBank failed to perform under the settlement agreement. *Id.* at *1.

The Bank opposed Atherton's motion based on three condition precedent arguments that affected only the timing of the arbitration. The Bank did not, however, dispute there was an enforceable agreement to arbitrate or that the dispute should be arbitrated. KeyBank argued that it did not have to give Atherton notice because she was not a party. The Bank argued instead that Atherton's Redemption had not yet sprung into existence because the Bank had to first acquire title to the Property before she could exercise her Redemption. This, however, went to the merits of the arbitrable dispute between Atherton and the Bank.

Atherton replied on July 23, 2021, wherein she advised the Court she had spent $600,000 to maintain, repair, and improve the Property, relying on the Bank to fulfill its promise to credit bid and acquire title to the Property by June 1, 2020. Atherton explained that at time of the Settlement Agreement, the likelihood of a bidder offering $4.6 to $4.8 million was not great—in other words, it was unlikely a third party would outbid the Bank. But because Atherton had made improvements beyond June 1, 2020, and due to the dramatic increase in local property values, the fair market value of the Property had jumped to between $5.5 and $6 million. If the Bank were outbid, then Atherton would receive only $1.8 million in cash rather than the right to buy her home for $1.6 million, which was worth $5 - $6 ($3.4 – 4.4 million in equity). Because the Bank's breach of the agreements was arbitrable, the only way Atherton could remedy the Bank's breach was to arbitrate her claims with the selected arbitrator.

The trial court denied Atherton's motion (App. 28a-29a) and entered an Order for Judgment and Decree of Foreclosure and of Sale. *Id.* at *1; App.21a-27a. It also decided the merits of the arbitrable dispute regarding the Bank's condition precedent arguments and the arbitration's timing by denying Atherton's motion to compel arbitration "without prejudice" pending completion of a sheriff's sale. *See id.* at *3; App. 28a-29a.

Atherton moved for reconsideration. *Id.* at *1. She argued RCW 7.04A.070(5) requires that if a party filed a motion to order arbitration, then the court must stay an action until entry of a final order. She further argued that once the arbitration motion was filed, the trial court should not have considered the merits of the underlying foreclosure until it rendered a final decision on the arbitration motion, citing RCW 7.04A.070(3), and that the court was required to decide the matter summarily. The court denied reconsideration. *Id.* at *1. App. 20a.

Atherton appealed. *Id.* at *2. The Washington Court of Appeals affirmed the trial court in an unpublished opinion entered July 25, 2022. *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023). The Court of Appeals stated, "Atherton contends the trial court took on a role reserved for an arbitrator by deciding a condition precedent to arbitrability. But the condition she identifies as a right to redeem if Key Bank prevails at a pending sheriff's sale is not a condition precedent to arbitrability." *Id.* at *1. In a footnote, the Court of Appeals stated:

> There is no Washington case that addresses the issue of whether the trial court can compel

> a premature nonjusticiable claim to arbitration. And there does not appear to be a consensus on this issue in other jurisdictions. For example, in *Bunker Hill Park Ltd. v. U.S. Bank National Ass'n*, a California appellate court held "all a petitioner is required to show before arbitration 'shall' be ordered is the existence of a valid agreement to arbitrate the issue underlying the petition and the opposing party's refusal to arbitrate the controversy." 231 Cal. App. 4th 1315, 1329, 180 Cal. Rptr. 3d 714 (2014). But in *Lower Colorado River Authority v. Papalote Creek II, LLC*, the Fifth Circuit Court of Appeals held that in deciding whether to grant or deny a motion to compel arbitration "we must 'look through' the petition to compel arbitration in order to determine whether the underlying dispute presents a sufficiently ripe controversy to establish federal jurisdiction." 858 F.3d 916, 922 (5th Cir., 2017). It appears that the trial court in rendering its decision here "looked through" Atherton's motion to compel arbitration in determining that a condition precedent, the foreclosure sale, must be met before either a trial court or an arbitrator could reach the merits of her claims. But based upon this record and limited briefing, we decline to further address this issue.

Key Bank, N.A. v. Atherton, 22 Wash. App. 2d 1059, 2022 WL 2915540, n.17 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023).

The Washington Court of Appeals then denied a motion for reconsideration and entered an order on August

22, 2022, awarding $74,229.06 in attorney fees and costs to Key Bank. App. 2a-6a.

Atherton petitioned the Washington State Supreme Court for review. Second Am. Pet. for Review. That court denied her petition and entered an Order Terminating Review on January 4, 2023. *Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023).

In the state court proceedings, the parties timely and properly raised the federal questions arising under the Federal Arbitration Act and the United States Constitution.

In 2016, the Bank asserted the FAA applies when it successfully moved to compel arbitration. Its briefing cited *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 46, 17 P.3d 1266, 1269 (2001)(Stein agreed to submit any unresolved dispute to binding arbitration governed by the procedures of the Federal Arbitration Act); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash. App. 446, 453, 45 P.3d 594, 599 (2002), *as amended* (June 6, 2002)(addressing whether Mendez's statutory claims were subject to arbitration under chapter 7.04 RCW, or 9 U.S.C. § 10, the Federal Arbitration Act (FAA), or both.); *Meat Cutters Loc. # 494 Affiliated with Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Rosauer's Super Markets, Inc.*, 29 Wash. App. 150, 160, 627 P.2d 1330, 1335 (1981)(parties were deemed to have drafted the collective bargaining agreement against the backdrop of the strong federal policy favoring arbitration). The Bank successfully compelled arbitration.

Atherton brought a July 13, 2021 motion to compel arbitration, which was denied. App. 28a-29a. In her motion

at 8, she cited an FAA case, *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 301, 103 P.3d 753 (2004) when arguing that arbitration is strongly favored. *Zuver* quotes the Federal Arbitration Act, where it provides, "Section 2 of the FAA provides that written arbitration agreements '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. § 2." *Zuver*, 153 Wash.2d at 301.

The argument was also validly raised in Atherton's opening brief filed with the Washington state Court of Appeals on January 12, 2022 in case no. 83104-6-I. Ginger Atherton's Opening Br., 17. Argument was confined solely to staying the underlying action pending final order. She asserted there was a valid agreement to arbitrate, citing at 18, *Janiga v. Questar Cap. Corp.*, 615 F.3d 735 (7th Cir., 2010). This case states, "Since Janiga does not challenge the validity of the arbitration clause itself, the district court should have constrained its review to the narrow question whether a contract existed between the parties." *Id.* at 742.

In Key Bank's response brief filed February 23, 2022, in no. 83104-6-I, it attacked the agreement to arbitrate, taking the position that Atherton was not an assignee. Corrected Brief of Respondent, 29. This argument had been rejected by the trial court, and there was no cross appeal. Additionally, Key Bank raised a factual affirmative defense that an unfulfilled condition precedent excused its nonperformance. *Id.* at 55. In its response brief, cases on which Key Bank relied included *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 362, 103 P.3d 773 (2004); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912 (3d

Cir., 1992); *Townsend v. Quadrant Corp.*, 173 Wash.2d 451, 268 P.3d 917 (2012); *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791 (9th Cir., 2017); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 225 P.3d 213 (2009) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

In Atherton's appellate reply brief filed March 16, 2022, she moved to strike any review other than the existence of an agreement to arbitrate and the scope of arbitration because the arbitrator, and not the courts, had primary subject matter jurisdiction to decide other issues, specifically as it related to Key Bank's unfulfilled condition precedent arguments. Ginger Atherton's Reply Br., 7-30. ("This Court should strike and not consider any arguments outside these issues because courts do not have the authority to decide those issues. This Court should reverse the trial court's rulings that were based on unfulfilled conditions precedent theories the Bank argued because they exceed the court authority to decide motions to compel arbitration." Ginger Atherton's Reply Br., 18.) She also cited *Howsan v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002), to support her argument that the Bank's waiver and estoppel by delay, and unfulfilled conditions precedent arguments, were outside the trial court's and the appellate court's authority to decide. Ginger Atherton's Reply Br., 15. She also cited an authority referencing the importance of the law that has developed under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Ginger Atherton's Reply Br., 13.

