

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

**JAIME ANDUJO, CHANA ANDUJO,
ERIC CHAVEZ, JACLYN CHAVEZ,
DAVID PYNE, DONNELLE PYNE,
ROBERT SHERWOOD, CAROL SHERWOOD,
WADE STENGER, ELIZABETH STENGER,
and LYLE WAGY,**

Plaintiffs/Appellees,

v.

**Court of Appeals
No. 28,660**

**PULTE HOMES OF NEW MEXICO, INC.,
PULTE HOMES, INC., GERARD SANCHEZ,
and BRETT CLEM,**

Defendants/Appellants.

BRIEF IN CHIEF OF APPELLANTS

**On Appeal from the Second Judicial District Court
County of Bernalillo
Honorable William F. Lang
No. CV-2007-5153**

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**COURT OF APPEALS OF NEW MEXICO
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SUMMARY OF PROCEEDINGS

A. Nature of the Case

Defendants/Appellants Pulte Homes of New Mexico, Inc., *et al.* (“Pulte”), appeal from the district court’s order denying their motion to compel arbitration as to Plaintiffs/Appellees Jaime Andujo, Chana Andujo, David Pyne, Donnelle Pyne, Robert Sherwood, Carol Sherwood, Wade Stenger, Elizabeth Stenger, and Lyle Wagyu (collectively, the “Non-Signatory Plaintiffs”).¹ These Plaintiffs claim that Pulte violated alleged contractual and tort duties in connection with the construction and repair of their homes. Although the contract on which these claims are based contains an arbitration provision, the district court held that the Non-Signatory Plaintiffs are not required to arbitrate because they did not sign the contract.

But under well-established principles governing arbitrability, non-signatories are bound by an agreement to arbitrate when they are (1) creditor third-party beneficiaries or (2) equitably estopped from avoiding the arbitration agreement. Because both of these circumstances exist here, the district court’s ruling should be reversed, and the Non-Signatory Plaintiffs should be compelled to arbitrate their claims.

¹ Eric and Jaclyn Chavez were initially identified as Non-Signatory Plaintiffs, but it has come to light that they actually purchased their home directly from Pulte. Accordingly, they are not parties to this appeal. *See* Joint Motion to Dismiss Plaintiffs-Appellees Eric Chavez and Jaclyn Chavez, filed March 23, 2009.

B. Course of Proceedings/Disposition Below

This suit arises from Pulte's construction and sale of residential homes in Bernalillo County, New Mexico. *See* RP 286-90, ¶¶ 1, 6, 12 (Plaintiffs' Third Amended Complaint for Breach of Contract and for Defamation/Slander). Alleging that their homes are defective and "bedeviled with problems," Plaintiffs claim that Pulte has delayed repairs or made them in a faulty manner. RP 288-90, ¶¶ 10-14. Plaintiffs assert that "Pulte/NM has entered into contracts with Plaintiffs whereby Pulte/NM sold Plaintiffs their homes," and "has breached those contracts." RP 290, ¶¶ 12-13. Plaintiffs also assert claims for negligence, defamation, slander, unfair trade practices in violation of the New Mexico Fair Practices Act, NMSA 1978, § 57-12-1 *et seq.*, and intentional misconduct. RP 290-94, ¶¶ 15-33. They seek substantial compensatory and punitive damages, prejudgment interest, attorneys' fees, and costs. *See id.*

In the district court, Pulte filed a motion to dismiss the suit and compel arbitration in accordance with the arbitration provision of the Purchase Agreement. *See* RP 42-51.² In response, Plaintiffs argued that the arbitration provision was

² In compliance with the page limitation for exhibits in Rule LR2-119 NMRA, Pulte filed only one Purchase Agreement, which was substantially the same as all of the Purchase Agreements, in support of its motion to dismiss. *See* RP 44 n.1. Accordingly, in the interest of judicial economy and simplicity, Pulte refers to the Purchase Agreement, Limited Warranty, and arbitration provision in the singular.