When the Court of Appeals issued its opinion, although requested to do so, it never determined whether it, or the trial court, had primary subject matter jurisdiction to

decide Key Bank's factual affirmative defenses that an unfulfilled condition precedent excused its failure to timely deliver the Settlement Agreement and Redemption Agreement. Instead, the Court of Appeals assumed that it, and the trial court, had primary subject matter jurisdiction to decide the condition precedent issue in the first instance because it was not a condition precedent to arbitrability. The Court of Appeals stated: "Atherton contends the trial court took on a role reserved for an arbitrator by deciding a condition precedent to arbitrability. But the condition she identifies as a right to redeem if Key Bank prevails at a pending sheriff's sale is not a condition precedent to arbitrability." *Key Bank, N.A. v. Atherton*, 22 Wash. App.2d 1059 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash.2d 1024, 522 P.3d 48 (2023).

Not until the Court of Appeals decision was announced (impliedly denying Atherton's Motion to Strike and assert primary jurisdiction to decide Key Bank's unfulfilled condition precedent factual affirmative defense) did Atherton know that the Court of Appeals would construe Washington state's Revised Uniform Arbitration Act (Wash. Rev. Code § 7.04A), to give the judiciary primary subject matter jurisdiction over the unfulfilled condition precedent issue.

She then squarely raised the issue in her September, 2022 Petition for Review to the Washington Supreme Court (as amended):

> Does the Opinion Violate the U.S. Constitution's Supremacy Clause by Determining Condition Precedent Issues Federal Courts Prohibit Courts from Deciding? Yes. Conflict

> Preemption prohibits states from interfering with the Federal Arbitration Act, 9 U.S.C. §1, et. seq. ("FAA"), which requires enforcement of agreements to arbitrate that "involve interstate commerce." The Bank is a national banking association engaging in lending, foreclosing, and real property transactions nationwide. Bank, and the industry it is involved in, broadly impact the economy and are subject to federal control. The FAA's substantial body of federal substantive law applies, but federal courts have decided this issue contrary to the Opinion to such an extent that it is now impossible to comply with both the federal and state acts at the same. The RUAA, therefore, is an obstacle to the FAA accomplishing Congress' full purposes and objectives. RAP 13.4(b)(3) and (4).

Second Am. Pet. for Review, 4. As stated above, Washington Supreme Court however denied the Petition for Review. App. 1a.

REASONS FOR GRANTING THE PETITION

A. The FAA Applies to the Agreement to Arbitrate in the Settlement Agreement.

1. The FAA Applies to Agreement Entered into by Lenders and Their Subsidiaries.

The FAA "encompasses a wider range of transactions than those actually 'in commerce' – that is 'within the flow of interstate commerce.'" *Citizens Bank of Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L.Ed.2d (2003)

citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130, L.Ed.2d 753 (1995). It requires "enforcement of arbitration agreements within the full reach of the Commerce Clause." *Citizens Bank*, 539 U.S. at 56, citing, *Perry v. Thomas*, 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987). The FAA even requires arbitration enforcement when the contract at issue may not have "any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent 'a general practice…subject to federal control'" *Citizens Bank* at 56-57.

Like this case, *Citizens Bank* determined the FAA applied to compel arbitration under the parties' debt restructuring agreement even though it was executed in Alabama, by Alabama residents, and there was no showing that particular agreement had any effect on interstate commerce. This Court held, "No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause." *Citizens Bank,* at 58, citing *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 38–39, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

2. The Bank was the First Party to Assert the FAA Applied to Settlement Agreements in the Foreclosure Proceedings.

In 2011 Key Bank signed a written Settlement Agreement to settle hundreds of millions of dollars in claims that the other parties to the Settlement Agreement had commenced against KeyBank in the United States District Court for the Western District of Washington.

That action was commenced against Key Bank due to its participation in an unlawful Ponzi scheme that caused the plaintiffs to lose their entire family wealth. Key Bank was being sued for over $200 million. The 2011 Settlement Agreement restructured the deficiency debts Key Bank alleged were still owed and the claims against it were dismissed. The 2011 Settlement Agreement also contained its own agreement to arbitrate.

In 2016 the Bank commenced this foreclosure proceeding seeking to foreclose both its first deed of trust (principal balance $2 million) and its second deed of trust (principal balance $500,000). The Bank, however, had declared a default and accelerated the principal balances on the notes that were secured by the Deeds of Trust. The statute of limitations in Washington to enforce a written promissory note was six (6) years. RCW 4.26.040(1); and *Barnes v. McLenton* , 128 Wash.2d 563, 569, 910 469, 472 (1996). There was, therefore, a cognizable statute of limitations defense to the Bank's attempt to foreclose either the first or the second Deed of Trust.

Moreover, there was also a cognizable release affirmative defense to Key Bank's action to foreclose its first deed of trust. The 2011 Settlement Agreement had a broad mutual release provision, but there were a few minor carve-outs to the release. One carve-out was the Bank's ability to foreclose its second deed of trust. There was no similar carve-out for the first deed of trust. That claim, therefore, was within the broad release.

After Key Bank commenced the foreclosure proceedings, the Trust and its beneficiaries raised both the statute of limitations and release affirmative defenses.

Once the Trust raised these affirmative defenses, the Bank filed a motion to compel arbitration. Its motion cited two Washington cases that compelled arbitration pursuant to the FAA: *Stein v. Geonerco, Inc.*, 105 Wash. App. 41, 46, 17 P.3d 1266 (2001); and *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash. App. 446, 453, 45 P.3d 594 (2002), as amended (June 6, 2002). The parties then submitted their disputes to arbitration. The Bank, therefore, was the party that initially asserted the FAA applied to the parties' relationship and their settlement agreements.

B. Washington's State Courts Violated the United States Constitution's Supremacy Clause.

1. The FAA Constructively Preempts State Statutes from Vesting Primary Jurisdiction to Determine Arbitrable Issues in Either its Judiciary or its Administrative Agencies.

The Federal Arbitration Act "establishes a national policy favoring arbitration" when parties agree to arbitrate their disputes. The substantive law created by the FAA must be applied "in state as well as federal courts…" *Preston v. Ferrer*, 552 U.S. 346, 349, 128 S. Ct. 978, 981, 169 L. Ed. 2d 917 (2008), citing, *Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984). In *Preston*, this Court held, "when parties agree to arbitrate all questions arising under a contract, state laws lodging *primary jurisdiction* in another forum, whether *judicial* or administrative, are superseded by the FAA. *Preston v. Ferrer*, 552 U.S. at 349–50, 128 S. Ct. 978, 981 (emphasis supplied).

Under *Preston,* the FAA superseded the state court's original subject matter jurisdiction and granted

the Arbitrator Stew Cogan the primary subject matter jurisdiction to decide the Bank's condition precedent defense in the first instance. The FAA having done so, required the state court to respect this Court's Opinion in *Preston*, recognize the Arbitrator has primary subject matter jurisdiction to decide the Bank's condition precedent defense. The state courts, however, did not do any of these things. They ignored this Court's Opinions, they construed state statutes to give themselves primary subject matter jurisdiction to decide the Bank's condition precedent defense, and they decided the Bank's defense on the merits. This is contrary to *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21, 133 S. Ct. 500, 503, 184 L. Ed. 2d 328 (2012), which requires the state court to respect the United States' Supreme Court's decisions as they relate to the FAA and not decide arbitrable issues on the merits.

2. The United State Constitution's Supremacy Clause Requires State Courts to Respect this Court's Decisions Regarding the FAA when Determining Whether to Compel Arbitration.

Four years after *Preston* was decided, this Court made clear the United States Constitution's Supremacy Clause requires state courts to respect its decisions interpreting the FAA. It said, "It is this Court's responsibility to say what a statute means, and once it has spoken, it is the duty of other court to respect that understanding as the governing rule of law." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21, 133 S. Ct. 500, 503, 184 L. Ed. 2d 328 (2012), quoting, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L.Ed.2d 274 (1994). It then held the Oklahoma State Supreme Court "*must* abide by the FAA, which is 'the supreme Law of

the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law." *Nitro-Lift*, 568 U.S. at 21, 133 S. Ct. at 503."

In *Nitro-Lift*, there was an agreement to arbitrate contained within each of two employment agreements that also contained non-competition provisions. *Nitro-Lift*, 568 U.S. 17, 18, 133 S. Ct. 500, 501–02. The employer demanded two former employees arbitrate its claims that they breached their noncompetition agreement. *Id.* 568 U.S. 17, 18, 133 S. Ct. 500, 502.

The employees filed suit in state court and sought to have the noncompetition agreements declared to be unenforceable under state law and enjoin their enforcement. *Id.* The trial court dismissed their complaint because the issue was within the scope of disputes covered in an agreement to arbitrate. *Id.*

The Oklahoma State Supreme Court retained the former employees' appeal and issued an order to show cause why it should not declare the noncompetition provisions unenforceable under its state law. *Nitro-Lift,* 568 U.S. 17, 19, 133 S. Ct. 500, 502. The former employer argued the employment agreement's arbitration provision was subject to the FAA and both federal and state courts were required to compel the matter to be arbitrated. *Id.* The Oklahoma Supreme Court disagreed with the former employer and concluded the "existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement." *Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, ¶ 15, n. 20, ¶ 16, 273 P.3d 20, 26, n. 20, 27 (2012). It found the noncompetition agreements unenforceable because they were against Oklahoma's public policy as set forth in its statutes. *Id.*

This Court accepted the former employer's Petition for Writ of Certiorari and issued a Writ vacating the Oklahoma Supreme Court's Order, stating,

> 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. Here, the Oklahoma Supreme Court failed to do so. By declaring the noncompetition agreements in two employment contracts null and void, rather than leaving that determination to the arbitrator in the first instance, the state court ignored a basic tenet of the Act's substantive arbitration law. The decision must be vacated.

Nitro-Lift, 568 U.S. at 17–18, 133 S. Ct. at 501

This case is no different and no less important than *Nitro-Lift*. The Washington appellate courts have interpreted its state's Revised Uniform Arbitration Act, Ch. 7.04A, RCW, to allow themselves to usurp an arbitrator's primary jurisdiction and power to decide, in the first instance, the merits of a contract dispute by interpreting the contract and then excuse a breaching party from liability if the court determines the provision is an unfulfilled condition precedent. *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059, *1 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash. 2d 1024, 522 P.3d 48 (2023). To do so, it construed RCW 7.04A.060(1) as granting its state courts primary jurisdiction to determine

conditions precedent if they have "no procedural effect on arbitrability." *Key Bank*, 22 Wash. App. 2d at *3.

Washington's interpretation of its RCW 7.04A.060(1) is directly opposite to this Court's year-after-year admonishments to state and lower federal courts that arbitrators have the primary jurisdiction over the merits of a contract dispute within which there is an agreement to arbitrate. Moreover, this Court's look through approach is limited to federal courts that must determine whether there is an independent basis for federal jurisdiction to establish their subject matter jurisdiction. It cannot be used to determine the merits of a contract dispute. For these reasons, this Court should accept and grant this Petition, and issue a writ vacating the Washington Supreme Court's denial of Atherton's Petition to Review and instruct it to grant it because arbitrators have primary subject matter jurisdiction or power to decide conditions precedent disputes that are not as to arbitrability.

C. The FAA Prohibits State Courts from Interpreting State Statutes to Divest an Arbitrator's Primary Jurisdiction to Decide, in the First Instance, Condition Precedent Issues that are not as to Arbitrability.

1 The FAA vests Arbitrators, and not the Courts, with Primary Jurisdiction to Determine the Merits of a Contract Dispute.

In *Preston*, this Court held state statutes cannot place primary jurisdiction to decide the merits of a dispute in either state courts or state administrative agencies. *Preston*, 552 U.S. 346, 349, 128 S. Ct. 978, 981. In *Nitro-*

Lift this Court prohibited state courts from construing state statutes in a way that allows them to usurp an arbitrator's primary jurisdiction and power to decide the merits of an arbitrable dispute. 568 U.S. at 17–18, 133 S. Ct. at 501.

The Washington state courts have done what *Preston* and *Nitro-Lift* hold they cannot do. The Washington Court of Appeals vested in itself, and by extension in all its inferior trial courts, primary subject matter jurisdiction to determine conditions precedent that are not as to arbitrability. By usurping arbitrators' primary subject matter jurisdiction, it has reduced their primary subject matter to determine only conditions precedent as to arbitrability that procedural preconditions. This violates the FAA

When asked to determine whether its state courts have primary subject matter jurisdiction to decide in the first instance condition precedent issues that are not as to arbitrability, it declined. There is now a decision from the highest court in Washington that it is unwilling to review its Court of Appeals' patently improper usurpation of an arbitrator's primary subject matter jurisdiction even when the agreement to arbitrate is controlled by the FAA. It has thus put its imprimatur on and allowed its Court of Appeals to reallocate the FAA's primary subject matter jurisdiction and primary power in a way that conflicts with relevant decisions of this Court and in a manner that conflicts with decisions from other states' high courts and the federal Circuit Courts of Appeal.

The primary jurisdiction and primary power analysis begins with *First Options of Chicago, Inc. v. Kaplan*,

514 U.S. 938, 942, 115 S. Ct. 1920, 1923, 131 L. Ed. 2d 985 (1995). There, this Court distinguished between a dispute's merits, a dispute's arbitrability, and who has the primary power to decide arbitrability issues. After distinguishing between these three disputes, this Court only addressed who has the primary power to decide arbitrability issues. *First Options*, 514 U.S. at 942, 115 S. Ct. at 1923.

This Court then broke arbitrability issues into two categories and assigned burdens of proof. Because parties may have courts decide issues unless they agree otherwise, the presumption is that courts decide arbitrability issues as to contract formation and placed the initial burden on the arbitration proponent to show there is clear and unmistakable evidence that the parties agreed to arbitrate who decides arbitrability issues. *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924. Next, if the arbitration proponent proves there is an agreement to arbitrate some issues, then the presumption is reversed and the burden shifts to the arbitration opponent to prove that a particular merits-based dispute is not within an agreement to arbitrate's scope. *First Options*, 514 U.S. at 945, 115 S. Ct. at 1924.

In 2008, this Court in *Preston* prohibited state lawmakers from vesting either the state courts or its administrative agencies with primary jurisdiction to decide an arbitrable dispute's merits. *Preston*, recognized arbitrators have the primary jurisdiction to decide an arbitrable dispute's merits. This is consistent with *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568, 80 S. Ct. 1343, 1346–47, 4 L. Ed. 2d 1403 (1960) wherein this Court held, courts "have no business" considering

a claim's merits like "determining whether there is particular language in the written instrument which will support the claim."

2 Conditions Precedent that are not as to Arbitrability are Merits-Based and Courts have no Business Considering them.

The Washington state courts got it wrong when they granted themselves primary jurisdiction to decide condition precedent issues that are "not as to arbitrability," *Key Bank*, at *1 and *3. This Court described those condition precedent issues as those that govern "what its substantive outcome will be on the issues in dispute." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 36, 134 S. Ct. 1198, 1207, 188 L. Ed. 2d 220 (2014). They are, therefore, merits-based defenses, and courts have no business considering them. *United Steelworkers*, 363 U.S. at 568, 80 S. Ct. at 1346-47.

Here, the Court of Appeals' decision allows state trial court to determine Atherton had no present remedy for the Bank's admitted failure to timely deliver a signed Settlement Agreement and Redemption Agreement and promptly restart the foreclosure so the Property could be timely sold at a sheriff's sale.

The Eleventh Circuit determined condition precedent disputes that are not as to arbitrability are merits-based and are determined by arbitrators. In *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 996–97 (11th Cir., 2012), the Eleventh Circuit analyzed both Florida and New York laws and concluded conditions precedent that are a "defense of nonperformance" because they

must be satisfied "to trigger contractual duties under an existing agreement" are not conditions precedents to contact formation and, therefore, are properly decided by the arbitrator rather than the court.

Legally, Washington characterizes conditions precedent the same way. "'Conditions precedent' are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance…" "Nonperformance or nonoccurrence of a 'condition' prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. "Nonfulfillment of [a condition precedent] excuses nonperformance." *Ross v. Harding*, 64 Wash.2d 231, 236, 391 P.2d 526, 530 (1964).

Factually the condition precedent in this case is like the condition precedent in *Solymar*. Here, the state Court of Appeals decided "[a]rbitration [was] premature because the condition precedent to Atherton's option/redemption right—KeyBank's acquisition of the property after the sheriff's sale—ha[d] not yet occurred." *Key Bank*, at *3. This condition's occurrence triggered the Bank's obligation to sell the Property and created a contract right to Redemption. This condition, however, was not a condition precedent to the formation of the parties' agreement to arbitrate, and the Arbitrator, not the courts, had primary subject matter jurisdiction to decide the issue.