(1) unenforceable against those Plaintiffs who signed the Purchase Agreement and
(2) not binding on the Non-Signatory Plaintiffs. *See* RP 125-126. In reply, Pulte asserted that the Plaintiffs who had signed the Purchase Agreement were bound by its terms, including the arbitration provision, and that the Non-Signatory Plaintiffs were bound as third-party beneficiaries of the Purchase Agreement and as parties who had sought and obtained benefits under the Limited Warranty, which was part of the Purchase Agreement. *See* RP 215-24, 228-31, 236, ¶ 13, 237-41; Tr. 12:5-13:17 (Feb. 13, 2008).

The district court held a hearing on the motion, at which the parties presented only their legal arguments; no evidence was presented at the hearing. *See generally* Tr. 3-26. The court then entered an order denying the motion as to the Non-Signatory Plaintiffs on the ground that they were not bound by the arbitration provision, and setting an evidentiary hearing on the remaining Plaintiffs' allegation that the arbitration agreement was unenforceable as to them. RP 296-301.³ Pulte appealed as to the Non-Signatory Plaintiffs. RP 302-04.

The appeal was initially assigned to the summary calendar, and the Court proposed summary affirmance. *See* Notice—Proposed Summary Disposition, filed July 23, 2008. Pulte filed a memorandum in opposition, and the Non-Signatory

³ These other Plaintiffs subsequently agreed to arbitrate their claim. The arbitration hearing commences March 30, 2009.

Plaintiffs filed a memorandum in support. *See Defendants/Appellants' Memorandum Opposing Proposed Summary Disposition*, filed Aug. 28, 2008; *Plaintiffs-Appellees' Memorandum in Support of the Court's Proposed Summary Disposition*, filed Aug. 28, 2008.

Pulte argued that the proposed summary disposition should not be entered because the Non-Signatory Plaintiffs were bound by the arbitration agreement as either third-party beneficiaries or as parties who exploited and directly benefited from the Purchase Agreement and Limited Warranty. *See Defendants/Appellants' Memorandum* at 6. In the alternative, Pulte argued that the Court should remand the case to the district court for an evidentiary hearing on the issue. *See id.* at 14-16. On November 14, 2008, the appeal was reassigned to the General Calendar. *See Second Notice—Reassignment to the General Calendar*, filed Nov. 14, 2008.

C. Summary of Facts Relevant to Issues Presented for Review

Plaintiffs began buying homes in a Pulte subdivision known as “Seville” several years ago. RP 287, ¶ 6. Most of the Plaintiffs purchased their homes directly from Pulte, pursuant to a Purchase Agreement. *See* RP 53-62 (representative Purchase Agreement). In the Purchase Agreement, Pulte warranted the home “against defects in workmanship and materials in accordance with, but subject to and limited by, the Limited Warranty.” RP 59, ¶ 17. A copy of the

Limited Warranty was available to purchasers at the Subdivision Sales Center, online, or upon request before or at the closing of the sale. *Id.*

The Purchase Agreement and Limited Warranty both contain arbitration provisions. Under the Purchase Agreement, Plaintiffs agreed to arbitrate any disputes arising out of the transaction:

ARBITRATION: If Buyer makes a claim against Seller or any of its employees or agents for any matter arising out of the Home or the Lot, the Limited Warranty, or this Contract, Buyer agrees that all claims will be submitted to mandatory, binding arbitration. By signing this Contract, Buyer elects to resolve all claims through arbitration under the Federal Arbitration Act. The claims and scope of issues that are subject to binding arbitration include every type of claim, whether in contract or tort or under the Deceptive Trade Practices - Consumer Protection Act or any other law, that could be alleged in a lawsuit by Buyer arising out of any design or construction defect or problem with the Home or Lot, any representation or warranty regarding the Home, or the Lot, the Limited Warranty or this Contract. . . .