The Court of Appeals overly focused on a single phrase in a single statutory subsection, gave no effect to the following phrase, and ignored another subsection. The Court of Appeals focused on only the first phrase

in RCW 7.04A.060(3), that states an arbitrator "shall decide whether a condition precedent to arbitrability has been fulfilled…" *Key Bank*, at *2 (emphasis in original). It, therefore, held it and the trial court, and not the Arbitrator, had primary jurisdiction to decide the issue.

The court, however, ignored the remainder of that subsection that states "and whether a contract containing a valid agreement to arbitrate is enforceable." Contract formation, therefore, is decided by a judge, and whether a contract duty is enforceable against the promisor is to be determined by an arbitrator. Here, the Bank's condition precedent argument was asserted to excuse its failure to timely perform its contract duty. If proven, it may have impacted Atherton's ability to enforce her Redemption rights, but it did not affect whether the agreement to arbitrate was formed.

The court also ignored RCW 7.04A.070(3) that embodies the *Steelworkers* trilogy of cases and provides, "The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." This statute clarifies that arbitration cannot be refused based on merits based determinations like decisions on conditions precedent that are not as to arbitrability. Here, courts, and not the Arbitrator decided that there were no present grounds to remedy the Bank's acknowledged breach of the Settlement Agreement because it was not justiciable.

BG Grp., also differentiated between conditions precedent as to arbitrability that are substantive and those that are procedural preconditions. It then presumed courts would decide substantive conditions

precedent that went to contract formation and the scope of the disputes covered by an agreement to arbitrate. It reversed the presumption and presumed arbitrators would decide procedural preconditions. The demarcation line that separates substantive conditions precedent as to arbitrability from procedural preconditions is the latter determines *when* a contractual duty to arbitrate arises and the former determines *whether* there is a contractual duty to arbitrate at all. The order denying arbitration in this case, which denied the motion to compel arbitration without prejudice and allowed it to be brought again after the foreclosure sale, demonstrates that even if the condition precedent were a condition precedent as to arbitrability, then it was a procedural precondition because it determined when and not whether the obligation to arbitrate arises.

D. There is no Justification for the Court of Appeals to use the Look Through Approach.

Article III, section 2, of the federal constitution lists limited types of cases to be heard by the federal judiciary. Therefore, standing, in federal courts, is always required for subject matter jurisdiction, and a federal court must examine jurisdiction if the parties fail to raise the issue. *Spokeo, Inc. v. Robins*, 136 U.S. 1540, 1543, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). Because the FAA does not provide an independent basis for a federal court to obtain subject matter jurisdiction, federal courts use a limited look through approach to determine if a basis for its subject matter jurisdiction exists. *Vaden v. Discover Bank*, 556 U.S. 49, 62, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009).

Washington courts do not face such constitutional limitations, and there is no justification for them to use a look through approach. The Washington Constitution article IV, §6 affords state superior courts with original subject matter jurisdiction over enumerated issues and "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Because Washington State superior courts are not courts of limited jurisdiction, the "look-through" analysis is not appropriate.

Despite not having the same need as a federal court to use a look through approach to determine federal jurisdiction, the Court of Appeals allowed the trial court to look through the motion to compel arbitration in this case to determine that a condition precedent, the foreclosure sale, must be met before either a trial court or an arbitrator could reach the merits of her claims. See *Key Bank* at *3, n17.

The Court of Appeals cited *Lower Colorado River Authority v. Papalote Creek II, LLC* for the proposition that a court may "look-through" a petition on a motion to compel arbitration. 858 F.3d 916, 922 (5th Cir., 2017). This is correct, but only to determine jurisdiction. "Jurisdiction over the appeal, however, 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Arthur Andersen LLP v. Carlisle*, 129 S.Ct. 1896, 1900, 556 U.S. 624, 628 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 311, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996).

The Court of Appeal seemingly ignored the *Arthur Andersen* court's express prohibition upon "conflating

the jurisdictional question with the merits of the appeal." *Arthur Andersen* at 628. In doing so, the State Court also stretched *Lower Colorado* beyond its limits. The Fifth Circuit, has recently clarified *Lower Colorado River*:

> Accordingly, we find that the bulk of Specialty's arguments are for an arbitrator, not the court. Specialty's defenses predicated on pre-Arbitration Agreement conduct, material breach, and mediation do not "attack the 'making' of the agreement to arbitrate itself." *Banc One*, 367 F.3d at 429 (quoting *Prima Paint*, 388 U.S. at 404, 87 S.Ct. 1801). Instead, its defenses go right to the heart of the parties' obligations under the Settlement Agreement. These questions implicate the enforceability of the agreement, not its "very existence." *Will-Drill*, 352 F.3d at 215.

Polyflow, L.L.C. v. Specialty RTP, L.L.C., 993 F.3d 295, 307 (Fifth Cir., 2021).

E. The Court of Appeals Improperly Reached the Arbitrable Dispute's Merits when it Interpreted the Redemption Agreement

Courts must indulge every presumption in favor of arbitration under the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), superseded on other grounds by 9 U.S.C. § 16(b)(1). Washington also has a strong public policy favoring arbitration. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 341 n.4, 103 P.3d 773 (2004).

There is a dispute whether the Bank's alleged breach was excused by a condition precedent or a breach of a promise. "Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists." *First Options*, 514 U.S. at 939, 115 S.Ct. at 1921. Key Bank's alleged breach was its failure to timely deliver the signed Settlement Agreement and Redemption Agreement and timely restart the foreclosure proceedings. There was no condition precedent to excuse the Bank's untimely performance, especially because time was of the essence. A breach of a promise subjects the promisor to liability for damages but does not necessarily discharge the other party's duty of performance. The nonoccurrence of a condition precedent, on the other hand prevents the promisee from acquiring a right or deprives him of one but subjects him to no liability. *Ross v. Harding*, 64 Wash.2d 231, 236, 391 P.2d 526 (1964); 5 S. Williston, Contracts § 665, at 132 (3d ed. 1961).

Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise. *Id.* An intent to create a condition is often revealed by such phrases and words as "provided that," "on condition," "when," "so that," "while," "as soon as," and "after." *Vogt v. Hovander*, 27 Wash. App. 168, 178, 616 P.2d 660 (1979). Nowhere in the arbitration clause of the Settlement Agreement do these words appear.

And the *breach* was unquestionably within the bailiwick of the arbitrator; as were Atherton's remedies flowing therefrom. Regardless, it is well settled under the Washington law of contracts that "'Conditions precedent' are those facts and events, occurring subsequently to

the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Ross* 64 Wash.2d at 236 (emphasis added); *Walter Implement, Inc. v. Focht*, 730 P.2d 1340, 1342, 107 Wash.2d 553, 557 (1987), *Koller v. Flerchinger*, 73 Wash.2d 857, 860, 441 P.2d 126 (1968), *Jones Assocs., Inc. v. Eastside Properties, Inc.,* 41 Wash. App. 462, 466, 704 P.2d 681 (1985). Here delivery of the Settlement Agreement and the Redemption Agreement was the formation of the parties' contract and could not, therefore, be something that had to occur subsequently. There was no condition precedent.

Even if there was a condition precedent, which there was not, there was still a question as to whether the nonoccurrence would excuse the Bank's breach. All Washington contracts have an "implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance." *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wash. App. 630, 636, 700 P.2d 338, 342 (1985). Therefore, "failure or nonoccurrence of a condition will not excuse the promisor's performance if the condition's failure was the fault of the promisor." *Id.* 40 Wash. App. at 636. These were issues that the Arbitrator had primary subject matter jurisdiction to decide.

F. Accepting the Petition will Assist in Analyzing the Coinbase Petition this Court has Already Granted and is now Considering.

On March 23, 2022, this Court heard oral arguments in *Coinbase, Inc. v. Bielski,* and in *Coinbase, Inc. v. Suski*

Case No, 22-105. Although the cases are different, they are also alike. First, they both implicate the same FAA policies of being able to pick the decision maker, making the proceedings more streamlined, agreeing on the rules the decision-maker must follow, and not having to have the decision delayed and become expensive.

G. The Decision Conflicts with Decisions from Other States' High Courts and the Federal Courts of Appeal

1. Federal Courts of Appeal

In deciding the arbitrability of the grievance, the court is not to look to the merits of the underlying claims. *International Union of Operating Engineers, Local Union 965-965A-965B-965C-965RA v. Associated General Contractors of Illinois*, 845 F.2d 704, 706 (Seventh Cir.,1988), *citing*, *AT & T*, 475 U.S. at 649, 106 S.Ct. at 1419.