Buyer understands, acknowledges and agrees that this paragraph eliminates Buyer's right to a trial in a court of law and any jury rights thereunder. If the Federal Arbitration Act does not apply to a claim made by Buyer, then that claim will be subject to binding arbitration under the New Mexico Uniform Arbitration Act (§ 44-7A-1 et seq.). The duty to arbitrate all claims is mandatory.

RP 61, ¶ 22 (emphasis in original). Similarly, the Limited Warranty included a provision for requesting warranty service and a provision for “the exclusive remedy of all disputes and controversies under this Limited Warranty,” which calls

for mediation by the Plan Administrator and, if the dispute remains unresolved, for binding arbitration. RP 239-40 (excerpt from Pulte Home Protection Plan).

The Non-Signatory Plaintiffs, however, did not purchase their homes directly from Pulte; instead, they bought their homes from individual sellers. Although the Non-Signatory Plaintiffs did not sign a Purchase Agreement with Pulte, they all claimed in this suit that Pulte had contractual obligations to compensate them for the alleged defects in the homes or the repairs or both. *See* RP 288-90, ¶¶ 10-14. And, each of the Non-Signatory Plaintiffs sought and received substantial repairs from Pulte or its subcontractors pursuant to the Limited Warranty. RP 236, ¶ 13. Any unresolved disputes concerning such repairs were subject to binding arbitration under the terms of the Limited Warranty. RP 239-40.

Moreover, in response to this Court's Proposed Summary Disposition, Pulte offered additional evidence of the terms of the Limited Warranty and the extensive repairs the Non-Signatory Plaintiffs sought and obtained for their homes. *See* Defendants/Appellants' Memorandum Opposing Proposed Summary Disposition at 4-5, 16 & Appendices A-H.⁴ For example, under the Limited Warranty, Pulte provides a series of warranties against various "Covered Defects," for different periods of time, as described in the Limited Warranty. *See* Appendix A at 6

⁴ All references to "Appendix" in this brief are to the Appendices attached to Defendants/Appellants' Memorandum Opposing Proposed Summary Disposition.

(excerpt from Pulte Home Protection Plan). The Limited Warranty extends “to the original purchaser of the home and to *all subsequent owners who take title within the warranty period* identified in the Performance Standards, and use the home for their residence only.” *Id.* (emphasis added). The Limited Warranty establishes procedures for requesting and providing warranty service. *See id.* at 7 (“The benefits included in this LIMITED WARRANTY are only available when service is requested according to the procedures established by THE BUILDER and included in your warranty material.”); *id.* at 9 (describing procedure).

In fact, the Service Request History report for the Andujos documents the numerous repairs they requested and received. *See* Appendix C. These repairs ranged from plumbing problems, *see id.* at 1, 5, 6, 8, to roof repair, *see id.* at 4, 9, 11, to window and door replacement, *see id.* at 2, 9. The Andujos received many electrical repairs. *See id.* at 1, 3, 8. Pulte also provided the Andujos various other repairs under the Limited Warranty, including but not limited to painting, landscaping, caulking, and replacing certain fixtures. *See generally id.*

The Pynes⁵ received plumbing and roof repairs, as well as electrical repairs and window replacement. *See* Appendix E at 1, 3, 4. They had shelves installed,

⁵ The Pynes no longer live in the home that is the subject of this lawsuit. They sold the home in August of 2008 and now live in Utah. The current owners have not joined the suit.

their sprinkler system fixed, and baseboards touched-up. *See id.* at 2. Pulte also repaired the garage door and did landscaping. *See id.*

The Sherwoods had their stucco, HVAC system, plumbing, and roof repaired. *See Appendix F* at 1, 3, 4. Pulte also replaced tile, patched drywall, and provided some landscaping. *Id.* at 1, 3, 4.

The Stengers primarily had problems with their plumbing, *see Appendix G*, but also received other repairs such as shelf installation and HVAC inspection. *See id.* at 1.

Mr. Wagy received plumbing repairs and had his windows and doors reset and replaced. *See Appendix H* at 1-3. He also received electrical repairs, landscaping, and painting. *See id.* at 2-4. Pulte repaired Mr. Wagy's drywall and grout around the fireplace. *See id.* at 3-4.

ISSUES PRESENTED FOR REVIEW

1. Are the Non-Signatory Plaintiffs bound by the arbitration agreement
 - (a) as third-party beneficiaries of the Purchase Agreement; or
 - (b) as parties who have exploited and directly benefited from the Purchase Agreement and the Limited Warranty?

2. In the alternative, is an evidentiary hearing required to resolve disputed questions of fact concerning the enforceability of the arbitration agreement as to the Non-Signatory Plaintiffs?

ARGUMENT

I. UNDER ORDINARY PRINCIPLES OF CONTRACT LAW, THE NON-SIGNATORY PLAINTIFFS ARE BOUND BY THE ARBITRATION AGREEMENT.

Standard of Review and Preservation of Issue. The threshold issue of whether the parties are bound by an agreement to arbitrate is a question of law, for the court to decide. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997); *Edward Family Ltd. P'ship*, 2006-NMCA-83, ¶ 13. Thus, this Court conducts de novo review of a district court's denial of a motion to compel arbitration. *See, e.g., Edward Family Ltd. P'ship v. Brown*, 2006-NMCA-83, ¶ 13, 140 N.M. 104, 140 P.3d 525. Pulte preserved the issues on appeal by arguing below that the Non-Signatory Plaintiffs were bound by the arbitration agreement as

third-party beneficiaries and as parties who obtained the benefits of the Purchase Agreement and the Limited Warranty. *See* RP 228-31, 236, ¶ 13, 237-41; Tr. 12:5-13:17.

Pulte based its demand for arbitration in the district court on the arbitration provision in the Purchase Agreement, which expressly states that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, is applicable. *See supra* at 5 (quoting Purchase Agreement, RP 61, ¶ 22). Moreover, the Purchase Agreement “evidenc[es] a transaction involving commerce” within the meaning of section 2 of the FAA, further confirming the applicability of the FAA. *See* 9 U.S.C. § 2; *see also Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 273-77 (1995) (in enacting section 2, Congress intended “to exercise its Commerce Clause powers to the full”). The arbitration provision also states that, in the alternative, it is enforceable under the New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7-1 to 44-7-22. *See supra* at 5.

A party who has not signed an arbitration agreement may nonetheless be bound by it “if so dictated by the ordinary principles of contract and agency.” *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (internal quotation omitted); *accord Burgher v. Dansey*, 2004 WL 842505, *1 (Mich. Ct. App. Apr. 20, 2004) (citing *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003)). And, under section 2 of the FAA, a state may not create

an exception from these ordinary principles for arbitration provisions, thereby treating them differently from other contract provisions. *See* 9 U.S.C. § 2; *Allied-Bruce*, 513 U.S. at 281 (under the FAA, states may not “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause”); *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 23, 144 N.M. 464, 188 P.3d 1215 (recognizing that “the FAA prevents ‘[s]tates from singling out arbitration provisions for suspect status’”) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)); *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005) (“[I]f Texas law would bind a nonparty to a contract generally, the FAA would appear to preempt an exception for arbitration clauses alone.”).

In the district court, Pulte argued that two “ordinary principles of contract,” the third-party beneficiary doctrine and equitable estoppel, are applicable here. *See* RP 228-31, 236, ¶ 13, 237-41; Tr. 12:5-13:17. The district court, however, held that “Plaintiffs who did not sign [Pulte’s] Purchase Agreement did not agree to arbitrate their claims and are not compelled to submit such claims to arbitration.” RP 297. The court’s written order did not specifically address whether the Non-Signatory Plaintiffs were bound by any other legal theory. *See id.* And, at the hearing, the district court summarily rejected Pulte’s arguments that the Non-Signatory Plaintiffs were bound because either they were third-party beneficiaries

or they could not “have it both ways,” that is, seek relief under the contract while denying the arbitration provision. *See* Tr. 12:5-13:17, 14:23-15:6, 22:9-13. This ruling is both legally and factually erroneous, and should be reversed.