Under Eleventh Circuit authority, the impact of a condition precedent "is ultimately for the arbitrator." *Solymar Investments, Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 997 (11th Cir., 2012).

> What emerges from *John Wiley & Sons* and *Howsam* is a fairly straightforward rule: A time-limitation provision involves a matter of procedure; it is a "condition precedent" to arbitration, *id.* (Internal quotation marks omitted); and it thus is "presumptively" a matter for an arbitrator to decide, id. In the absence of an agreement to the contrary, in the absence in other words of language in

> the agreement rebutting the presumption, arbitrators rather than judges should resolve disputes over time-limitation provisions.

United SteelWorkers of America, AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417, 422 (Sixth Cir., 2007).

Courts are limited to decided *construction* of arbitration clauses and any contractual provisions relevant to its scope, as well as any other "forceful evidence" suggesting that the parties intended to exclude the disputes at issue from arbitration; not the underlying merits. *Rite Aid of Pennsylvania, Inc. v. United Food and Commercial Workers Union, Local 1776*, 595 F.3d 128, 131–32 (Third Cir., 2010); *E.M. Diagnostic Sys., Inc. v. Local 169*, 812 F.2d 91, 95 (3d Cir., 1987).

> [T]he presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.' " *Howsam*, 537 U.S. at 84, 123 S.Ct. 588 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)) (second alteration in original). Indeed, "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 85, 123 S.Ct. 588 (citations omitted).

Pro Tech Industries, Inc. v. URS Corp., 377 F.3d 868, 871–72 (Eight Cir., 2004). Likewise, the Ninth Circuit has stated "a dispute over whether a contract has *expired* or has been terminated or repudiated....*is for the arbitrator* if the breadth of the arbitration clause is not in dispute." *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 593 (9th Cir. 1992) (emphasis in original).

The Tenth Circuit has recognized the Supreme Court's "express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (Tenth Cir., 2017). Even pre-emption is for the arbitrator. *Prime Healthcare Services–Landmark LLC v. United Nurses and Allied Professionals, Local 5067*, 848 F.3d 41, 49 (First Cir., 2017).

2. State Supreme Courts

State Courts of last resort have held that the occurrence of conditions precedent are for the arbiter, not the court: "the question of whether contractor met conditions precedent to arbitration was a matter of procedural arbitrability subject to determination by arbitrator." *Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C.*, 35 So.3d 601 (Ala., 2009).

The Supreme Court of Idaho reversed the lower court in *Storey Const. Inc. v. Hanks*, 224 P.3d 468, 478, 148 Idaho 401, 411 (2009). There, the lower court impermissibly addressed the merits of a *res judicata* argument. "Whether any of those claims were actually decided adversely to the Trustee in the prior arbitration

is a matter for the arbitrators to decide." *Id*. *See also Montana Public Employees' Ass'n v. City of Bozeman*, 343 P.3d 1233, 1236, 378 Mont. 337, 340, 2015 MT 69, ¶ 8 (Mont.,2015); *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 431 P.3d 911, 921, 393 Mont. 396, 411, 2018 MT 297, ¶ 20 (2018); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 521 (Tex., 2015).; *First Weber Group, Inc. v. Synergy Real Estate Group, LLC*, 860 N.W.2d 498, 514, 361 Wis.2d 496, 526–27, 2015 WI 34, ¶ 46 (2015).

H. The Policy Behind the FAA Supports Granting the Petition.

Congress enacted the FAA in 1925 to overcome "judicial hostility to arbitration." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022); *see* 9 U.S.C. § 1 et seq. The FAA replaced "judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (cleaned up). Under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Congress's "clear intent" in the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id*. at 22.

Judicial hostility toward arbitration is peaked in Washington State. At a recent presentation held by the Seattle University School of Law, the Justices of Washington State's Supreme Court made that hostility plain. This is a rare case indeed when there is direct

evidence from the state court Justices themselves that they consider the fact arbitrations do not happen in open proceedings and do not help develop the state's rich common law when they decide whether to compel arbitration. *See*, TVW, *Washington State Supreme Court, February 23, 1:30 pm*, 2023, https://tvw.org/video/washington-state-supreme-court-2023021435/?eventID=2023021435 (0:58:00-1:02:06) (last viewed, April 3, 2023)

This hostility deprives Washington State litigants, including the Petitioner here, of the many benefits of arbitration, as required under Federal law.

To secure these benefits of traditional arbitration the FAA requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Unfortunately, the Washington Court of Appeals here failed to do so. The Washington Supreme Court, the state's court of last resort, evidencing its publicly displayed animus, declined to correct the error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 4, 2023

APPENDIX

TABLE OF APPENDICES

APPENDIX A — DENIAL OF REVIEW OF THE SUPREME COURT OF WASHINGTON, FILED JANUARY 4, 2023

THE SUPREME COURT OF WASHINGTON

No. 101301-9

Court of Appeals
No. 83104-6-I

KEY BANK,

Respondent,

v.

GINGER ATHERTON,

Petitioner.

ORDER

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its January 3, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 4th day of January, 2023.

For the Court
/s/_____
CHIEF JUSTICE

APPENDIX B — ORDER OF COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE, FILED AUGUST 22, 2022

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

No. 83104-6-I

Filed August 22, 2022

KEY BANK, N.A.,

Respondent,

v.

GINGER ATHERTON,

Appellant,

HENRY DEAN, AS TRUSTEE FOR THE SHARON GRAHAM BINGHAM 2007 TRUST; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, AS SUCCESSOR-IN-INTEREST TO CASCADE BANK; WASHINGTON FEDERAL, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO HORIZON BANK, WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST CITIZENS BANK AND TRUST CO., AS SUCCESSOR-IN-INTEREST TO VENTURE BANK; STATE OF WASHINGTON;

Appendix B

DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC., MUFG UNION BANK, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO FRONTIER BANK; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALTY PARTNERS II LLC; LVB-OGDEN MARKETING, LLC,

Defendants.

On July 25, 2022, this Court issued an unpublished opinion affirming a trial court order that denied appellant Ginger Atherton's motion to compel arbitration and stay a deed of trust foreclosure pending the arbitration. This Court awarded attorney fees on appeal to respondent KeyBank, N.A. under a settlement or redemption agreement. On August 18, 2022, this Court denied Atherton's motion for reconsideration.

Meanwhile, KeyBank filed a declaration of its counsel Jesús Palomares and a cost bill, requesting an award of attorney fees in the amount of $74,146.56 and costs in the amount of $82.50, totaling $74,229.06. Atherton filed an objection to the requested attorney fees. KeyBank filed a reply with an additional declaration of counsel.

Atherton argues KeyBank is in breach of the settlement or redemption agreement upon which this Court awarded attorney fees. She argues "an award of attorney fees, if any, is subject to arbitration." Objection at 3. But this Court awarded attorney fees to KeyBank in the opinion. Atherton's objection to the award itself may

be raised in a timely motion for reconsideration, but not in an objection to the declaration of fees and expenses under RAP 18.1(e). Thus, I reject Atherton's objection to the award itself.

Atherton argues attorney Steve Miller billed his work at $502 per hour, despite counsel Palomares's fee declaration stating that Miller charged KeyBank in this matter at a discounted rate of $403 per hour. Counsel Palomares's fee declaration stated that attorney Miller's standard rate was $630 per hour while the firm charged his time at a discounted rate of $403 per hour. Atherton states Miller logged 78.6 total hours resulting in a $7,781.40 overcharge. Atherton also argues attorney Miller spent excessive amount of time (29.8 hours) working on a rejection of her supersedeas bond.

In reply, counsel Palomares explains that Miller's discounted hourly rate for this appeal was $502, although counsel's initial fee declaration inadvertently stated by mistake that Miller's discount hourly rate was $403. Counsel Palomares explains that $403 is the discounted rate used for counsel himself who replaced Miller after his retirement. Counsel states Miller's hourly rate is reasonable for an attorney of commensurate experience and comparable with other Seattle area law firms.

Reasonable attorney fees are based on the number of hours reasonably spent, multiplied by a reasonable hourly rate. *Berryman v. Metcalf,* 177 Wn. App. 644, 660, 312 P.3d 745 (2013). This calculation does not turn solely on what the prevailing party's firm can bill. *Nordstrom, Inc.*

v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). An attorney's reasonable hourly rate should reflect the attorney's "ability to produce results in the minimum time." *Berryman,* 177 Wn. App. at 664 (quoting *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). "Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Berryman,* 177 Wn. App. at 657 (quoting *Mahler v. Szucs,* 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998)).

$502 is a high hourly rate. But attorney Miller is described as an accomplished lawyer with substantial experience handling complex litigation with focus on banking and financial services matters. In her objection, Atherton does not claim $503 is an unreasonable hourly rate for attorney Miller. In light of counsel Palomares's initial and reply fee declarations, I overrule Atherton's objection to attorney Miller's hourly rate.

I also overrule Atherton's objection to the amount of time attorney Miller spent working on a rejection of her supersedes amount. The parties' dispute over the amount of supersedeas bond involved highly contested fact issues regarding the fair market value of the use of the subject property pending review. KeyBank notes that in response to Atherton's $60,000 supersedeas bond, Miller had to prepare a motion and declaration with 17 exhibits, including another declaration, review Atherton's response with supporting declarations, and prepare a reply. The parties continued to litigate over the appropriate

supersedeas amount, and I denied Atherton's emergency motion objecting to the trial court's supersedeas decision requiring a supersedeas bond of $1 million. Considering the nature of the parties' dispute on the supersedeas issue, I decline to reduce Miller's attorney fees on the issue.

Atherton argues Ella Vincent billed 2.4 hours at $293 an hour (totaling $703.20) researching legal issues and summarizing research but is not listed as one of the assigned attorneys in the fee declaration. Atherton points out the fee declaration contains no explanation about Vincent's background or qualifications. In his reply declaration, counsel Palomares explains Vincent's qualifications as an associate attorney. Counsel states $293 was Vincent's discounted hourly rate. In light of the reply declaration, I overrule Atherton's objection regarding Vincent's fees.

The costs for the clerk's papers ($82.50) are allowed under RAP 14.3(a). Atherton does not contend otherwise. Therefore, it is

ORDERED that attorney fees and costs in the amount of $74,229.06 are awarded to respondent KeyBank, N.A. Appellant Ginger Atherton is liable for this award and shall pay this amount.

/s/_____

APPENDIX C — OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE, FILED JULY 25, 2022

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

No. 83104-6-I

KEY BANK, N.A.

Respondent,

v.

GINGER ATHERTON,

Appellant,

HENRY DEAN, AS TRUSTEE FOR THE SHARON GRAHAM BINGHAM 2007 TRUST; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, AS SUCCESSOR-IN-INTEREST TO CASCADE BANK; WASHINGTON FEDERAL, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO HORIZON BANK, WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST CITIZENS BANK AND TRUST CO., AS SUCCESSOR-IN-INTEREST TO VENTURE BANK; STATE OF WASHINGTON; DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC., MUFG UNION BANK, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO FRONTIER BANK; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALITY PARTNERS II LLC; LVB-OGDEN MARKETING, INC., LLC,

Defendants.

Appendix C

UNPUBLISHED OPINION

VERELLEN, J. — Two issues predominate in Ginger Atherton's appeal from a trial court order denying her motion to compel arbitration and to stay a deed of trust foreclosure pending the outcome of the arbitration. First, Atherton contends the trial court took on a role reserved for an arbitrator by deciding a condition precedent to arbitrability. But the condition she identifies as a right to redeem if Key Bank prevails at a pending sheriff's sale is not a condition precedent to arbitrability. Second, she relies on the mandate of RCW 7.04A.070(5) that the trial court must issue a stay pending a final decision on a motion to compel arbitration. But the trial court here did issue a final decision on the motion to compel arbitration.

We affirm.

FACTS

In 2007, KeyBank loaned Scott and Kelly Bingham[1] $2.5 million. KeyBank's loans were secured by deeds of trust against the property located at 721 250th Lane NE, Sammamish, Washington. The property served as the security to ensure repayment of the loans.

That same year, Scott and Kelly Bingham quitclaimed the property to the "2007 Sharon Graham Bingham Trust."[2] Henry Dean, the trustee of the trust, and his wife, Ginger Atherton, have lived on the property since 2007.

1. Because the parties share the same last name, we refer to them by their first names for clarity.

2. Clerk's Papers (CP) at 137.

Appendix C

In 2019, after extensive negotiations, the trust and KeyBank entered into a settlement and release agreement and a redemption agreement.

The settlement agreement provided that KeyBank and the trust stipulated to judgments of foreclosure in KeyBank's favor, that KeyBank would foreclose on the liens against the property securing the loans, and that KeyBank would credit bid at least $4.2 million at the sheriff's sale.

The redemption agreement provided that if KeyBank acquired the property at the sheriff's sale, the trust could redeem the property from KeyBank by paying KeyBank $1.6 million, but if KeyBank did not prevail at the sheriff's sale, then KeyBank would retain $3 million and pay the trust any additional funds that it received from the sale.

KeyBank and the trust also stipulated that KeyBank's deeds of trust were valid and enforceable, that the liens in favor of KeyBank were superior to any other interests, and that KeyBank was entitled to a final judgment of foreclosure.

In 2020, Dean assigned the trust's "right, title and interest in" the settlement and redemption agreements to Atherton.[3]

On June 29, 2021, KeyBank filed its motion for a final decree of foreclosure. Atherton filed an emergency motion to compel arbitration and to stay KeyBank's foreclosure.

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3. CP at 174.

Atherton argued that the parties should be compelled to arbitrate the validity of the trust's stipulation that KeyBank obtained from the settlement agreement and whether KeyBank failed to perform under the settlement agreement.

The trial court granted KeyBank's motion for a final decree of foreclosure and denied Atherton's motion to compel arbitration. The court noted that the ruling on Atherton's motion was "without prejudice, pending completion of a sheriff's sale of the [p]roperty."[4] Atherton filed a motion for reconsideration. The trial court denied Atherton's motion.

Dean filed a $60,000 cash supersedeas to stay KeyBank's foreclosure. KeyBank opposed the supersedeas, arguing that it did not comply with RAP 18.1. The trial court concluded that the $60,000 supersedeas was inadequate to supersede the foreclosure judgment and stop the sale under RAP 18.1. Commissioner Kanazawa rejected Atherton's objection to the trial court's decision.[5]

Atherton appeals.

4. CP at 178.

5. The trial court set the supersedeas amount at $1 million.

Appendix C

ANALYSIS

I. Motion to Compel Arbitration

Under the Uniform Arbitration Act (UAA), chapter 7.04A RCW, the legislature has delegated which preliminary issues must be decided by the trial court and which issues are to be decided by the arbitrator.[6]

RCW 7.04A.060, the validity of agreement to arbitrate statute, provides that a court "shall decide whether an agreement to arbitrate exists or [whether] a controversy is subject to an agreement to arbitrate"[7] and an arbitrator "shall decide whether a condition precedent to *arbitrability* has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."[8]

In *Townsend v. Quadrant Corp.*, our Supreme Court noted a comment to the UAA which explains that the provisions of RCW 7.04A.060 are intended to

> "incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act] that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether

6. *See Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 456-57, 268 P.3d 917 (2012).

7. CW 7.04A.060(2).

8. RCW 7.04A.060(3) (emphasis added).

> a dispute is encompassed by an agreement to arbitrate, 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."[9]

A condition precedent to arbitrability under section .060(3) contemplates arbitration provisions that have procedural prerequisites that must be satisfied before the trial court compels arbitration. For example, a contract might contain an arbitration provision that requires a party to wait a certain number of days before compelling arbitration, or a contract could contain an arbitration clause that requires the parties to mediate before a party moves for arbitration.[10]

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9. 173 Wn.2d 451, 457, 268 P.3d 917 (2012) (quoting UAA § 6 cmt. 2, 7 U.L.A. 24 (2005)); *see also* RCW 7.04A.901 ("In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."). A trial court may decide the gateway issues such as whether an arbitration clause is invalid. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 813-14, 225 P.3d 213 (2009) ("'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA].'") (quoting *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)).