A. The Non-Signatory Plaintiffs Are Bound By The Arbitration Agreement As Creditor Third-Party Beneficiaries.

Under ordinary principles of contract law, a nonparty to a contract can enforce, or be bound by, its terms as a third-party beneficiary. *See, e.g., Leyba v. Whitley*, 120 N.M. 768, 771, 907 P.2d 172, 175 (1995); *In re Weekley Homes*, 180 S.W.3d at 131 & n.15. A non-signatory to a contract is a creditor beneficiary when “performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary” *Dist. Moving & Storage Co. v. Gardiner & Gardiner, Inc.*, 492 A.2d 319, 322 (Md. Ct. Spec. App. 1985) (internal quotation omitted); *see Johnson v. Armstrong & Armstrong*, 41 N.M. 206, 210, 66 P.2d 992, 994 (1937).

For instance, in *District Moving*, the plaintiff, a lessee of a warehouse, brought suit against the architect and the contractor for defective workmanship and non-compliance with contract specifications. 492 A.2d at 320-21. The lessee was not a party to the architect’s and contractor’s contracts with the owner, both of which contained arbitration provisions. *Id.* Nonetheless, the owner had a contractual duty to provide the lessee with a warehouse, and the architect’s and

contractor's performance of their promises would satisfy the owner's duty to the lessee. *Id.* at 322. Hence, the lessee was a creditor third-party beneficiary. *Id.*

In this case, the Non-Signatory Plaintiffs have asserted breach of contract and other tort claims against Pulte, all of which are rooted in Pulte's contractual obligations to construct and repair the homes. *See* RP 290-94. While the Non-Signatory Plaintiffs may have had a breach of contract claim against the sellers from whom they bought their homes, the Non-Signatory Plaintiffs instead chose to sue Pulte, and its performance will satisfy the sellers' duties to the Non-Signatory Plaintiffs. Hence, like the lessee in *District Moving*, the Non-Signatory Plaintiffs are suing as creditor third-party beneficiaries.

Creditor third-party beneficiaries are bound by the terms of the contract between the principals, including any arbitration provisions:

[the third-party beneficiary] should not be allowed to sue for breach of the contracts between [the principals] and thus benefit from those agreements without equally being made to abide by the terms of the contracts compelling arbitration of disputes arising therefrom.

Dist. Moving, 492 A.2d at 323; *accord Jeanes v. Arrow Ins. Co.*, 494 P.2d 1334, 1337 (Ariz. Ct. App. 1972).

The decision in *Brugher*, a case that is strikingly similar to this case, also confirms this conclusion. Like the Non-Signatory Plaintiffs, the *Brugher* plaintiffs were subsequent purchasers of a Pulte home. *See* 2004 WL 842505 at *1. After

buying the home, they discovered drainage problems for which they sued the sellers and Pulte. *Id.* The purchase agreement between Pulte and the sellers contained an arbitration provision that is substantially similar to the arbitration provision in the Purchase Agreement here. *Compare id.* at *1 n.1, with RP 59, ¶ 17 (Purchase Agreement, Limitations of Liability), and RP 239-40 (Limited Warranty, Dispute Resolution section). And, the limited warranty in *Brugher* extended its protections to subsequent owners. *See Brugher*, 2004 WL 842505 at *2 (extending the limited warranty “to the original purchaser of the home and to all subsequent owners who take title within the warranty periods...and use the home for their residence only”). Based on those provisions, the court held plaintiffs were bound by the arbitration agreement because “the rights of a third-party beneficiary seeking to enforce a contract made for its benefit are subject to the limitations and conditions of the contract,” and because plaintiffs had sought to enforce the contract. *See* 2004 WL 842505 at *2.