10. *See Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 406-07, 200 P.3d 254 (2009) (the appellate court held that a 21-day time limit in an arbitration agreement was a condition precedent to arbitrability and was

Atherton insists that by denying her motion to compel arbitration "without prejudice, pending a completion of a sheriff's sale of the [p]roperty,"[11] the trial court took on a role exclusively reserved for the arbitrator by deciding whether a condition precedent to arbitrability had been fulfilled. But KeyBank argued to the trial court that "[a]rbitration [was] premature because the condition precedent to Atherton's option/redemption right—KeyBank's acquisition of the property after the sheriff's sale—ha[d] not yet occurred."[12]

We review a trial court's decision to grant or deny a motion to compel arbitration de novo.[13]

At the core of this appeal is a disagreement between the parties whether the trial court made a final decision

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therefore an issue for the arbitrator to decide). *See, e.g.*, James Acret and Annette Davis Perrochet, *Conditions Precedent to Arbitration*, CONSTRUCTION ARBITRATION HANDBOOK § 3:48 (2d ed. 2021) ("No demand for arbitration … may be made until … the date on which the architect has rendered his written decision of the 10th day after the parties have presented their evidence to the architect or have been given a reasonable opportunity to do so, if the architect has not rendered his written decision by that date"; "notice of a claim must be presented to the board of education within three months after the accrual of a claim before bringing any action or special proceeding against the board." (internal quotation marks omitted) (citations omitted)).

11. Appellant's Reply Br. at 2.

12. CP at 132.

13. *Townsend*, 173 Wn.2d at 455 (quoting *Satomi*, 167 Wn.2d at 797).

by denying Atherton's emergency motion to compel arbitration and her motion to stay KeyBank's motion for a judgment and decree of foreclosure.

Specifically, the redemption agreement provided,

> If KeyBank is the successful bidder at the sheriff's or trustee's sale following completion of the foreclosure proceedings in the Superior Court Action, then the Trust may exercise the Redemption by delivering written notice thereof to KeyBank (such notice, the "Exercise Notice"), and by concurrently depositing a fully executed copy of this Redemption agreement $1,600,000 USD in immediately available funds ("Redemption Price") to Escrow, on or before June 1, 2020. The Trust's delivery of the Exercise Notice shall be deemed to be an irrevocable election to purchase the Property pursuant to the terms of this Redemption agreement. The Redemption will terminate if the Trust fails to exercise it in the time and manner provided in this Section. Except for the Redemption, the Bingham Parties expressly waive any and all claims or rights in the Property, including any statutory or redemption rights.[14]

And the settlement agreement provided,

14. CP at 156.

> Any disputes related to or arising under this Agreement will be arbitrated before Stew Cogan, or if he is unwilling or unavailable to serve, then selected according to the procedure described in the Prior Settlement. Arbitration will include only the terms of this Agreement, exclusive of testimony or other extrinsic evidence about the Parties' rights and obligations, and will conclude no later than 30 days from submission to the arbitrator or as soon thereafter as the arbitrator's schedule allows. The arbitrator's decision under this Section is binding on the Parties and cannot be appealed.[15]

Here, under the redemption agreement, KeyBank prevailing at the foreclosure sale is a condition precedent to the trust or Atherton exercising the right to redeem the property from KeyBank for $1.6 million. But this is distinct from the type of condition precedent that section .060(3) contemplates because this condition precedent has no procedural effect on arbitrability. Rather, the condition here solely relates to when or whether Atherton can "exercise the Redemption." Because Atherton's conditional redemption right is not a condition precedent to arbitrability, the trial court did not take on a role reserved exclusively to the arbitrator.

It is not entirely clear how the trial court arrived at the precise language that "the [m]otions are denied without

15. CP at 139.

prejudice, pending completion of a sheriff's sale of the [p]roperty,"[16] but our de novo review, coupled with Atherton's narrow arguments, do not persuade us to reverse the trial court's decision denying Atherton's motion to compel arbitration and motion to stay the proceedings.

First, to the extent that KeyBank contends that the foreclosure sale is a condition precedent to any vesting, acquisition, or assertion of Atherton's right to redeem, Atherton provides no authority whether such hypothetical, premature, unripe, or tentative claims are beyond the authority of a trial court faced with a motion to compel arbitration of a dispute that is grounded in the assertion of Atherton's right to redeem.[17]

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16. CP at 178.

17. There is no Washington case that addresses the issue of whether the trial court can compel a premature nonjusticiable claim to arbitration. And there does not appear to be a consensus on this issue in other jurisdictions. For example, in *Bunker Hill Park Ltd. v. U.S. Bank National Ass'n*, a California appellate court held "all a petitioner is required to show before arbitration 'shall' be ordered is the existence of a valid agreement to arbitrate the issue underlying the petition and the opposing party's refusal to arbitrate the controversy." 231 Cal. App. 4th 1315, 1329, 180 Cal. Rptr. 3d 714 (2014). But in *Lower Colorado River Authority v. Papalote Creek II, LLC*, the Fifth Circuit Court of Appeals held that in deciding whether to grant or deny a motion to compel arbitration "we must 'look through' the petition to compel arbitration in order to determine whether the underlying dispute presents a sufficiently ripe controversy to establish federal jurisdiction." 858 F.3d 916, 922 (5th Cir. 2017). It appears that the trial court in rendering its decision here "looked through" Atherton's motion to compel arbitration in

Second, the mere reference by the court that Atherton's motion to compel was denied "without prejudice" until some future developments took place, namely, the sheriff's sale, does not render the court's denial ineffective. We read the trial court's ruling as a clear denial of the motion to compel arbitration that was pending before the trial court.

Third, viewing the trial court's order as a final order denying the motion to compel arbitration is consistent with Atherton's assertion that the court's order is appealable as a matter of right. RCW 7.04A.280(1)(a) recognizes that an appeal may be taken from "[a]n order denying a motion to compel arbitration." A trial court's order compelling arbitration and denying a motion to stay judicial proceedings is appealable as of right under RAP 2.2(a)(3) because the order has the result of discontinuing the action for an arbitration.[18] Consistent with the application of RAP 2.2(a)(3), the court's ruling here that "the motions are denied" had the similar impact of discontinuing the action for arbitration. Therefore, in this context, the court's order denying arbitration at this point in the litigation was a final decision.

Many of Atherton's arguments focus upon the stay provisions of RCW 7.04A.070(5). Section .070(5) compels

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determining that a condition precedent, the foreclosure sale, must be met before either a trial court or an arbitrator could reach the merits of her claims. But based upon this record and limited briefing, we decline to further address this issue.

18. *See Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 445, 783 P.2d 1124 (1989).

a court to impose a stay "until the court renders a final decision" in regard to the motion to compel arbitration. But that provision no longer applies once a final decision is made denying the motion to compel arbitration. And, as discussed, the trial court's denial of Atherton's motion to compel arbitration was a final decision. RCW 7.04A.070(5) has no impact here.[19]

Other than general unsupported assertions about the narrow role of a trial court facing a motion to compel arbitration, Atherton provides no specific argument or authority that compels an arbitrator to decide the issues presented in this unusual setting. And on this record and this briefing, our de novo review leads us to the conclusion that the motion to compel arbitration was properly denied and therefore, no stay is mandated under RCW 7.04A.070(5).

II. Fees on Appeal

KeyBank requests attorney fees on appeal. As the prevailing party, KeyBank is entitled to reasonable attorney fees based upon the settlement or redemption agreement's attorney fee provisions, subject to their compliance with RAP 18.1.[20]

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19. Our decision has no impact on the application or enforcement of the supersedeas bond issued by the trial court.

20. Key Bank's alternate theory for fees on appeal under RAP 18.9(a) for a frivolous appeal is not compelling because Atherton raises some debatable issues. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

Finally, because Atherton does not prevail here, her request that the parties be ordered to arbitration is denied.

We affirm.

/s/ Verellen, J

WE CONCUR:

/s/ Bowman, J

/s/ Mann, J

APPENDIX D — ORDER OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY, FILED AUGUST 31, 2021

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR KING COUNTY

NO. 16-2-06689-5 SEA

KEYBANK, N.A.,

Plaintiff,

vs.

HENRY DEAN, *et al.*,

Defendant.

ORDER DENYING GINGER ATHERTON'S MOTION FOR RECONSIDERATION

THIS MATTER came before the court on the Ginger Atherton's Motion for Reconsideration of the court's August 10, 2021 orders Denying her Motion to Compel Arbitration and for Judgment and Decree of Foreclosure Order. The court reviewed the files and records, including the motion for reconsideration. IT IS HEREBY ORDERED that Ginger Atherton's Motion for Reconsideration is DENIED.

DATED this 31st day of August, 2021.

Electronic Signature Attached

_____

Judge Regina S. Cahan
King County Superior Court

APPENDIX E — ORDER OF THE SUPERIOR COURT OF WASHINGTON, KING COUNTY, FILED AUGUST 10, 2021

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
KING COUNTY

No. 16-2-06689-5 SEA

KEYBANK N.A.,

Plaintiff,

v.