Like the plaintiffs in *District Moving* and *Brugher*, the Non-Signatory Plaintiffs are seeking to enforce the Purchase Agreement and Limited Warranty as third-party creditor beneficiaries. Accordingly, the Non-Signatory Plaintiffs are required to arbitrate their claims against Pulte.

B. The Non-Signatory Plaintiffs Are Bound By The Arbitration Agreement Because They Have Benefited From The Purchase Agreement And The Limited Warranty.

Under the doctrine of equitable estoppel, the Non-Signatory Plaintiffs also are bound by the arbitration agreement because they have exploited and obtained warranty benefits under the contract. *See Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *In re Weekley Homes*, 180 S.W.3d at 135; *Brugher*, 2004 WL 842505 at *3.

As shown above, the district court only briefly addressed Pulte's argument that the Non-Signatory Plaintiffs were bound by the arbitration agreement for reasons of equity, and cursorily dismissed it. *See* Tr. 14:23-15:6, 22:9-13, 23:4-5. Although the court ordered an evidentiary hearing on the issue of whether the arbitration clause was unconscionable and thus unenforceable as to the Plaintiffs who signed the Purchase Agreements, *see id.* at 21:18-22:2, 22:24-23:1, the court did not order an evidentiary hearing on whether the Non-Signatory Plaintiffs were bound by the arbitration agreement.

Yet Pulte had filed an affidavit stating that the Non-Signatory Plaintiffs had "sought benefits from the warranty agreement with Pulte Homes of New Mexico, Inc. and each had received services on their respective homes from Pulte."

RP 236, ¶ 13.⁶ Pulte also provided an excerpt from the Limited Warranty, pursuant to which these services were provided, referring to the procedures for seeking such services and for resolving disputes about them through mediation and, if necessary, arbitration. RP 228-31, 236, ¶ 13, 237-40. And, Pulte argued, this lawsuit itself demonstrates that the Non-Signatory Plaintiffs are seeking to exploit the Purchase Agreement and Limited Warranty: they are claiming that those contracts have been breached and seeking to recover damages as a result. RP 229; Tr. 12:21-23; *see In re FirstMerit Bank N.A.*, 52 S.W.3d 749, 755 (Tex. 2001) (“[A] litigant who sues based on a contract subjects him or herself to the contract’s terms.”).

As in *Brugher*, all of the Non-Signatory Plaintiffs have sought services and repairs covered by the Limited Warranty, and Pulte has provided them. *See* 2004 WL 842505 at *3; RP 228-31, 236, ¶ 13. Thus, the Non-Signatory Plaintiffs’ “remedy is to adjudicate their [claims] through binding arbitration,” as provided by the arbitration agreement in the contract they sue under. *See Brugher*, 2004 WL 842505 at *3.

⁶ For this reason, *Murken v. Suncor Energy, Inc.*, 2005-NMCA-102, ¶ 5, 138 N.M. 179, 117 P.3d 985, does not warrant a different conclusion. There, equitable estoppel was inapplicable under the facts of that case because the non-signatory plaintiff was “*not* alleged to have embraced and directly benefited from the agreement.” *Id.* ¶ 13 (emphasis added).

In sum, the undisputed evidence establishes that the Non-Signatory Plaintiffs have obtained the benefit of contractual warranties and, therefore, they are bound by the arbitration agreement.

II. IN THE ALTERNATIVE, AN EVIDENTIARY HEARING IS WARRANTED.

Standard of Review and Preservation of Issue. As noted above, the denial of a motion to compel arbitration is subject to this Court's de novo review. *Edward Family Ltd. P'ship*, 2006-NMCA-83, ¶ 13. Pulte preserved this issue by offering evidence that, at a minimum, created a factual issue as to whether the Non-Signatory Plaintiffs were bound either as third-party beneficiaries or as parties who have obtained repairs and services under the Purchase Agreement and the Limited Warranty. *See* RP 228-31, 236, ¶ 13, 237-41; Tr. 12:5-13:17.