HENRY DEAN, AS TRUSTEE FOR THE SHARON GRAHAM BINGHAM 2007 TRUST; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, AS SUCCESSOR-IN-INTEREST TO CASCADE BANK; WASHINGTON FEDERAL, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO HORIZON BANK; WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST-CITIZENS BANK & TRUST CO., AS SUCCESSOR-IN-INTEREST TO VENTURE BANK; STATE OF WASHINGTON, DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC.; MUFG UNION BANK, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO FRONTIER BANK; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALTY PARTNERS II LLC; LVB-OGDEN MARKETING, LLC,

Defendants.

Appendix E

August 10, 2021, Decided
August 10, 2021, Filed

Regina Cahan, Judge.

ORDER FOR JUDGMENT AND DECREE OF FORECLOSURE AND OF SALE

CLERK'S ACTION REQUIRED

JUDGMENT SUMMARY

Judgment Creditor	KeyBank N.A.
Attorney for Judgment Creditor	Steven A. Miller Kellen A. Hade Miller Nash LLP 2801 Alaskan Way, Ste. 300 Seattle, WA 98121
Judgment Debtor	Kelly Bingham, provided that KeyBank's remedy is limited to execution on the Property, without the right of deficiency.
Attorney for Judgment Debtor	Emanuel Jacobowitz Nathan J. Arnold Arnold & Jacobowitz PLLC 2701 First Avenue, Ste. 200 Seattle, WA 98121

Appendix E

Judgment Amount	$4,437,451.05 (as of April 2, 2021, with interest accruing at $279.34 per day thereafter)
Attorney Fees and Costs	$173,894.12
Full Legal Description	Included in Exhibit "1" attached hereto
Assessor's Property Tax Parcel Number	352506-9034

Before the Court is Plaintiff KeyBank N.A.'s ("KeyBank") Motion for Judgment and Decree of Foreclosure and Order of Sale (the "Motion"). The Court having entered stipulated and default judgments against all defendant junior lienholders (the "Lienholders"), adjudging that KeyBank's Deeds of Trust are valid and enforceable liens against the property described in Exhibit 1 (the "Property") and are superior to any interest, lien, or claim that Lienholders may have in the Property, and having declared that KeyBank's lien on the Property extinguished the interest, liens, or claims on the Property held by all Lienholders, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. For the purpose of authorizing foreclosure only, judgment is hereby entered in favor of KeyBank against defendant Kelly Bingham ("Bingham") in the amount of $4,437,451.05 (plus interest accruing at $279.34 each day after April 2, 2021 to the date of entry of the judgment), which consists of the loans' principal amount

of $2,442,087.21, interest to April 2, 2021 in the amount of $1,299,206.67, disbursements, advances and fees in the amount of $522,163.05 and attorney fees' and costs in the amount of $173,894.12;

2. Awarded judgment will bear post-judgment interest at the legal rate from the day after the date of judgment entry until the date of sale;

3. Additional amounts for post-judgment sheriff and attorney fees and costs will be determined and recovered at the time of sale;

4. KeyBank's remedy hereunder shall be confined to the sale of the Property;

5. KeyBank's Deeds of Trusts encumbering the Property are adjudged and decreed to be paramount liens on the Property and that said liens are hereby foreclosed;

6. The King County Sheriff's Office ("Sheriff") shall sell the Property pursuant to the terms of this Decree of Foreclosure and Order of sale, and pursuant to RCW 6.21.010, *et seq.*, and other applicable law (the "Sale"). Payment of the debt secured by the Deeds of Trust, with interest and costs, at any time before the sale, shall satisfy this judgment.

7. At the Sale, Plaintiff is authorized to credit bid and the Sheriff is authorized to accept Plaintiff's bid on the Property, the amount set forth in Paragraph 1 of this Judgment. If the Sale results in a surplus, the Sheriff

shall apply the cash proceeds of the Sale as follows: first, to the Sheriff's fees and costs associated with the Sale; second, to KeyBank in satisfaction of all amounts due and owing under the Judgment as of the date such amounts are paid to KeyBank; and third, if cash proceeds remain after satisfaction of the amount owed to KeyBank, the excess proceeds shall be deposited with the Clerk of this Court until such parties claiming such proceeds may be heard and the proceeds released by order of this Court, in RCW 6.21.110.

8. By such foreclosure and sale, the rights of Bingham and Lienholders, and all persons claiming by, through, or under them, are forever terminated and foreclosed, subject to any rights of redemption;

9. Upon completion of the sale, the Sheriff shall take such further actions as may be required under applicable law. including, without limitation, making and delivering to the purchaser of Property a Certificate of Sale in the form required by law, and causing such certificate of sale to be recorded in the offices of the King County Recorder;

10. Upon completion of the Sale, the purchaser or purchasers at such Sale shall be entitled to exclusive possession of the Property, from the time of such Sale until redemption, if any;

11. KeyBank is not entitled to a deficiency judgment against Bingham. The redemption period, if available, is eight months from the date of sale.

12. The Court reserves and retains jurisdiction over this action for the purpose of making further orders that may be necessary to carry out this Judgment and Decree of Foreclosure and Order of Sale, correct any error in calculation, or for the purpose of making orders as the Court deems necessary or appropriate.

DATED this 10th day of August, 2021.

Electronic Signature Attached

_____
Judge Regina Cahan
Chief Civil Judge

Presented by:

MILLER NASH LLP

/s/_____
Steven A. Miller, WSBA No. 30388
Kellen A. Hade, WSBA No. 44535
Pier 70, 2801 Alaskan Way, Suite 300
Seattle, WA 98121
Tel: 206-624-8300
Fax: 206-340-9599
steve.miller@millernash.com
kellen.hade@millernash.com

Attorneys for KeyBank National Association

Appendix E

EXHIBIT 1

PARCEL A:

LOT X OF KING COUNTY BOUNDARY LINE ADJUSTMENT NO. L00L0094, ACCORDING TO SURVEY RECORDED SEPTEMBER 23, 2003 UNDER RECORDING NO. 20030923900013, IN KING COUNTY, WASHINGTON

PARCEL B:

A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AS DELINEATED ON KING COUNTY SHORT PLAT NO. 677134, ACCORDING TO PLAT RECORDED FEBRUARY 23, 1978 UNDER RECORDING NO. 7802230997, IN KING COUNTY, WASHINGTON.

PARCEL C:

A NONEXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AS DELINEATED ON KING COUNTY SHORT PLAT NO. 677135, ACCORDING TO PLAT RECORDED FEBRUARY 23, 1978 UNDER

APPENDIX F — ORDER OF THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY, FILED AUGUST 10, 2021

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

Case No. 16-2-06689-5 SEA

FILED August 10, 2021

KEYBANK, N.A.,

v.

Plaintiff,

HENRY DEAN, AT TRUSTEE FOR THE SHARON GRAHAM BINGHAM 2007 TRUST; ESTATE OF SCOTT BINGHAM; KELLY BINGHAM; UMPQUA BANK; OPUS BANK, AS SUCCESSOR- IN-INTEREST TO CASCADE BANK; WASHINGTON FEDERAL, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO HORIZON BANK; WASHINGTON FEDERAL N.A.; WASHINGTON TRUST BANK; FIRST-CITIZENS BANK & TRUST CO., AS SUCCESSOR-IN-INTEREST TO VENTURE BANK; STATE OF WASHINGTON, DEPT. OF REVENUE; CENTRUM FINANCIAL SERVICES, INC.; MUFG UNION BANK, N.A., ITSELF AND AS SUCCESSOR-IN-INTEREST TO FRONTIER BANK; PEARLMARK REAL ESTATE PARTNERS; PEARLMARK MEZZANINE REALTY PARTNERS II LLC; LVB-OGDEN MARKETING, LLC,

Defendants.

Before the Court are various motions brought by non-party Ginger Atherton, filed July 13, 2021 ("Motions"), which generally ask the Court to compel arbitration, stay this case and strike KeyBank N.A.'s motion for judgment and decree of foreclosure. The Court has considered Atherton's motions, KeyBank's opposition and supporting declaration, and Atherton's reply.

Being fully informed, it is HEREBY ORDERED that the Motions are denied without prejudice, pending completion of a sheriff's sale of the Property.

DATED this 10th day of August, 2021.

Electronic Signature Attached

Judge Regina Cahan
Chief Civil Judge