For the reasons set forth above, the undisputed evidence establishes that the Non-Signatory Plaintiffs are bound by the arbitration agreement. *See supra* at 9-17. In the alternative and at a minimum, however, the Court should conclude that Pulte's evidence created a factual dispute as to this issue, and the case should be remanded for an evidentiary hearing to resolve it. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (when the parties dispute the existence of a binding arbitration agreement, the court must hold an evidentiary hearing to resolve the dispute); *accord DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 4, 134 N.M. 630, 81 P.3d 573. In other words, "[o]nly

when there is no genuine issue of fact concerning the formation of an arbitration agreement should the court decide the existence of the agreement as a matter of law.” *DeArmond*, 2003-NMCA-148, ¶ 4.

Here, the district court did not conduct an evidentiary hearing on Pulte’s motion to compel arbitration. Instead, the court heard only arguments of counsel. *See generally* Tr. 3-26. But Pulte had provided sufficient evidence to create a genuine issue of fact both as to whether the Non-Signatory Plaintiffs are creditor third-party beneficiaries, *see supra* at 9-14, and as to whether they obtained warranty benefits under the Purchase Agreement and Limited Warranty and therefore, are bound by the arbitration agreement under the doctrine of equitable estoppel, *see supra* at 15-17. Moreover, in response to this Court’s Proposed Summary Disposition, Pulte offered additional evidence demonstrating that the Non-Signatory Plaintiffs have sought and received warranty benefits under the Purchase Agreement and Limited Warranty. *See supra* at 6-8.

In light of the evidence Pulte provided below and at summary disposition, if the Court does not hold that the Non-Signatory Plaintiffs are bound by the arbitration agreement as a matter of law, then an evidentiary hearing is warranted to resolve the factual disputes pertaining to this issue. *See, e.g., Edward Family Ltd. P’ship*, 2006-NMCA-83, ¶ 20 (reversing order confirming arbitration award and remanding for determination of existence of arbitration agreement); *Sisneros v.*

Citadel Broad. Co. d/b/a KKOB-FM, 2006-NMCA-102, ¶¶ 11, 23, 28, 140 N.M. 266, 142 P.3d 34 (holding that it was error for the district court to rule on a motion to compel arbitration before resolving factual issues related to whether an agreement to arbitrate existed); *DeArmond*, 2003-NMCA-148, ¶ 4 (reversing order compelling arbitration and remanding for resolution of factual dispute as to whether agreement to arbitrate existed).

CONCLUSION

The district court's order that the Non-Signatory Plaintiffs are not required to arbitrate their claims should be set aside. The Court should conclude that the Non-Signatory Plaintiffs are bound by the arbitration agreements as creditor third-party beneficiaries and by equitable estoppel, and that they are compelled to arbitrate their claims. In the alternative, the district court's ruling as to the Non-Signatory Plaintiffs should be reversed, and the case should be remanded for an evidentiary hearing to resolve factual disputes concerning the enforceability of the arbitration agreement as to the Non-Signatory Plaintiffs under either of these ordinary principles of contract law.

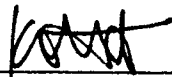
CERTIFICATION OF WORD COUNT

The undersigned certifies that the word count of the body of this Brief in Chief, including footnotes, is 4,202.

Dated: March 23, 2009.

Respectfully submitted,

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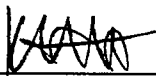
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CERTIFICATE OF SERVICE

I certify that on March 23, 2009, I served a copy of the foregoing BRIEF IN CHIEF OF APPELLANTS to the following by U.S. Mail, postage prepaid:

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